



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 20 2015 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:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as 151-employee "QA and Testing solutions firm" established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "QA Analyst/Tester" position at a salary of \$70,762 per year, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, 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 beneficiary is qualified for the proffered position.

On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that the submitted evidence was sufficient.

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 Notice of Appeal or Motion (Form I-290B), and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

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 director's decision, we also find that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner describes itself on the Form I-129 as 151-employee "QA and Testing solutions firm" located at [REDACTED] Massachusetts.¹ The petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a full-time QA analyst/tester at a salary of \$70,762.² The petitioner indicated that the beneficiary will work off-site at "[REDACTED] [Pennsylvania]." The Form I-129 was signed by [REDACTED], HR Administrator.

¹ Although the petitioner states on the Form I-129 that it has 151 employees, the petitioner submitted other documentation stating that it has over 500 employees.

² Although the petitioner states on the Form I-129 that the proffered salary would be \$70,762 per year, the petitioner submitted other documentation stating that the proffered salary would be \$71,000 per year.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a "QA Analyst/Tester," and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1199, Software Quality Assurance Engineers and Testers" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position.³ The petitioner indicated on the LCA that the beneficiary will be working at two locations: (1) [REDACTED] Pennsylvania; and (2) [REDACTED], Massachusetts.

In support of the petition, the petitioner submitted, *inter alia*, a letter, dated March 11, 2014, describing itself as a "business information technology consulting firm." The petitioner asserted that the beneficiary is "an excellent candidate" for the proffered position, and noted that the beneficiary holds a Bachelor of Pharmacy degree from [REDACTED] (India) and is "expected to graduate" from [REDACTED] in May 2014. The petitioner further asserted that although the beneficiary will be assigned to work for the end-client [REDACTED] the petitioner "will be the beneficiary's actual employer" and will be responsible for: the source of the skills, instrumentalities, and tools required to perform the specialty occupation; the right to assign the beneficiary additional work; payment of the beneficiary's salary and employee benefits; treatment of the beneficiary as an employee for tax purposes; and the right to hire, fire, and supervise her.

The petitioner also submitted a letter from [REDACTED] dated March 17, 2014, confirming that the beneficiary "is working at [REDACTED] as a Software Analyst & Tester" and that "[s]he is currently working as a contractor thru our agreement with [the petitioner]." The letter listed the beneficiary's duties as follows:

- Analyze the applications
- Develop Test scenarios
- Write SQL queries to validate the databases (Oracle)
- Managing all phases of System testing ensuring test cases are completed and meet business requirements
- Responsible for preparing Test plans, Test cases, record defects using HQ Quality Center and validate, fix defects identified during the integration, system and functional testing.

The petitioner also submitted a "Consultant Agreement" between the petitioner and [REDACTED] which became effective February 16, 2010. The scope of services provided through this agreement was for "One (1) consultant for Systems Assurance Specialist services through April 30, 2010."

³ For further information regarding the four LCA wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The petitioner also submitted evidence that the beneficiary initially entered the United States in H-4 non-immigrant status on July 26, 2012. She subsequently changed to F-1 non-immigrant status on April 9, 2013, and re-entered the United States in such status on January 31, 2013. The petitioner also submitted evidence that the beneficiary was granted employment authorization to perform part-time employment at the petitioner's office in New Jersey from May 13, 2013 to May 12, 2014, and then full-time employment from June 2, 2014 to June 1, 2015.

The petitioner also submitted a copy of a paycheck it issued to the beneficiary in February 2014.

The petitioner also submitted the beneficiary's unofficial transcript for her graduate studies, and a copy of her Bachelor of Pharmacy degree awarded in April 2011.

The director issued an RFE instructing the petitioner to submit, *inter alia*, additional documentation establishing that an employer-employee relationship would exist between the petitioner and the beneficiary. The director specifically noted in the RFE that the petitioner's Consultant Agreement with [REDACTED] expired on April 30, 2010. The director also requested additional evidence establishing that the proffered position qualifies for classification as a specialty occupation, and that the beneficiary is qualified for the proffered position.

In response to the RFE, the petitioner submitted, *inter alia*, a new letter from [REDACTED] dated May 20, 2014, stating: "Please be advised that [REDACTED] has contracted with [the petitioner] under a service agreement to be provided with programming, systems analysis, quality assurance, and testing related services." The letter further states that the beneficiary has been selected to work as a QA analyst/tester at its offices to perform the following duties:

- Analyze business requirements documents and functional specification document to identify any gaps.
- Work with business users, Solution Analysts, development team & support to identify and implement testing solutions for business and system requirements.
- Involve [*sic*] in the development of detailed test strategy for functional and system testing.
- Write test plan/cases perform UAT, smoke, and system testing.
- Validate data in database using SQL queries.
- Work with cross functional teams.

