



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 09 2014**

OFFICE: VERMONT 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:

SELF REPRESENTED

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 denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as 23-employee IT development and software consulting business<sup>1</sup> established in 2008. In order to employ the beneficiary in what it designates as a full-time Programmer Analyst position at a salary of \$60,000 per year,<sup>2</sup> the petitioner seeks to classify him 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, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; and (2) the proffered position qualifies as a specialty occupation. The director also found that the beneficiary is not eligible for an extension of stay.<sup>3</sup>

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>4</sup>

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. Beyond the decision of the director, we will enter an additional basis for denial, i.e., the failure to submit a valid Labor Condition Application (LCA) that corresponds to the petition. For all these reasons, the appeal will be dismissed, and the petition will be denied.

## I. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 11, 2013. On the Form I-129, the petitioner listed its

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 7, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analyst" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level I prevailing wage rate.

<sup>3</sup> We do not have jurisdiction over the denial of an application to extend the beneficiary's stay. As provided in 8 C.F.R. § 248.3(g), the denial of an application to change nonimmigrant status may not be appealed. Accordingly, this issue will not be further addressed.

<sup>4</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

business address as [REDACTED], New Jersey. The petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a Programmer Analyst from October 1, 2013 to September 1, 2016. The petitioner specifically indicated on the Form I-129 that the beneficiary would work at the petitioner's business address above, and that he would not work off-site.

In support of the initial petition, the petitioner submitted a letter, dated March 18, 2013, affirming that the beneficiary will be employed full time at the petitioner's corporate office, located at [REDACTED], New Jersey to work on in-house projects. This letter also provided a description of the proffered position and its constituent duties. Specifically, the petitioner stated, in pertinent part:

A Programmer Analyst is essentially one who researches, analyzes, and designs computer based solutions for defined business, scientific or engineering problems. This includes planning and developing new computer systems, customized, to achieve solutions of a specifically defined need or problem. The first and probably the most critical task of an analyst are identification and clear definition of needs of the customer. This implies that the analyst has to understand the operations of the customer, including an intimate understanding of the end purpose of the operation. For instance, an analyst designing a computer system for a firm engaged in bio-medical research, has to understand the complexity of the component tasks, which forms the entire operating structure.

\* \* \*

The beneficiary [ ] will be [the petitioner's] full time employee. He shall be working in our corporate office, located at [REDACTED], New Jersey [REDACTED] on ongoing in-house projects. His primary job role would involve design and develop business to business and business to customer, internet and intranet, n-tier web based portal system using component based enterprise architecture and software. The beneficiary will also be responsible for compiling and generating reports, graphs, and charts of reconciled data and Design, develop and administer relational database management system.

The beneficiary will perform the following additional duties as set forth in the petition and that would describe a typical week for the beneficiary:

- Research, design and develop computer software systems, in conjunction with hardware choices, for applications which require use of advanced computational and quantitative methodologies;
- Apply principles and techniques of computer sciences and quantitative methodology & techniques to determine feasibility of design within time and cost constraints;
- Analyze the communications, informational, database and programming requirements; plan, develop, design, test and implement software programs for

- engineering applications and highly sophisticated network systems;
- Design, program and implement software application packages customized to meet specific needs;
- Review existing computer systems to determine compatibility with projected or identified needs; research and select appropriate system, including ensuring forward compatibility of existing systems;
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs;
- Train personnel on use of software applications and computer systems developed; provide trouble shooting and debugging support;
- Testing and implementing the system to provide analytical support to monitor operation of assigned application system. Required to support the project team by participating in enhancements and develop accurate documentation that complies with the company standards;
- Assist as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions; [and]
- Review our company's complex specifications to identify problems in the systems package for systems development requiring need for revision of project scope and operational strategies[.]

In the same letter, the petitioner asserted that it will have an employer-employee relationship with the beneficiary. In particular, the petitioner stated:

The employer demonstrates the right of control over the beneficiary via the employment agreement whereby the petitioner pays the salary of the beneficiary. The beneficiary shall receive a W-2 from the petitioner at the end of the calendar year. Moreover, the beneficiary will receive additional employment benefits namely health insurance and/or employee contribution. Such documentation continues to show that the beneficiary and the petitioner have the direct employer employee relationship and no other party is involved.

The petitioner submitted an "Employment Agreement as Programmer Analyst," dated March 18, 2013, between the petitioner and the beneficiary. In pertinent part, this agreement describes the duties of the beneficiary as a Programmer Analyst as simply "providing programming and other data processing." It also sets forth provisions related to the beneficiary's compensation and other employment benefits, such as medical and dental insurance.

