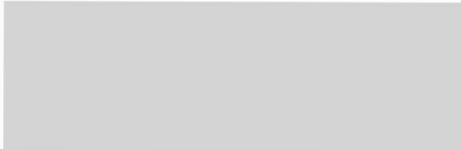


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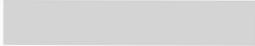
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **APR 06 2015**

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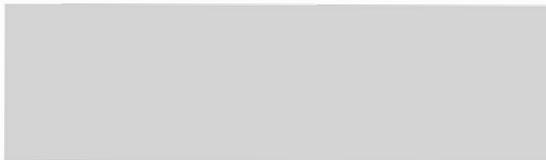
IN RE:

Petitioner: 

Beneficiary: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a circular stamp or seal.

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 (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a four-employee "IT staffing, solution, and services company" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Systems Analyst" position, 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and failed to establish that it qualifies as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).¹

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 the petitioner's submissions on appeal.

II. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Systems Analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position.

The period of employment requested in the visa petition is from October 1, 2014 to September 10, 2017. The Period of Employment for which the LCA is certified is from September 10, 2014 to September 10, 2017. The visa petition states that the beneficiary would work at the petitioner's location at [REDACTED]. The LCA is certified for employment at that location and the surrounding area.

¹ In fact, the director also found that the petitioner has not demonstrated that it has made a credible offer of specialty occupation employment to the beneficiary. We will address this ground in our specialty occupation analysis below.

The petitioner also submitted: (1) a Consulting Agreement between the petitioner and [REDACTED] [REDACTED] (2) a Task Order from [REDACTED]; and (3) a letter, dated March 12, 2014, from [REDACTED] signing as the petitioner's president.

The Consulting Agreement sets out general terms pursuant to which the petitioner might provide its workers to [REDACTED]. That agreement states, *inter alia*, "the estimated duration of the services to be performed shall be defined in the Task Order attached hereto."

The Task Order provided indicates that the petitioner would provide the beneficiary to [REDACTED] to work on a project at [REDACTED] Minnesota beginning on November 1, 2013 and continuing for three months. That order further states: "The exact nature of work will be determined by the on-site Reporting Manager based on project requirements and consultant skills." That document identifies the Reporting Manager as [REDACTED] but does not identify the company for which [REDACTED] works.

In his March 12, 2014 letter, [REDACTED] stated that the beneficiary would provide services to [REDACTED] Minnesota through the petitioner's client, [REDACTED]. He further stated that the petitioner will control the beneficiary at all times and that the following are the duties of the proffered position:

- Understands business requirements and participates along with the DEV team in BDR, FRS reviews in the initial phases of the projects;
- Prepares project test plans, identifies risk in project and prepares the risk mitigation plan;
- Participates in Functional and Technical specification review meetings;
- Prepares Master Test Plan and Test specifications;
- Follows standard release management and configures management process;
- Gathers test data in SIT and UAT phases;
- Performs testing on Web services and XML reports by using Soap UI 3.6;
- Tests data warehouse structures, mappings, ETL process, transformation of business rules, and reports;
- Validates and ensures data quality in tables;

- Performs Functionality Testing, Regression Testing, Integration and Database Testing;
- Understands Business Requirements from BRD, prepares Test plan and Test cases;
- Prepares test data for testing;
- Performs Smoke testing for new builds and, if application found stable enough, then conveys the report to the development project manager; and
- Creates shared object repository reusable.

As to the educational requirements of the proffered position, the petitioner's president stated:

All analyst positions at [the petitioner] require that the applicant possess at least a baccalaureate degree; thus, we consider the position of Systems Analyst to be a specialty occupation, pursuant to 8 C.F.R. § 214.2(h).

On May 12, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation and evidence pertinent to the asserted employer-employee relationship between the petitioner and the beneficiary. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, the petitioner submitted: (1) a portion of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* chapter pertinent to Computer Systems Analysts; (2) a printout of content from the About.com website pertinent to the requirements for computer systems analyst position; (3) a letter, dated July 10, 2014, from [redacted] signing as HR Manager of [redacted] (4) evidence pertinent to other employees in the petitioner's operations; (5) two vacancy announcements placed by the petitioner for positions entitled "System Analyst" in [redacted] and [redacted] NC"; (6) six vacancy announcements placed by other firms; (7) a document headed, "Itinerary of [the beneficiary]"; (8) an organizational chart of the petitioner's operations; (9) a document pertinent to the petitioner's performance review process; (10) a letter, dated June 10, 2014, from [redacted] signing as [redacted] Business Relationship Manager for [redacted] (11) a letter, dated July 8, 2014, from [redacted] signing as regional manager for [redacted] (12) a letter, dated July 18, 2014, from [redacted] signing as the petitioner's president; and (13) a document, dated October 10, 2013, addressed to the beneficiary and headed "RE: Employment Offer Letter";

The July 10, 2014 letter from [redacted] HR Manager of [redacted], states the letter is an "acknowledgement letter stating minimum requirement for a Technology related Job

openings" and that "[i]mportant minimum requirements are Bachelor's degree in Engineering background, experience or knowledge on software related technologies, Masters degree is a plus."