The same letter states: "The minimum requirements for this position is [*sic*] a Baccalaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [*sic*]."

The petitioner also submitted two status reports purportedly sent by the beneficiary to the petitioner in June 2014.

The petitioner also submitted copies of two additional paychecks it issued to the beneficiary in April and May of 2014.

The petitioner also submitted an affidavit from the beneficiary, dated May 13, 2014, attesting that she: is currently an employee of the petitioner; has already signed an Employment Agreement with the petitioner; and is currently assigned to provide technical services to [REDACTED] in the capacity of QA analyst/tester. The beneficiary further attests that she is supervised by "Technical Managers employed by [the petitioner] and report[s] to [the petitioner] for all matters." She also states that she is a "REGULAR & W-2 Employee of [the [petitioner]]" with a salary of \$71,000 annually plus incentives.

The petitioner submitted its "Employer-Employee Agreement," dated May 2, 2014, between itself and the beneficiary. Through this agreement, the petitioner "agrees to hire [the beneficiary] in the capacity of QA Analyst and Tester" at an annual salary of \$71,000. The Employment Dates are specifically listed as: "Start Date: 10/01/2014 (contingent upon proof of employment eligibility)" and "End Date: 12/01/2017."

The petitioner also submitted a "Consultant – Non-Disclosure Agreement" between the petitioner and the beneficiary. This document was signed by the beneficiary on May 2, 2014 and by the petitioner on May 5, 2014. In this agreement, the beneficiary, therein referred to as the "Consultant" and "Consultant/Sub-contractor," agrees to the following:

1. Consultant agrees not to compete with the [petitioner] (Directly or Indirectly, for itself or other party) in providing services to any clients introduced to the [beneficiary] and [the petitioner]. . . .
2. [The beneficiary], will not solicit any direct employment from the client or join the client on direct billing ignoring [the petitioner], Consultant/Sub-contractor will not discuss the Financials/billing rates with the client. . . .

The petitioner submitted its organizational chart depicting [REDACTED] President/CEO, at the top, directly overseeing [REDACTED] Senior Vice President, who in turn oversees six managerial employees including [REDACTED] QA/Java Technical Manager. The chart depicts [REDACTED] as the beneficiary's direct supervisor. The chart further depicts [REDACTED] the signatory of the instant petition, as a HR Coordinator subordinate to [REDACTED], HR Manager.

The petitioner also submitted an affidavit, dated June 18, 2014, from [REDACTED] attesting that he is the beneficiary's first-line supervisor and that he supervises her work through daily scrum meetings and weekly status reports, among other methods. He further attests that he "will act as [the beneficiary's] primary point of contact and appraise her work performance, using [the petitioner's] standard review process and form, a copy of which is being submitted herewith."

The petitioner submitted a "Performance Review" of the beneficiary's work from January 1, 2014 through March 31, 2014.

The petitioner also submitted screen-shots from its website, in which it describes itself as "one of the largest QA & testing Solutions firm with 500+ QA consultants and has operations across USA and India." In the "Careers" webpage, the petitioner lists multiple QA analyst/tester position openings, and states: "*The minimum requirements for all this positions is a Bacculaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [sic].*" It further states: "Job locations in [REDACTED] MA & various unanticipated client sites nationally requiring relocation and travel."

The petitioner also submitted another letter listing the same job duties for the proffered position as found in the letter from [REDACTED] dated May 20, 2014. The petitioner reaffirmed in this letter that "[t]he minimum requirements for this position is a Bacculaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [sic]."

The petitioner submitted a "[p]osition evaluation" from Dr. [REDACTED] concluding that the minimum educational requirements for the proffered position are "[a] **four year** Bachelors (BS) degree in Computer Information Systems or Engineering or Business Administration a related field [sic]."

The petitioner also submitted a "Credential Evaluation Report" dated June 11, 2014 from Dr. [REDACTED] concluding that the beneficiary has the academic equivalent to a bachelor of science (BS) degree in Computer Information Systems based on a combination of academics, specialized training, and work experience. In pertinent part, Dr. [REDACTED] states that the beneficiary obtained specialized training "in the field of Computer Information Systems through a one year Post Graduate Diploma in Computer Applications at [REDACTED] (a private educational institution registered with and approved by the Govt of [REDACTED] India)" in April 2012. Dr. [REDACTED] also states that the beneficiary has "work experience testimonials that exhibit about **2.0 years** of gainful employment," exactly half of which was gained through her purported employment with the petitioner from May 2013 to present (June 11, 2014) as a Quality/Systems Analyst, and the other half as an "IT Business Analyst" with [REDACTED] from May 2011 to June 2012.

