



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 27 2015** OFFICE: VERMONT SERVICE CENTER FILE: 

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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 158-employee "IT Consulting Services" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Clinical SAS 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 has standing to file the instant visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

II. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Clinical SAS 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 wage Level I, entry-level, position.

The visa petition states that the beneficiary would work at "[REDACTED]": [REDACTED]. With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor's degree in chemical engineering from [REDACTED] in India and a master's degree in environmental engineering from the [REDACTED].

The petitioner also submitted, *inter alia*, (1) a printout of data from the Foreign Labor Certification Data Center Online Wage Library (OWL) pertinent to computer systems analysts; (2) a Contractor Agreement, dated March 18, 2014, executed by the petitioner and [REDACTED] ([REDACTED]); (3) a work order issued by [REDACTED] to the petitioner on March 18, 2014; (4) an employment agreement executed by the petitioner and the beneficiary on March 19, 2014; and (5) a letter, dated March 27, 2014, from [REDACTED] signing as the petitioner's HR Manager.

The OWL printout indicates, *inter alia*, that computer systems analysts are in "Job Zone 4."

The March 18, 2014 Contractor Agreement sets out general terms pursuant to which the petitioner may provide workers to [REDACTED]. It also states that [REDACTED] will pay the petitioner as set out in the accompanying work order. That agreement does not indicate when it will terminate, except that either party may terminate it with 15 days' notice.

The March 18, 2014 work order indicates that the petitioner will provide the beneficiary to [REDACTED] to work as a Clinical SAS Analyst. It states: "Term of Services: Start Date: March 24, 2014." It does not indicate how long the beneficiary's assignment would continue. It identifies the Reporting Manager as [REDACTED]. It does not state where the work would be performed or whether the beneficiary would work full-time on that project.

The March 19, 2014 employment agreement between the petitioner and the beneficiary states, *inter alia*:

Location and Beginning of Services. [The beneficiary] agrees to perform services at any location as determined by [the petitioner]. [The petitioner] may determine the location in which [the beneficiary] will provide services at anytime [sic] and without notice. Should [the beneficiary] be unable to begin work for [the petitioner] on the agreed upon date, [the beneficiary] agrees that he or she will immediately pay [the petitioner] liquidated damages of Ten Thousand Dollars (\$10,000).

In his March 27, 2014 letter, [REDACTED] stated, *inter alia*, "Although Beneficiary will be providing services off-site, Petitioner will, at all times, maintain a valid employer-employee relationship with the beneficiary."

On May 6, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence pertinent to the potential relationship between the petitioner and the beneficiary. The director outlined the specific evidence to be submitted.

In response to the RFE, the petitioner submitted: (1) a letter, dated June 3, 2014, from [REDACTED] addressed "To Whom it May Concern"; (2) an evaluation of the beneficiary's performance by the petitioner during the period from July 1, 2013 to December 31, 2013, signed by the beneficiary on June 5, 2014; (3) a document headed "Itinerary of Definite Employment," dated July 8, 2014 and signed by [REDACTED]; (4) an undated document headed "Project Itinerary for [the beneficiary]"; and (5) a Brief in Response to Request for Evidence, dated July 8, 2014, and signed by [REDACTED] the petitioner's HR manager.

The June 3, 2014 letter from [REDACTED], addressed "To Whom it May Concern," states that the beneficiary will work on the following projects:

	PROJECT	DURATION
1.		Aug'2012 – Feb'2015
2.		Jan'2013 – Jun'2015
3.		Feb'2013 – Jun'2015
4.		Dec'2012 – Feb'2017

The July 8, 2014 document headed "Itinerary of Definite Employment" reiterates that the petitioner will provide the beneficiary to [REDACTED] for the entire three-year period of requested employment. The undated "Project Itinerary" also asserts that the petitioner would provide the beneficiary to [REDACTED] for the entire period of requested employment.

In the "Brief in Response to Request for Evidence," [REDACTED] asserted that the evidence submitted is sufficient to show that the petitioner would have an employer-employee relationship with the beneficiary.

