



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 08 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Software Consulting" firm. In order to employ the beneficiary in what it designates on the visa petition as a "programmer analyst" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish (1) that it would employ the beneficiary in a specialty occupation position, (2) that it would have an employer-employee relationship with the beneficiary, and (3) that the Labor Condition Application (LCA) submitted is valid for all the locations where the beneficiary would work. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. EVIDENCE

The period of employment requested in the visa petition is from October 1, 2013 to March 21, 2016. The LCA submitted to support the visa petition states that the proffered position is a Software Test Engineer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1799, Computer Applications, All Other, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. The places of employment specified in the LCA are the petitioner's address in [REDACTED] Washington and [REDACTED] Washington.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in Information and Computing Sciences from [REDACTED] in China. The record does not contain an evaluation of the beneficiary's foreign degree equating that degree to a U.S. bachelor's degree.

Counsel also submitted a letter, dated April 1, 2013, from the petitioner's president. That letter cites the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* chapter pertinent to Computer Systems Analysts as evidence that programmer analyst positions require a bachelor's degree. It also states that a search of the Internet site dice.com shows that hundreds of information technology positions require a bachelor's degree and that USCIS approves many H-1B visa petitions for computer systems analysts. It did not state that the positions that require bachelor's degrees are for parallel positions in organizations similar to the petitioner or that they require bachelor's degrees in any specific specialty.

Finally, that letter cited an information sheet entitled, "Temporary Services and Employee Leasing Industries," published by the California Employment Development Department, for the proposition that the petitioner is correctly classified as such a service or industry that assigns workers to perform services for clients or customers. The petitioner described itself in the following manner:

In this instant petition, we consider ourselves a temporary services employer. The definition of a temporary services employer/employee leasing is one that contracts with clients or customers to supply workers to perform services for the client or customer and perform all of the following functions:

1. Negotiates with clients or customers for matters such as time, place, type of work, working conditions, quality and price of the services.
2. Determines assignments or reassignment of workers, even though workers retain the right to refuse specific requirements[.]
3. Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer[.]
4. Assigns or reassigns the worker to perform services for a client or customer[.]
5. Sets the rate of pay of the worker, whether or not through negotiation[.]
6. Pays the worker from their own account or accounts[.]
7. Retains the right to hire and terminate workers.

Other than the assertion in the visa petition that the job title of the proffered position is Programmer Analyst, the assertion on the LCA that the job title of the proffered position is Software Test Engineer, and the assertion on the LCA that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1799, Computer Applications, All Other, from O*NET, the petitioner provided no description of the duties of the proffered position. Further, the petitioner did not reveal the identity of the end-user or end-users of the beneficiary's services, the duration of the projects, or the specific locations where the work would be performed.

On August 19, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, (1) evidence that the proffered position qualifies as a specialty occupation position, (2) evidence that the petitioner would have an employer-employee relationship with the beneficiary, and (3) evidence pertinent to the locations where the beneficiary would work. The service center

provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel submitted (1) a copy of an employment contract, dated April 1, 2013, between the petitioner and the beneficiary; (2) a document entitled, "Exhibit A Assignment Agreement"; (3) a letter, dated October 30, 2013, from the petitioner's president; (4) a letter, dated October 30, 2013, from [REDACTED] on the letterhead of [REDACTED] (5) a Professional Services Agreement executed by the petitioner and [REDACTED] (6) an undated document entitled, "Exhibit 'A' to Professional Services Agreement"; (7) an organizational chart of the petitioner's operations; (8) a sample of an evaluation of one of the petitioner's employees; and (9) counsel's own letter, dated November 4, 2013.

The April 1, 2013 employment contract states that the petitioner is hiring the beneficiary to work as a Software Test Engineer but does not concretely describe her duties. Exhibit A to the assignment agreement states that the beneficiary's employment at [REDACTED] WA" would begin on November 1, 2013 and would continue through November 15, 2016, but is extendable.

The petitioner's president's October 30, 2013 contains the following description of the duties of the proffered position:

- Install and maintain multiple testing environments (20%)
- Understand requirements and translate requirements to correct test set up and design (10%)
- Developing test plans as required (10%)
- Designing load test scenarios to validate systems ability to provide service in compliance with the SLA required (10%)
- Gathering requirements for scalability testing of applications including integration with other systems and quickly understand implications to test effort, schedule and test execution plan (15%)
- Coordinating project level work between onshore and offshore teams. Manage test schedules for projects. (10%)
- Participate in testing life cycle, from test planning to execution and reporting. Identify areas of improvements in the process where appropriate. (10%)
- Building automation and reporting tools to provide capabilities around your service [sic] (15%)

That letter also states: "The demands of the [proffered position] are such that only an employee with at least a Bachelor's degree in Computer Science, Technology or a related technical field could competently perform it."

The October 30, 2013 letter from [REDACTED] does not identify [REDACTED] position with [REDACTED] or level of authority within that organization. However, it states that, "pursuant to a

confidential agreement between [REDACTED] and [REDACTED] the beneficiary would perform the following duties in the proffered position:

1. Preparation of test plan, test strategy and test scenarios based on the requirements.
2. Preparation of test cases based on scenarios and setup the test cases in Quality Center after getting a sign off.
3. Setup the test data required to execute the tests by manipulating the Database using PL/SQL and execute the test cases once the test environment is ready.
4. Identify the test cases for Regression testing and develop the test automation suites for the regression scenarios after identifying the best suited automation tool.
5. Development of automated test suites in QTP using VB scripting language.
6. Analyze and report functional and regression test results and track the identified defects to closure.
7. Coordinate with Data Base Administrators to ensure execution of logical and physical data models according to customer requirements.
8. Observe work output and identify contingencies and to promptly escalate them.
9. Close coordination with the development team.
10. Regular Client communication and update the client on a daily and weekly basis.
11. Work with Business Analysts to determine and prioritize execution scenarios.