The petitioner submitted a certificate dated April 27, 2012 from [REDACTED] certifying the beneficiary's completion of a one-year course "P.G.D.C.A."

The petitioner also submitted a copy of the beneficiary's resume. Under "Education," the beneficiary listed her Bachelor of Pharmacy degree and her Master of Business Administration in Information Technology degree. Under "Work-Experience," the petitioner listed her current employment with the petitioner as a QA Analyst since May 2013. No other educational, training, and professional experience was listed.

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 again noted that the Consultant Agreement between the petitioner and [REDACTED] had expired on April 30, 2010, and observed that the second letter from [REDACTED] indicated that a new service agreement is "to be provided" but has not yet been affirmed. The director also concluded that the beneficiary is not qualified for the proffered position, and declined to give the evaluation by Dr. [REDACTED] probative weight.

The petitioner subsequently filed an appeal. On appeal, the petitioner asserts that "[t]he expired Consultant Agreement was previously provided to show a prior contractual relationship with the End-Client, not of evidence of a current relationship." The petitioner further asserts that there is a "Master Service Agreement, effective February 25, 2011, signed by both parties, [that] is currently in effect showing a current contractual relationship between the parties."

On appeal, the petitioner submits, *inter alia*, a copy of a Master Service Agreement dated February 25, 2011 between the petitioner ("Company") and [REDACTED] ([REDACTED]). Under "Scope of Services" this agreement states: "Company will perform the Services as set forth in a written Statement of Work, each of which specifies the rates, expenses, and any other relevant information pertaining to the Services to be provided." Under "Assigned Employees" it states that the petitioner "shall coordinate the project with [REDACTED] Project Manager."

II. EMPLOYER-EMPLOYEE RELATIONSHIP

The first issue to be discussed is whether the petitioner will have and maintain an employer-employee relationship with the beneficiary throughout the entire validity period requested.

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:

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).

B. Analysis

In this matter, the director determined 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.

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.⁴

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a

⁴ 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).

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 318-319.⁵

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).⁶

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*

⁵ 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))).

⁶ 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).

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, we agree with the director that 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 off-site for the end-client, [REDACTED], located at [REDACTED] Pennsylvania. The petitioner does not identify any other end-client on the Form I-129, LCA, and supporting documentation.

However, the record of proceeding does not contain reliable documentation from [REDACTED] describing in sufficient detail the circumstances of the beneficiary's assignment. While the petitioner submitted letters from [REDACTED] stating that the petitioner has "the right to control" and "managerial authority" over the beneficiary's work, these letters do not describe in any factual detail the manner in which the petitioner purportedly exercises such rights and authority. Without more, these are conclusory statements that are not entitled to evidentiary weight. 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)).

In fact, the record of proceeding lacks reliable evidence of a valid contractual agreement assigning the beneficiary to [REDACTED]. As the director duly noted, the Consultant Agreement between the petitioner and [REDACTED] expired on April 30, 2010. On appeal, the petitioner submitted a Master Service Agreement between the parties, which purportedly went into effect on February 25, 2011. However, we must question the reliability of the Master Service Agreement. First, although the director specifically requested an "updated and current contract" in the RFE, the petitioner did not submit this Master Service Agreement or explain why it was not submitted in response to the RFE. 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). Second, we note that this "current" Master Service Agreement undermines the statement in the [REDACTED] letter dated May 20, 2014 that a service agreement is "to be provided (emphasis added)." The petitioner has not explained why the [REDACTED] letter dated May 20, 2014 indicates that a current service agreement has not yet been executed, when the Master Service Agreement purportedly went into effect several years prior.

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.*

Moreover, the petitioner did not submit the actual Statement of Work between the parties specifically assigning the beneficiary to work at [REDACTED]. The Master Service Agreement specifically states that the petitioner "will perform the Services as set forth in a written Statement of Work, each of which specifies the rates, expenses, and any other relevant information pertaining to the Services to be provided." Without the actual Statement of Work, and in light of the other discrepancies discussed above, the evidence is insufficient to establish that the petitioner and [REDACTED] have actually entered into a contract for the beneficiary's services.