The director submitted a detailed RFE instructing the petitioner to submit additional documentation establishing that the petitioner is currently engaged in in-house software development and will have the ability to provide the beneficiary with specialty occupation work for the requested H-1B validity period. Specifically, the director advised the petitioner that the petition did not include documentation referencing an in-house project or other work to which the beneficiary will be assigned. Furthermore, the director advised the petitioner of the following:

USCIS records show that previous claims of in-house development as a basis for specialty occupation employment at your facility were not substantiated. During an administrative site visit conducted by USCIS, you stated that you do not develop in-house projects. Additionally, petitions in which you have claimed that the beneficiaries will be assigned to in-house projects were returned by the consulate for review when it was determined that the purported projects did not exist. Consequently, this raises questions as to the validity of your request for H-1B employment for the beneficiary of the present petition. The record, therefore, does not establish that specialty occupation work is currently available and will continue to be available to the beneficiary. . . .

The director then listed types of evidence that the petitioner could submit to establish that it develops software internally and will employ the beneficiary in specialty occupation work, including, *inter alia*:

- Copies of relevant portions of recent contracts, statements of work, work orders, service agreements, and letters between [the petitioner] and the authorized officials of companies to which [the petitioner's] product and/or services will be delivered and for which the beneficiary will be engaged in developing [the petitioner's] product or rendering services during H-1B employment;
- Copies of relevant portions of recent contracts, statements of work, work orders, service agreements, and letters between [the petitioner] and the authorized officials of companies to which [the petitioner's] product and/or services have previously been delivered;
- Documentary evidence of payments made to the petitioner by recent clients for products purchased and/or services delivered; and
- Materials showing the progress of internal projects currently under development.

In response to the RFE, the petitioner submitted two letters, both dated October 14, 2013, asserting that it is a "bona fide existing company, engaged in the regular, systematic and continuous provision of products and services . . . [which] has a bona fide job offer for the beneficiary, [], to provide support and maintenance for an internal product in use by [the petitioner]." The petitioner further asserted that the beneficiary will perform services at the petitioner's premises at [REDACTED] New Jersey, on its in-house project, the [REDACTED] project." The petitioner stated: "We are not working on contracts with any end-client companies or offering services to any company with regards to this particular project." The petitioner stated that once the project is finished, it plans to sell this product to other companies. In one letter, the petitioner stated that it is "planning to undertake" the [REDACTED] project, and in another letter, the petitioner asserted that the [REDACTED] project started on October 1, 2012. Similarly, in one letter, the petitioner asserted that the [REDACTED] project "is scheduled to last until November 2016," and in another letter, the petitioner stated that the [REDACTED] project "is anticipated to end on December 1, 2017."

With respect to the beneficiary's particular job duties on the [REDACTED] project, the petitioner provided substantially the same description of the proffered position as previously submitted. In addition, the petitioner asserted that the beneficiary "shall write Java programs, write SQL/PLSQL statements, leverage Java webservices, create business components, work with weblogic servers and use Oracle Fusion Middleware stack for the development of [REDACTED] as per the petitioner's specifications."

In the same letter, the petitioner asserted that it has a valid employer-employee relationship with the beneficiary, in that the petitioner has control over the beneficiary's duties and position, and has the right to hire and fire the beneficiary. The petitioner states that the beneficiary will be directly supervised by Mr. [REDACTED] the petitioner's Manager IT Services, with whom the beneficiary "must communicate on a biweekly basis . . . and submit timesheets." The petitioner emphasized that the beneficiary will receive a Form W-2 from the employer as well as additional employment benefits, namely, health insurance and/or employee contribution. The petitioner concluded by reiterating that: it is the only entity maintaining the right to hire and fire the beneficiary; the beneficiary will work at the petitioner's business premises on the petitioner's internal product support and maintenance; the beneficiary shall only work on pre-agreed "specialty occupation level work" as described in the instant petition; and the petitioner's employment offer is bona fide.