That letter also states: "The minimum education, training, and experience necessary to perform the job duties is a Bachelor's degree or equivalent in a closely related field." It does not list or otherwise describe the array of fields that would be considered sufficiently closely related to the proffered position to qualify one to work in the position.

The Professional Services Agreement is dated April 20, 2012, but was signed by a representative of [REDACTED] on April 20, 2012 and ratified by the petitioner's president on April 22, 2012. It states that it shall remain in force until April 19, 2013. It sets out terms pursuant to which [REDACTED] may provide the petitioner's workers to [REDACTED] clients. The undated document entitled, "Exhibit 'A' to Professional Services Agreement" indicates that the petitioner and [REDACTED] agreed that the petitioner would provide the beneficiary to [REDACTED] will provide the beneficiary to perform services for [REDACTED] from November 1, 2013 to May 31, 2015.

We observe that the agreement between the petitioner and [REDACTED] to provide the beneficiary to [REDACTED] indicates that the assignment would continue only until May 31, 2015, although the period of employment requested on the visa petition continues through March 21, 2016. We also note that the end date differs from the end date in Exhibit A of the assignment agreement between the petitioner and the beneficiary.

The petitioner's organizational chart indicates that the beneficiary would be directly supervised by [REDACTED], the petitioner's president.

In her November 4, 2013 letter, counsel stated, "Please note that the petitioner was unable to obtain the vendor-client agreement because of its confidential terms."

The director denied the petition on November 20, 2013, finding, as was noted above, that the petitioner had not demonstrated (1) that it would employ the beneficiary in a specialty occupation position, (2) that it would have an employer-employee relationship with the beneficiary, and (3) that the submitted LCA is valid for all the locations where the beneficiary would work. On appeal, counsel asserted that the evidence submitted is sufficient to satisfy the requirements for approval.

III. SPECIALTY OCCUPATION

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, no evidence was provided pertinent to any requirements [REDACTED] imposes on the proffered position. [REDACTED] whose position and level of authority with [REDACTED] were not revealed, referred to a confidential agreement between [REDACTED] and counsel asserted that the petitioner was therefore unable to obtain a copy of the agreement between [REDACTED]. However, there is insufficient evidence to demonstrate, (1) that [REDACTED] has agreed to utilize the beneficiary's services, (2) the substantive nature of the duties the beneficiary would perform at the [REDACTED] location, (3) the educational requirement [REDACTED] imposes on the performance of those duties, or (4) that the project at [REDACTED] would continue through the end of the period or requested employment.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the visa petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. No evidence was submitted from [REDACTED] the claimed end-user of the beneficiary's services. The absence of any evidence from [REDACTED] of the existence of a project to which it has agreed to assign the beneficiary is sufficient reason to find that the petitioner has not demonstrated the existence of any such project or position awaiting the beneficiary's availability.

USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

IV. EMPLOYER-EMPLOYEE

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee

relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term

"United States employer" to be even more restrictive than the common law agency definition.¹

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.²

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

² To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).³

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties,

erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

³ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

In the instant case, the petitioner asserts that, if the visa petition were approved, it would assign the beneficiary to [REDACTED] which would, in turn, assign the beneficiary to [REDACTED] to work at [REDACTED] location on a [REDACTED] project. Although the petitioner's organizational chart indicates that the petitioner's president is the beneficiary's direct supervisor, the record contains no indication that the petitioner's president will be assigned to work at the [REDACTED] location and no indication that the petitioner, or [REDACTED] is in charge of developing the project at [REDACTED]. Although the petitioner asserts that it would supervise the beneficiary in the scenario described, it is manifestly unlikely that the petitioner would be assigning the beneficiary's tasks and supervising her performance.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed and the visa petition will be denied on this additional basis.

V. LCA ISSUES

The final basis for the decision of denial is the director's finding that the petitioner has not demonstrated that the LCA submitted is valid for employment in all of the locations where the beneficiary would work if the visa petition were approved.

For reasons explained in detail above, we have found that the petitioner has not demonstrated that the beneficiary will work at the [REDACTED] location on the [REDACTED] project throughout the requested period of employment, or at all.

The petitioner has not, therefore, demonstrated where the beneficiary would be employed if the visa petition were approved, and has not demonstrated that the visa petition is valid for all the locations where the beneficiary would work. The appeal will be dismissed and the visa petition will be denied on this additional basis.

It is further noted that the petitioner stated on the Form I-129 visa petition that the proffered position is a programmer analyst position. The petitioner cited the *Handbook* chapter pertinent to Computer Systems Analysts as evidence that the proffered position requires a bachelor's degree, and acknowledged that a programmer analyst is a type of computer systems analyst. In fact, both O*NET and the *Handbook* discuss programmer analysts as a subset of computer systems analysts.

The LCA, however, is certified for an SOC code and title 15-1799, Computer Applications, All Other position from O*NET, rather than for a 15-1121.00, Computer Systems Analyst position. As such, the LCA submitted does not correspond to the visa petition. The petition must be denied for this additional reason.

VI. BENEFICIARY QUALIFICATIONS

The record suggests an additional issue that was not addressed in the decision of denial.

The petitioner did not submit an evaluation of the beneficiary's foreign degree or other evidence sufficient to establish that her degree is equivalent to a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty or its equivalent, the petitioner has not demonstrated that the beneficiary is qualified to work in any specialty occupation position.

VII. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis). Moreover, when we deny a petition on

multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.