We also question the credibility of the petitioner's documents submitted in support of its claimed employer-employee relationship with the beneficiary. For instance, the petitioner submitted its "Employer-Employee Agreement" with the beneficiary, signed by both parties on May 2, 2014. This document specifically lists the beneficiary's employment start date as October 1, 2014. However, the evidence of record reflects that the beneficiary has been working for the petitioner since well before October 1, 2014. Furthermore, the beneficiary's own affidavit, dated May 13, 2014, attests that she is currently an employee of the petitioner and has already signed an Employment Agreement with the petitioner. Notably, in contrast to the "Employer-Employee Agreement" which refers to the beneficiary as the petitioner's "employee," the petitioner and the beneficiary also entered into a "Consultant – Non-Disclosure Agreement" in which the beneficiary is referred to as a "Consultant/Sub-contractor." The petitioner's reference to the beneficiary as a "Consultant/Sub-contractor" rather than an "employee" indicates that the beneficiary is working independent of the petitioner. The petitioner has not provided an explanation for this non-disclosure agreement, which we note the beneficiary signed on the same day as the "Employer-Employee Agreement."

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner asserts that it will control and manage all aspects of the beneficiary's off-site work. Specifically, the petitioner submitted an affidavit from Mr. [REDACTED] the beneficiary's purported first-line supervisor, attesting that he has direct contact with the beneficiary in the form of "daily scrum meeting[s]," weekly status reports, and periodic performance evaluations. He specifically states in his affidavit that he "will act as her primary point of contact and appraise her work performance." However, the beneficiary's performance review bears the signature of [REDACTED] the petitioner's human resources administrator/coordinator, under the signature section for "Managerial Approval of Performance Review Document." Through her signature, Ms. [REDACTED] certified that she "reviewed and approved the performance document and overall rating and reviewed the goals of the employee."⁷ The petitioner has not adequately explained why the beneficiary's performance review would be signed by a human resources administrator/coordinator, rather than by Mr. [REDACTED] who purportedly "appraise[s] her work performance," or by another employee with appropriate authority over such matters.⁸ Moreover, while the petitioner submitted examples of the beneficiary's weekly status reports, the petitioner has not adequately explained the manner in which these evaluations were conducted, prepared, transmitted, and received (e.g., the source of the information regarding the beneficiary's planned activities for the next week).

In addition, the Statement of Work states that the petitioner "shall coordinate the project with [REDACTED] Project Manager." However, the petitioner has not explained the nature of the relationship (if any) between itself, [REDACTED] Project Manager, and the beneficiary with respect to the beneficiary's daily work at [REDACTED]. We note that Mr. [REDACTED] affidavit makes no mention of [REDACTED] Project Manager.

Thus, even if the petitioner were to establish that it provides the beneficiary's salary and other employment benefits, these factors, alone, are insufficient to establish that the petitioner qualifies as the beneficiary's employer having an employer-employee relationship with her. Other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order

⁷ The petitioner's organizational chart depicts Ms. [REDACTED] as one of two "HR Coordinators" subordinate to [REDACTED] the "HR Manager." Ms. [REDACTED] is not depicted as overseeing any employees.

⁸ In his affidavit, Mr. [REDACTED] states that he, [REDACTED] and [REDACTED] (the petitioner's President) all "review" the beneficiary's weekly status reports. However, Mr. [REDACTED] does not state that Ms. [REDACTED] and Mr. [REDACTED] have any roles with respect to the beneficiary's performance reviews or in overseeing her work in general.

to make a determination as to who will be the beneficiary's employer. Here, there is insufficient evidence establishing all the relevant factors of the beneficiary's employment. 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.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters and other submitted documentation that the petitioner exercises complete control over the beneficiary, without competent evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it qualifies as an "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). For this reason, the petition must be denied.

III. SPECIALTY OCCUPATION

The material deficiencies in the record regarding the employer-employee relationship between the petitioner and the beneficiary preclude the approval of the petition. Nevertheless, we will address, beyond the decision of the director, whether the position proffered here qualifies for classification as a specialty occupation. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. We find here that the evidence of record fails to establish that the proffered position qualifies for classification as a specialty occupation.

A. The 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), 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.

B. Analysis

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 similarly devoid of sufficient, credible information from [REDACTED] or any other end-client(s) regarding the specific job duties to be performed by the beneficiary. As discussed *supra*, the record of proceeding does not contain the actual Statement of Work or other reliable evidence establishing the beneficiary's assignment to [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Also as discussed *supra*, there are inconsistencies in the record as to whether a current service agreement between [REDACTED] and the petitioner even exists.