In support of the RFE, the petitioner submitted, *inter alia*, a separate letter entitled "Employer and Employee Relationship [the petitioner] and [the beneficiary]." In this letter, the petitioner attests, in pertinent part, that it supervises the beneficiary through "validating if his services are in accordance to [*sic*] the compliance policies established by [the petitioner]." The petitioner also attests that: it will maintain on-site supervision through the beneficiary's supervisor, Mr. [REDACTED] it has "full control on [the beneficiary's] work on a day to day basis" and has "the ability to change/modify the work developed by his [*sic*];" it will provide the beneficiary with the tools or instruments needed to perform the duties of employment and that it has the ability to hire, fire and pay the beneficiary; it evaluates the work product of the beneficiary through having "evaluated the past professional experience of [the beneficiary] by conducting background checks before initiating the hiring process;" it will provide the beneficiary with standard employee benefits; and that the beneficiary will use "the proprietary software, methodology, [and] Quality Controls established by the petitioner."

The petitioner submitted its organizational chart, which depicts its president, [REDACTED], at the top, directly overseeing the following: Mr. [REDACTED] Functional Operations; Mr. [REDACTED] IT Services Manager; Ms. [REDACTED] Systems Administrator; and Ms. [REDACTED] Human Resources. Mr. [REDACTED] is depicted as directly overseeing: "Marketing;" "Strategy Development;" and "Sales Development." Mr. [REDACTED] is depicted as directly overseeing "Project 1" and "Project 2;" underneath "Project 1" are: "Business Analyst;" "Programmer Analyst [the beneficiary];" "Network Administrator;" and "Project Specifications and Client Requirements." Ms. [REDACTED] is depicted as directly overseeing: "Computer Hardware;" "Enhancements;" and "Software Maintenance." Ms. [REDACTED] is depicted as directly overseeing: "Executives;" and "Trainees." With respect to the subordinates of Mr. [REDACTED] Mr. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] it is not clear whether the chart depicts departments or positions, as no names or number of employees were identified other than the beneficiary as a Programmer Analyst.

The petitioner submitted a document entitled "Itinerary Services for [the beneficiary] Programmer Analyst" listing the beneficiary's job duties and work distribution as follows:

- Analyzing, Designing and developing customized applications (40%);
- Create application prototypes with new features and entirely new applications on current and future mobile platforms (20%);
- Enhance existing applications and Perform unit tests across multiple devices using prescribed testing applications (20%);
- Code Analysis, software review and Performance analysis (20%).

The petitioner submitted its "[REDACTED] Guide (Version 1 as of November 7, 2012)" which provides technical information about the project, as well as provides an overview of the tools and resources, overview and functionality, cost analysis, and market analysis for this project. In pertinent part, the guide lists the "resources required for the implementation of [REDACTED]" as two Programmer Analysts, two Java, J2EE, Webservices Developers, two Oracle ADF Developers, one SOA BPEL Developer, one Weblogic Administrator, one Hyperion DRM Developer & Administrator, one Windows Administrator, one Business Analyst, two QA testers, and one Project Manager.

Furthermore, the petitioner submitted, *inter alia*, the following documents:

- The petitioner's Employee Handbook which provides general information about employment conditions and benefits;
- A blank "Performance Review Template" on the petitioner's letterhead;
- The petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the 2<sup>nd</sup> quarter of 2013 (beginning in April and ending in June), listing the number of employees who received wages, tips, and other compensation for the entire pay period as "0;"
- The petitioner's Quarterly Report of Wages Paid and Premiums Owed for the State of Colorado, indicating that the petitioner had one employee to whom it paid wages in April of 2013;
- The petitioner's State of Delaware Unemployment Insurance and Quarterly Tax Report, indicating that the petitioner had one employee to whom it paid wages in April of 2013;
- The petitioner's Report for the Quarter Ending 06-30-2013 for the State of Georgia, indicating that the petitioner had one employee to whom it paid wages in April and May of 2013;
- The petitioner's Employer's Contribution and Wage Report for the State of Illinois, indicating that the petitioner had three employees to whom it paid wages in April of 2013, and one employee to whom it paid wages in May of 2013;
- The petitioner's Maryland Employer's Unemployment Insurance Quarterly Contribution Report, indicating that the petitioner had one employee to whom it paid wages in April and May of 2013;

- The petitioner's Quarterly Report of Wages Paid and Premiums Owed for the State of Colorado, indicating that the petitioner had one employee to whom it paid wages in April of 2013;
- The petitioner's Massachusetts [REDACTED] File Facsimile, indicating that the petitioner had two employees to whom it paid wages in April and May of 2013;
- The petitioner's Employer's Quarterly Report for the State of New Jersey, indicating that the petitioner had ten employees to whom it paid wages in April of 2013, one employee to whom it paid wages in May 2013, and zero employees in June 2013;
- The petitioner's Employer's Quarterly Tax and Wage Report for the State of North Carolina, indicating that the petitioner had one employee to whom it paid wages in April and May of 2013;
- The petitioner's Generic Local Reconciliation for the State of Pennsylvania, indicating that the petitioner had one employee to whom it paid wages in May and June of 2013;
- The petitioner's Employer's Quarterly Report for the State of Texas, indicating that the petitioner had two employees to whom it paid wages in April of 2013, and one employee to whom it paid wages in May of 2013; and
- The petitioner's Employer's Quarterly Tax Report for the State of Virginia, indicating that the petitioner had one employee to whom it paid wages in April of 2013.