The director denied the visa petition on July 23, 2014, finding, as was noted above, that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer. In that decision, the director stated that publicly available records show that the projects listed in the June 3, 2014 letter from [REDACTED] are sponsored by [REDACTED] and that [REDACTED] is therefore the likely end client.

On appeal, the petitioner submitted (1) a Services Agreement between [REDACTED] and [REDACTED] ratified by [REDACTED] on December 11, 2008; (2) a Master Clinical Services Agreement between [REDACTED] and [REDACTED] signed by [REDACTED] on April 3, 2009 and by [REDACTED] on April 7, 2009; (3) a statement of work (SOW), pertaining to a "Master Service Agreement . . . effective 7 April 2009" between [REDACTED] and [REDACTED]. ("SOW #1"); (4) an SOW pertaining to a "Master Services Agreement dated April 9th, 2009," between [REDACTED] and [REDACTED] ("SOW #2"); (5) an invoice, dated July 30, 2014, issued to [REDACTED] by [REDACTED] (6) portions of another invoice; (7) a letter, dated August 13, 2014, from [REDACTED] signing as vice president of [REDACTED] and (8) a short statement from the petitioner regarding its appeal.

The December 11, 2008 services agreement sets out general terms pursuant to which [REDACTED] would perform biostatistics and medical writing services for [REDACTED] in connection with "the [REDACTED]." The term of that agreement was from December 1, 2008 to November 30, 2009.

The Master Clinical Services Agreement sets out general terms pursuant to which [REDACTED] might perform biostatistics and medical writing services for [REDACTED]. It does not list any particular study or project and does not state when that agreement would terminate. The agreement states that [REDACTED] "will perform all of its obligations and discharge all of its duties under this Agreement through its own employees. [REDACTED] may not subcontract any of its obligations and may not discharge any of its duties through consultants or other third parties without [REDACTED] prior written approval in each case."

SOW #1 indicates that [REDACTED] would provide bio statistical analyses to [REDACTED] in connection with the [REDACTED]. It states that the agreement became effective upon signing and would continue in effect, unless previously terminated by one of the parties, until the work specified was completed.

SOW #2 indicates that [REDACTED] would provide bio statistical analyses to [REDACTED] in connection with the [REDACTED].

The July 30, 2014 invoice shows that [REDACTED] then billed [REDACTED] for "services performed to deliver the [REDACTED] specification and datasets and datasets [sic] in April 2012" related to the [REDACTED] study in the amount of \$54,180.¹

The portions provided of another invoice are also dated July 30, 2014. They show that [REDACTED] then billed [REDACTED] for "[REDACTED] Invoice for services performed to deliver the [REDACTED] for Phase II in April 2014."

In his August 13, 2014 letter, [REDACTED] stated that all of the beneficiary's work would be performed in its [REDACTED] office, and further stated:

[W]e have absolutely no control over these employees other than to outline the scope of work that must be done pursuant to a SOW. These IT professionals report to their own management and supervisory team in determining how to best get the required work done.

The short statement appended to the Form I-290B appeal states that [REDACTED] and not [REDACTED], is the petitioner's end-client.

III. EMPLOYER-EMPLOYEE

We will now address whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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

¹ We observe deferring billing for two years after a billable service is completed is not a typical business practice.

[Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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

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

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

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

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

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

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

The United States Supreme Court has determined that where federal law fails to clearly define the term

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

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

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

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

² 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).

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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).⁴

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.

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

³ 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))).

⁴ 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).

§ 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors

in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. 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.

In the instant case, the petitioner insists that it will exercise control over the beneficiary while he works on projects at the location of [REDACTED]. The petitioner provided a copy of a performance evaluation which shows that the petitioner produced at least a pro forma appraisal of the beneficiary's performance. However, the relevance of that performance evaluation is unclear, given that it purports to cover the period from July 1, 2013 to December 31, 2013, but was not signed by the beneficiary until June 5, 2014.