The petitioner's organizational chart shows that, in addition to the beneficiary, the petitioner employs [REDACTED] and [REDACTED] as systems analysts. Evidence submitted shows that [REDACTED] has a foreign bachelor's of technology degree in electronics and communication engineering and a master's degree in technology management earned in the United States; and [REDACTED] has a foreign bachelor of engineering in civil engineering and a master's degree in construction management earned in the United States. [REDACTED] résumé states that he has a foreign bachelor of technology in electrical and communication engineering and a master's in technology management earned in the United States, as well as experience as a junior systems analyst.

The petitioner's vacancy announcement is for a "System Analyst" position in [REDACTED] and states: "Minimum Requirements: Bachelors with Basic knowledge on listed technology. Masters Degree is a plus." It also states the following as the duties of that position:

- Managing all the interlinked applications end to end testing for multiple releases
- Understanding business requirements and Participated alone with dev teams in BRD, FRS reviews in the Preparing of project test plan ,Identifying Risk in project and prepare Risk mitigation Plan.
- Preparing of Master Test Plan and Test specifications.
- Following standard release management and configuration management process.
- Following standard process to gather test data in SIT and UAT phases.
- Web services testing and XML reports are pulling by using Soap UI 3.6.
- Testing data warehouse structures, mappings, ETL process, transformation of business rules, and rep
- Responsible for Functionality Testing, Regression Testing, Integration and Database Testing.
- Understanding Business Requirement from BRD, Preparing Test plan, and Test cases
- Preparing test data for testing.
- Performing Smoke testing for new builds and if application found stable enough then proceed else re
- Creating shared object repository reusable actions and functions using Quick Test Professional QTP.
- Establishing connectivity between QTP and Mercury Quality Centre and access the functions from QC.

[Verbatim]

The petitioner's vacancy announcement for a "System Analyst" position in [REDACTED] NC" and it states that a "Bachelors with Basic knowledge on listed Technology, Master's degree is a plus."

The itinerary provided states that the beneficiary will work at the [REDACTED] location throughout the period of requested employment. It further states that the petitioner will control the beneficiary at all times, that neither the client nor the intermediate vendor has authority to assign additional duties to the beneficiary, and that the following are the duties of the proffered position.

- Managing all the **interlinked** applications end to end testing for multiple releases.
- Understanding business requirements and Participated alone with dev team in **BRD, FRS** reviews in the initial phases of project.
- Preparation of project test plan, Identifying Risk in project and prepare **Risk mitigation Plan**.
- Participating in **Functional** and **Technical** specification review meetings and reparation of Master Test Plan and Test specifications.
- Following standard release management and configuration management process.
- Following standard process to gather test data in SIT and UAT phases.
- Web services **testing** and **XML** reports are pulling by using **SOAP UI 3.6**.
- Testing data warehouse structures, mappings, ETL process, transformation of business rules, and reports. Validate, and ensure data quality in tables.
- Responsible for **Functionality Testing, Regression Testing, Integration and Database Testing**.
- Understanding Business Requirement from **BRD**, Preparing Test plan, and Test cases and Preparing test data for testing.
- Responsible for Performing Smoke testing for new builds and if application found stable enough then proceed else report to development project manager.
- Creating shared object repository reusable actions and functions using Quick Test Professional **QTP**.
- Responsible for Establishing connectivity between QTP and **Mercury Quality Centre** and access the functions from QC.

[Verbatim]

The performance review document indicates that the petitioner conducts daily, monthly, and quarterly supervision reviews of all of its employees and issues them each an annual review.

The June 10, 2014 letter from [REDACTED] Business Relationship Manager for [REDACTED] provides the following "key duties":

- Maintain and upgrade existing applications.
- Develop workflow integrations enable new functionality in the applications[.]
- Interact with internal business owners and the Quality Assurance group.
- Making all the changes in a test environment[.]
- Analyzing and providing solutions for archival of e-communications[.]
- Implementing the solutions for archival of e-communications[.]

- Creating test plan and perform system testing and coordinating end user testing[.]
- Creating a communication/ implementation plan[.]
- Communication and implementation into production[.]
- Aligning with Senior Leadership on any policy change that will impact archival or supervision[.]