The director denied the petition, concluding that the evidence of record does not demonstrate that the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary. The director determined that the record did not contain sufficient, credible evidence of the petitioner's claimed in-house [REDACTED] project on which the petitioner asserted the beneficiary would be working. The director acknowledged the petitioner's [REDACTED] Guide Version 1 as of November 7, 2012," but found that the record contains no evidence of progress on this project or any other internally developed products by the petitioner. Based on the lack of evidence, the director concluded that "the record does not demonstrate the likelihood that [the petitioner's] offer of in-house employment will provide sustainable specialty occupation work to the beneficiary for the requested validity period." The director also concluded that he could not determine whether the proffered position qualifies as a specialty occupation, in that there is no evidence of the availability of in-house specialty occupation work at the time the petition was filed.

On appeal, the petitioner reiterates that the beneficiary will be performing the job duties as outlined in the petition. The petitioner also reiterates that its development of the [REDACTED] project "is scheduled to last until November 2016," and that the petitioner is "not working on contracts with any end-client companies or offering services to any company with regards to this particular product." In support of the appeal, the petitioner resubmits, *inter alia*, its Employee Handbook and "[REDACTED] Guide (Version 1 as of November 7, 2012)."

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first discuss the director's determination that the evidence of record does not establish that the petitioner is a "United States employer" who will have "an employer-employee relationship" with the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B non immigrant 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).

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.<sup>5</sup>

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<sup>5</sup> 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.,

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.<sup>6</sup>

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).<sup>7</sup>

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,

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*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).

<sup>6</sup> 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 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))).

<sup>7</sup> 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).

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, 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).

Applying the *Darden* and *Clackamas* tests to this matter, 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."

In the instant matter, the petitioner asserts that the beneficiary will work exclusively on-site at its business location in [REDACTED] New Jersey, on its in-house [REDACTED] project. The petitioner asserts that it is "not working on contracts with any end-client companies or offering services to any company with regards to this particular product."

However, the petitioner's claims regarding its in-house [REDACTED] project and the beneficiary's exclusive services on this project are not credible or corroborated by sufficient documentary evidence. Foremost, the evidence of record does not contain sufficient, credible documentation establishing that the petitioner's claimed [REDACTED] project is bona fide, i.e., that this project actually exists and is being developed by the petitioner's employees. The only evidence contained in the record of proceeding relating to the petitioner's claimed [REDACTED] project is the petitioner's internally generated "[REDACTED] Guide (Version 1 as of November 7, 2012)." As noted by the director, this document is dated November 7, 2012, but the record contains no evidence of progress made on this project. Furthermore, while the "[REDACTED] Guide (Version 1 as of November 7, 2012)" provides technical descriptions of the [REDACTED] project, it does not explain with any specificity what actual work has been and will be done on this project.

For instance, the guide states vaguely that the "resources required for the implementation of [REDACTED]" are two Programmer Analyst positions, two Java, J2EE, Webservices Developer positions, two Oracle ADF Developer positions, one SOA BPEL Developer position, one Weblogic Administrator position, one Hyperion DRM Developer & Administrator position, one Windows Administrator position, one Business Analyst position, two QA tester positions, and one Project Manager position. However, the guide provides no explanation as to what the job duties are and/or will be for the above positions with respect to the particular project. Furthermore, the guide provides no explanation as to when these positions were or will be filled. Notably, the petitioner's organizational chart does not list the following positions: Java, J2EE, Webservices Developer; Oracle ADF Developer; SOA BPEL Developer; Weblogic Administrator; Hyperion DRM Developer & Administrator; Windows Administrator; QA tester; and Project Manager. The petitioner's organizational chart lists only one Programmer Analyst position, which is filled by the beneficiary, but does not list another Programmer Analyst position.

Moreover, the guide does not provide any explanation as to when specific work has been and/or is scheduled to be performed on the project, such as a timeline or list of internal deadlines. Here, we note the discrepancies regarding the start and anticipated termination dates for the overall project, as the petitioner has concurrently claimed that the [REDACTED] project has not yet started, that it has already started on October 1, 2012, that the project "is scheduled to last until November 2016," and that the project "is anticipated to end on December 1, 2017."