The petitioner claims that the beneficiary will work on a project that [REDACTED] is developing for [REDACTED] and that the beneficiary's work will be assigned, directed, and evaluated by a supervisor employed by the petitioner. However, the details of that arrangement and how it will be executed have not been adequately explained by the petitioner. There is insufficient evidence that the petitioner would maintain any supervisory presence at the [REDACTED] work location. In contrast, as noted above, the March 18, 2014 Work Order indicates that [REDACTED] is the reporting manager for the project upon which the beneficiary would work, and his subsequent letter identifies him as a vice president at [REDACTED] rather than an employee of the petitioner. The record contains insufficient evidence that the petitioner would provide a supervisor to work at the [REDACTED] location where the beneficiary would work. Under these circumstances, we find that, if the visa petition were approved, and the beneficiary works at the [REDACTED] location on a project for [REDACTED], his work would more likely than not be assigned, directed, and evaluated by a supervisor working for [REDACTED].

We also note that the credibility of the petition is undermined by the fact that the Master Clinical Service Agreement between [REDACTED] and [REDACTED] which appears to pertain to the beneficiary's work assignments clearly states that [REDACTED] "will perform all of its obligations and discharge all of its duties under this Agreement through its own employees" and that "[REDACTED] may not subcontract any of its obligations and may not discharge any of its duties through consultants or other third parties without [REDACTED] prior written approval in each case." In this case, the evidence points to the beneficiary performing work contracted to [REDACTED] pursuant to that Master Clinical Service Agreement, i.e., projects [REDACTED] and [REDACTED] however, there is insufficient evidence indicating such subcontracting work has been approved by [REDACTED].

We find that 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).

For the reasons explained above, the petitioner has not demonstrated that it would have an employer-employee relationship with the beneficiary if the visa petition were approved. The appeal will be dismissed and the visa petition denied for this reason.

IV. ADDITIONAL ISSUES

A. Specialty Occupation

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) defines "specialty occupation" as follows:

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.

For a position to qualify as a specialty occupation position, it must require a minimum of a bachelor's degree in a specific specialty or its equivalent. In the instant case, [REDACTED] stated, in his March 27, 2014 letter, "Petitioner requires a minimum of a bachelor's degree or its equivalent in a field related to the proffered position." This statement stops short of identifying a specific specialty or even providing a list of specialties closely related to the proffered position in which a degree would qualify one for the proffered position.

Further, the evidence submitted suggests that the proffered position is a SAS systems analyst position. The beneficiary, however, has a bachelor's degree in chemical engineering and a master's degree in environmental engineering. Those degrees do not appear to be closely related to an SAS systems analyst position. This makes yet more clear that the proffered position does not require a minimum of a bachelor's degree *in a specific specialty* or its equivalent and does not qualify as a specialty occupation position.

Further, although the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which we routinely rely for the educational requirements of particular occupations, indicates that most computer systems analysts have a bachelor's degree in a computer-related field, it indicates that some computer systems analysts have liberal arts degrees and programming or technical expertise elsewhere. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Apr. 22, 2015). Thus, the *Handbook* does not support the claim that the occupational category is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here (an entry-level position in comparison to others within the occupation), would normally have such a minimum, specialty degree requirement or its equivalent. For this additional reason, the proffered position has not been shown to require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation position; therefore, beyond the decision of the director, the visa petition must be denied for this additional reason.⁵

⁵ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

B. Beneficiary Qualifications

If the petitioner had demonstrated that the proffered position is a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent, then the petitioner would also have been obliged to demonstrate that the beneficiary is qualified to work in that position by virtue of having a minimum of a bachelor's degree *in that specific specialty* or its equivalent. See *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that, in any event, the record does not establish that the beneficiary, who has degrees in chemical engineering and environmental engineering, possesses a minimum of a bachelor's degree in a specific specialty or its equivalent in a subject area directly related to computer systems analysis.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, we need not reach the issue of the beneficiary's qualifications.

V. CONCLUSION

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

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

(b)(6)



NON-PRECEDENT DECISION

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