The letter also states:

We confirm the duties mentioned above are complex of a bachelor's in nature, and require a minimum degree in science or engineering or equivalent experience. Neither [redacted] nor [redacted] have the authority to alter [the beneficiary's] duties

The July 8, 2014 letter of [redacted] regional manager for [redacted] states that [redacted] is a subsidiary of [redacted] which "is executing the current project at [redacted]" It further states that the beneficiary's assignment at [redacted] "is expected to continue for longterm with strong possibility of further extension," but that "The agreements signed cannot be shared because of client confidentiality arrangements." He provided the same duty description contained in [redacted] June 10, 2014 letter.

In his July 18, 2014 letter, [redacted] asserted that the evidence provided, including the *Handbook* printout, the letter from [redacted] the vacancy announcements provided, and the evidence pertinent to the petitioner's other systems analysts, demonstrates that the proffered position qualifies as a specialty occupation position, and the evidence pertinent to the [redacted] project is evidence that the petitioner "is responsible for assigning work to [the beneficiary], and supervising him in his business activity," and would have an employer-employee relationship with the beneficiary.

At one point in that letter, [redacted] stated that the proffered position requires a bachelor's degree, without mentioning any specific specialty or even any range of subjects. Subsequently, he stated: "It is [the petitioner's] practice to employ individuals in these positions who have at least a bachelor's degree in an Engineering or related program." Later in the same letter, he stated: "[The petitioner] requires the individual to possess a Master's degree in an Engineering or related program" In that letter, [redacted] provided a duty description that is substantially identical to the description in his March 12, 2014 letter.

The October 10, 2013 employment offer addressed the beneficiary repeatedly states that the petitioner will assign the beneficiary's duties and supervise his performance of them. The offer also contains a duty description that is largely identical to that contained in the itinerary provided.

The director denied the petition on August 20, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by

virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent, and failed to demonstrate that it would have an employer-employee relationship with the beneficiary and qualify as the beneficiary's employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

On appeal, the petitioner submitted: (1) a letter, dated August 5, 2014, from [REDACTED] signing as Senior Director, Strategic Sourcing, Enterprise Procurement, for [REDACTED] (2) another letter from [REDACTED] (3) another Task Order issued to the petitioner by [REDACTED] and (4) a brief.

The August 5, 2014 letter from [REDACTED] confirms that [REDACTED] has entered into a Master Service Agreement with [REDACTED] dated January 1, 2013 and a Work Order [REDACTED] effective January 1, 2014 "for the services for software development activities by developing, documenting, testing, modifying, and maintaining new and existing software applications." It states that [REDACTED] may have agreements with subcontractors to fulfill the needs of that work order.

The additional letter from [REDACTED] is signed by [REDACTED] as its HR Manager. It states that [REDACTED] requires at least a bachelor's degree "in the related fields of Engineering, Engineering Management, or Technology Management" for its systems analyst positions.

The [REDACTED] Task Order states that [REDACTED] will utilize the beneficiary's services at the [REDACTED] project for 12 months beginning on October 1, 2014. It also states, "The exact nature of [the beneficiary's] work will be determined by the on-site Reporting Manager based on project requirements and consultant skills" and identifies [REDACTED] as the on-site Reporting Manager.

In the brief, counsel asserted that the evidence is sufficient to show that the proffered position qualifies as a specialty occupation position and that the petitioner would have an employer-employee relationship with the beneficiary.

III. SPECIALTY OCCUPATION

A. The Law

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.

B. Specialty Occupation Analysis

As a preliminary matter and 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 v. Meissner*, 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.*

Here, the record of proceeding in this case is devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company.² The letter from [REDACTED] states that [REDACTED] "has entered into a Master Service Agreement" with [REDACTED] "as well as Work Order [REDACTED] effective 1/1/2014 . . ." With respect to the job duties, [REDACTED] vaguely states that Work Order [REDACTED] is "for the services for software development activities by developing, documenting, testing, modifying and maintaining new and existing software applications." We note that neither the Master Service Agreement nor the Work Order referenced by [REDACTED] were submitted in this matter. 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 reason, the appeal will be dismissed and the petition denied.

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 petition, the petitioner had secured work of any type for the beneficiary to perform during any portion of the requested period of employment.

Specifically, the visa petition was submitted on April 1, 2014. The evidence indicates that the Task Order requesting the beneficiary's services at the [REDACTED] project expired before the petition was filed. We also note that the Task Order was not signed by [REDACTED]. Therefore, it is not evidence of any work the petitioner had, to which it could have assigned the beneficiary during any part of the period of requested employment, which runs from October 1, 2014 to September 10, 2017, when the visa petition was submitted.