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In the RFE, the director specifically requested evidence of the petitioner's development of in-house projects, including the [REDACTED] project. However, the only relevant document the petitioner submitted in response to the RFE was the "[REDACTED] Guide (Version 1 as of November 7, 2012)" which, for the reasons discussed above, is insufficient to establish the existence and development of this project. The petitioner provided no evidence indicating that the petitioner has ever or is now

developing any other in-house projects or products other than the claimed [REDACTED] project. The lack of such documentation undermines the petitioner's claim that the beneficiary will be working exclusively on-site at its business location on its in-house [REDACTED] project.

The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Notably, in the RFE, the director advised the petitioner of derogatory evidence that undermined the credibility of the petitioner's claims of an in-house project. Specifically, the director pointed out the following: that previous claims of in-house development as a basis for specialty occupation employment at the petitioner's facility were not substantiated; that the petitioner made a statement to USCIS during an administrative site visit that the petitioner does not develop in-house projects; and that other petitions in which the petitioner claimed in-house project assignments for beneficiaries were returned by the consulate based on findings that the purported projects did not exist. In response to the RFE, however, the petitioner did not directly address the director's specific concerns. Instead, the petitioner asserted vaguely that it is a "bona fide existing company, engaged in the regular, systematic and continuous provision of products and services . . . [which] has a bona fide job offer for the beneficiary."

Further undermining the petitioner's claims regarding the beneficiary's employment is the fact that the petitioner has provided significantly conflicting descriptions of the beneficiary's job duties. For example, the petitioner asserts that the beneficiary will only work onsite on its in-house project, indicating that the beneficiary will not be working on contracts with any end-client companies or offering services to any company with regards to this particular product. However, the petitioner then describes the proffered position and its constituent duties as necessarily dependent upon client interaction and specifications. Specifically, the petitioner asserted: "The first and probably the most critical task of an analyst are identification and clear definition of needs of the customer. This implies that the analyst has to understand the operations of the customer." The petitioner also stated that the beneficiary's "primary job role would involve design and develop [*sic*] business to business and business to customer" systems. It is not clear how the beneficiary could perform these stated primary duties, if the petitioner has not yet secured any end-clients or offered services to any company with regards to its [REDACTED] project.

In fact, the overall nature of the proffered position is not clear. The petitioner describes the proffered position as a "Programmer Analyst" under the "Computer Systems Analyst" occupational classification, SOC (O\*NET/OES) Code 15-1121. However, the majority of the proffered duties cannot be said to reasonably match the range of duties for the "Computer Systems Analyst" classification as described in O\*NET OnLine. Specifically, as stated above, the petitioner asserted that the beneficiary's "primary job role" would involve designing and developing systems. Similarly, in the itinerary, the petitioner asserted that 40% of the beneficiary's time will be spent analyzing, designing and developing customized applications. The petitioner also asserted that the

beneficiary will perform duties such as: writing Java programs; designing and developing computer software systems; developing and designing software programs; and designing and programming software application packages. The petitioner's Employment Agreement with the beneficiary specifically describes the beneficiary's job duty as "programming." In contrast, O\*NET OnLine's description of duties for a position under the "Computer Systems Analyst" occupational classification does not contain any duties involving programming and the actual design and development of software applications, systems, or programs.<sup>8</sup>

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

We acknowledge the petitioner's assertions that the beneficiary will receive a Form W-2, salary, and other employment benefits from the petitioner, and that the petitioner "controls" the beneficiary's conditions of employment, including the right to hire and fire the beneficiary. To support these assertions, the petitioner submitted the "Employment Agreement as Programmer Analyst" between the petitioner and the beneficiary, the petitioner's Employee Handbook, a performance review template, and a letter entitled "Employer and Employee Relationship [the petitioner] and [the beneficiary]."

However, the afore-mentioned documents the petitioner submitted in support of the employer-employee relationship are insufficient to establish an employer-employee relationship between the petitioner and the beneficiary. The "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*,

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<sup>8</sup> According to O\*NET OnLine, the duties of a "Computer Systems Analyst" are:

Expand or modify system to serve new purposes or improve work flow; Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems; Develop, document and revise system design procedures, test procedures, and quality standards; Provide staff and users with assistance solving computer related problems, such as malfunctions and program problems; Review and analyze computer printouts and performance indicators to locate code problems, and correct errors by correcting codes; Consult with management to ensure agreement on system principles; Confer with clients regarding the nature of the information processing or computation needs a computer program is to address; Read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements; Coordinate and link the computer systems within an organization to increase compatibility and so information can be shared; and Determine computer software or hardware needed to set up or alter system.