Assuming *arguendo* that there is a valid contractual agreement between [REDACTED] and the petitioner for the beneficiary's services, the letters from [REDACTED] are insufficient to explain the circumstances of the beneficiary's assignment there. For instance, the duties of the proffered position as described in these letters are too generalized and broad to sufficiently convey the substantive nature of the proffered position and its constituent duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the stated duty of "[i]nvolve in the development of detailed test strategy for functional and system

testing." There is no further explanation of what is meant by the term "[i]nvolve in the development," i.e., what specific tasks the beneficiary will be involved in and the complexity of such tasks. Another stated duty for the beneficiary is to "[w]rite test plan/cases perform UAT, smoke, and system testing." Again, this statement is insufficient to describe the demands, level of responsibilities, and requirements necessary for the performance of this duty.

Furthermore, the petitioner indicated on the LCA that the beneficiary will also be working at its business premises located at ██████████ Massachusetts. However, the petitioner has not provided any explanation of the work the beneficiary will allegedly perform at its business premises.⁹

Overall, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the beneficiary. The failure to establish the substantive nature of the work, 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 for classification as a specialty occupation.

Even if the petitioner were able to establish the substantive nature of the work to be performed by the beneficiary, we still could not find that the proffered the proffered position qualifies for classification as a specialty occupation. Specifically, the petitioner asserts that the proffered position requires "a Baccalaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [*sic*]."

In general, provided the specialties are closely related, e.g., Computer Science and Computer Information Systems, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same.

Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields,

⁹ We note that the petitioner's vacancy announcements state that job locations will be in '██████████ MA & various *unanticipated* client sites (emphasis added)."

such as Computer Science, Pharmacy, and Healthcare Management, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.¹⁰ Section 214(i)(1)(B) of the Act (emphasis added). The petitioner has not done so here.

In other words, the petitioner has not established that Pharmacy and Healthcare Management are closely and directly to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.

We decline to assign the position evaluation from Dr. [REDACTED] any probative value. Specifically, Dr. [REDACTED] concludes that the minimum educational requirements for the proffered position include a bachelor's degree in "Engineering or Business Administration." However, neither the petitioner nor the end-client has ever stated that the minimum educational requirement for the proffered position can be satisfied by a degree in Business Administration or an otherwise unspecified Engineering degree.¹¹

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). In addition, doubt cast on any aspect of the

¹⁰ While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

¹¹ If the proffered position can be satisfied by a degree in "Engineering or Business Administration" as stated by Dr. [REDACTED] this would further support the conclusion that the proffered position is not a specialty occupation. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title or a general-purpose degree, such as Engineering or Business Administration, without further specification, does not establish the position as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (stating that a business administration degree is a general-purpose bachelor's degree). Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

IV. BENEFICIARY'S QUALIFICATIONS

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note additional deficiencies and discrepancies which further support the director's decision not to afford the evaluation by Dr. [REDACTED] any probative weight.

In particular, Dr. [REDACTED] concludes that the beneficiary has "2.0 years of gainful employment," exactly half of which was gained through her purported employment with the petitioner from May 2013 to June 11, 2014. However, we note that the beneficiary was granted employment authorization to work *part-time* for the petitioner from May 13, 2013 to May 12, 2014. Neither Dr. [REDACTED] nor the petitioner has explained how the beneficiary's part-time work from May 13, 2013 to May 12, 2014 could reasonably equate to "1.00 years" of work experience.

Moreover, we note that the other half of the beneficiary's work experience, i.e., her purported employment as an IT Business Analyst with [REDACTED] from May 2011 to June 2012, occurred at approximately the same time the beneficiary was purportedly receiving "specialized training" through a one-year "Post Graduate Diploma in Computer Applications" program at [REDACTED] which ended in April 2012.¹² The petitioner has not explained how the beneficiary was able to complete this training program at [REDACTED] at approximately the same time she was working for [REDACTED].¹³ The record of proceeding is notably absent any evidence from [REDACTED] verifying the beneficiary's claimed employment there, as well as the "work experience testimonials" upon which Dr. [REDACTED] claims to have relied. We also note that the beneficiary's resume does not list any prior work experience for [REDACTED] or specialized training from [REDACTED]. As previously noted, we are not required to accept opinion statements

¹² The beneficiary would have begun this one-year "Post Graduate Diploma in Computer Applications" program in approximately April 2011, the same month and year that she graduated with a bachelor's degree in Pharmacy from [REDACTED], India.

¹³ The petitioner has not explained its relationship to [REDACTED].

Assuming [REDACTED] is the same branch office as listed on the petitioner's website, [REDACTED] office is located in [REDACTED]. See [http://\[REDACTED\]](http://[REDACTED]) (last visited April 15, 2015). In contrast, the beneficiary's "diploma" indicates that [REDACTED] is located in [REDACTED] India.

that are not in accord with other information or are in any way questionable. *Matter of Caron International*, 19 I&N Dec. 791.

V. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also find, beyond the decision of the director, that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the petition will be denied.

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.