The second Task Order is for work to be performed from October 1, 2014 to September 30, 2015. However, that Task Order was signed by [REDACTED] for the petitioner on October 14, 2014 and by [REDACTED] for [REDACTED] on October 15, 2014. Even if construed as a firm commitment by

² We observe that both of the Task Orders showing work to which the petitioner would assign the beneficiary make explicit that [REDACTED] would assign the beneficiary's duties. [REDACTED] has not been shown to be an employee of the petitioner, of [REDACTED]. Therefore, it is a possibility that [REDACTED] who would be responsible for assigning the beneficiary's duties, is an employee of [REDACTED]

██████████ to utilize the beneficiary's services on its project, that Task Order had not been executed on April 1, 2014, when the instant visa petition was submitted.

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).

Although the July 8, 2014 letter of ██████████ regional manager for ██████████ describes the beneficiary's assignment at ██████████ as "longterm with strong possibility of further extension," that statement is far from a commitment from ██████████ or any other company, to utilize the beneficiary's services during the entire period of qualifying employment, or during a specific portion of it.

The petitioner has not established that, when it submitted the visa petition, it had any work at all to which to assign the beneficiary during the period of requested employment. For this reason also, the appeal will be dismissed and the petition denied.

IV. EMPLOYER-EMPLOYEE

The remaining basis for the denial of the instant visa petition is the director's finding that the petitioner has not established that, if the visa petition were approved, the petitioner would have an employer-employee relationship with the beneficiary and would be the beneficiary's employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

A. The Law

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 (emphasis added):

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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

B. Employer-Employee Analysis

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 an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). 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 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.³

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

³ 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).

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 318-319.⁴

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).⁵

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),

⁴ 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))).

⁵ 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).

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, 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).

The petitioner claims that it will have an employer-employee relationship with the beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 375-376. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. 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)). 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."

The evidence that the petitioner has work for the beneficiary to perform during the period of requested employment is, as was explained in detail above, insufficient. In any event, that evidence all pertains to an assignment by the petitioner, through [redacted] and possibly other intermediaries, to work on a project at the location of [redacted]. Notwithstanding the petitioner's assertions to the contrary, the petitioner has executed Task Orders in which it agrees that the beneficiary's duties would be assigned by on-site Reporting Manager [redacted]. That [redacted] is described as the on-site Reporting Manager suggests that, despite the petitioner's

protestations to the contrary, the beneficiary would report to [REDACTED] who would supervise the beneficiary's performance of the duties he assigned. The record contains no indication that [REDACTED] is an employee of the petitioner. In fact, it appears that [REDACTED] is an employee of [REDACTED]. As such, the evidence suggests that another entity, and not the petitioner, would assign the beneficiary's duties and supervise his performance at a project to which he was assigned through some number of intermediaries. We find that such an attenuated relationship indicates that the petitioner will not have an employer-employee relationship with the beneficiary.

The petitioner also has not demonstrated with sufficient evidence how the beneficiary would be supervised in [REDACTED] Minnesota while the petitioner is located in [REDACTED] North Carolina. We reviewed the documentation provided by the petitioner that outlines the petitioner's "Review Policy" and the beneficiary's "Performance Review" which was signed on February 5, 2014. The petitioner claimed that it undertakes "daily, monthly and quarterly supervision reviews" and that based on these reviews, an annual review is prepared. Although the petitioner provided a brief description of its performance review process, it must be noted that the letter lacks information regarding how the petitioner determines and rates an employee, as well as whether the petitioner measures the details of how the work is performed or the end result. Further, the petitioner did not clarify the identity of the beneficiary's manager or supervisor.

We assessed and weighed the relevant factors as they exist or will exist and the evidence does not support the petitioner's assertion 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 petitioner claims that the beneficiary will be employed at [REDACTED] office, and the evidence indicates that [REDACTED] will have discretion over when and how long the beneficiary will work, as well as assigning projects to the beneficiary. There is a lack of evidence establishing the petitioner's right to control or actual control in the instant case. The petitioner failed to establish such aspects of the employment, such as who will oversee the day-to-day work of the beneficiary and who will be responsible for his performance evaluations. In the instant case, it appears that the petitioner's role is likely limited to invoicing and proper payment for the hours worked by the beneficiary.⁶

Upon review of the record of proceeding, we therefore cannot conclude that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the

⁶ We note that the itinerary states that the beneficiary will be paid \$31 per hour; however, according to the LCA, the beneficiary must be paid at least \$33.23 per hour. The petitioner states in the Form I-129 and the LCA that it will pay the beneficiary \$34 per hour. 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).

petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). 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 for this additional reason.

V. CONCLUSION

An application or petition that does not 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 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable. ").

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 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.