See O\*NET OnLine Summary Report for "15-1121.00 - Computer Systems Analysts," <http://www.onetonline.org/link/summary/15-1121.00> (last accessed August 7, 2014).

538 U.S. at 450. The petitioner's Employee Handbook provides only general information about employment conditions and benefits. The blank performance review template is not accompanied by evidence of actual usage by the petitioner, and the petitioner provided no description of how and by whom the employee assessments are made. Furthermore, the petitioner's letter entitled "Employer and Employee Relationship [the petitioner] and [the beneficiary]," contains no more than conclusory assertions regarding the petitioner's claimed control over the beneficiary. Merely claiming that the petitioner exercises 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Thus, while salary and other benefits are 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, 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. As discussed above, the submitted evidence is insufficient to establish an employer-employee relationship between the petitioner and the beneficiary. Moreover, as discussed in this decision, the petitioner's claim that the beneficiary will work exclusively on its in-house [REDACTED] project is not credible. Thus, we are left with no credible description of the relevant factors necessary to determine who will control the beneficiary. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.<sup>9</sup>

In summary, the evidence of record does not support the petitioner's claim that the beneficiary will work exclusively onsite on its in-house [REDACTED] project. The key element in this matter is who will have the ability to control the work of the beneficiary for the duration of the H-1B petition. As discussed earlier, such indicia of control include when, where, and how a worker performs the job, among other factors. 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

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<sup>9</sup> We note that the overall nature, size, and scope of the petitioner's business activities are not clear. The petitioner asserted on the Form I-129 that it is a 23-employee company. However, the petitioner's federal Form 941 indicates that the petitioner had zero employees to whom it paid wages, tips, or other compensation at the time of filing. The petitioner's organizational chart, as previously mentioned *supra*, does not clearly depict and identify the exact size and staffing of the petitioning company.

We also note that the majority of the petitioner's employees appear to work out-of-state, according to the petitioner's state quarterly reports for the second quarter of 2013. Specifically, the petitioner paid wages to approximately fifteen total employees in CO, DE, GA, IL, MD, CO, MA, NC, PA, TX, and VA, whereas it paid wages to only ten employees in NJ. This suggests that the petitioner places personnel at third party sites and that it will not be the end user of the beneficiary's services.

Lastly, we note that Mr. [REDACTED], whom the petitioner claimed would directly supervise the beneficiary, was not listed as a paid employee on any of the petitioner's state quarterly reports.

384, 388. Here, without a credible explanation and evidence of when, where, and how the beneficiary will perform the job, as well as other relevant factors necessary to determine whether the petitioner will have the ability to control the beneficiary's work, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. For this reason, the petition must be denied.

### III. SPECIALTY OCCUPATION

We also find that the evidence of record fails to establish that the proffered position is a specialty occupation.

#### A. Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d at 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.

As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

### B. Analysis

Here, the record of proceeding in this case is devoid of sufficient information regarding the specific job duties to be performed by the beneficiary. As discussed earlier in this decision, we do not find the petitioner's assertion that the beneficiary will exclusively work on-site at its business premises on in-house projects to be credible. As determined above, the record contains no credible evidence that the petitioner's claimed in-house project is bona fide, in that it actually exists and is being developed by the petitioner. Nor does the record contain a credible description of the proffered position and corresponding duties. Overall, the record is devoid of credible evidence establishing the substantive nature of the work to be performed by the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

### IV. THE CERTIFIED LCA DOES NOT CORRESPOND TO THE PETITION

Finally, beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Specifically, the job title on the LCA submitted with the petition reads "Programmer Analysts," and it was certified for SOC (O\*NET/OES) Code 15-1121 or "Computer Systems Analysts." As determined *supra*, however, the job as titled and as described by the petitioner does not reasonably correspond to SOC

(O\*NET/OES) Code 15-1121.00 "Computer Systems Analysts." The petitioner is required to provide at the time of filing an LCA certified for an occupational classification that corresponds to the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

## V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary, and that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. We also conclude that the LCA submitted does not correspond to the petition. Accordingly, the director's decision will not be disturbed.

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 the AAO conducts 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 petition will be denied and the appeal dismissed 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

(b)(6)

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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.