(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: APR 28 2015

PETITION RECEIPT #:

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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an Information Technology Consulting company established in In order to employ the beneficiary in what it designates as a Database/Software Developer 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, concluding that the evidence of record does not demonstrate that: (1) the petitioner complied with the itinerary requirement; or (2) the position proffered qualifies as a specialty occupation.

On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that the petitioner satisfied the evidentiary requirements.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 15, 2014, listing its business address as Texas. The petitioner states that it is a sixteen-employee "Information Technology Consulting" company. Regarding the beneficiary, the petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a "Database/Software Developer" at the petitioner's business address above. The petitioner checked the box on the H Classification Supplement to Form I-129 on Page 19, Part 5(a) indicating that the beneficiary will not work at an off-site location.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a database/software developer, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1132, Software Developers, Applications, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In support of the initial petition, the petitioner submitted a letter, dated April 1, 2014, describing

itself as a solution provider and system integrator, and claims that it "can assist organizations to improve their business processes and services through effective solutions." It further claims that it "set the standard in the Technology Staffing industry," and states that it provides "Human Resources and outsourcing services to customers in the United States." It further claims to provide both long-term and short-term temporary and direct placement of technology and professional, as well as managed staffing services, for companies in various industries, including information technology, healthcare, and telecommunications.

The petitioner states that it requires the services of the beneficiary in the position of database/software developer, and provided the following overview of the proffered position:

- [The beneficiary] will be involved in catering analyze [sic] users' needs, then design, test, and develop software to meet those needs[.]
- Recommend software upgrades for customers' existing programs and systems[.]
- Design each piece of the application or system and plan how the pieces will work together[.]
- Analyze the logical model of the databases and normalizing it when necessary.
- Involve in identification of the fact and dimension tables
- Extracting, transforming and loading into different databases.
- Will write **PL/SQL stored procedures and triggers** for implementing business rules and transformations
- Develop transformation logic as per the requirement, created mappings and loaded data into respective targets.
- Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance.
- Develop and direct software system testing and validation procedures, programming, and documentation.
- Confer with systems analysts, engineers, programmers, and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.
- Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.
- He will be involved in design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
- Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Consult with customers about software system design and maintenance.
- He will supervise the work of programmers, technologists and technicians and other engineering and science personnel.
- Coordinate software system installation and monitor equipment functioning to

ensure specifications are met.

- Obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code[.]
- Ensure that the software continues to function normally through software maintenance and testing[.]
- Document every aspect of the application or system as a reference for future maintenance and upgrades[.]
- Collaborate with other computer specialists to create optimum software.

These duties were also listed in an April 1, 2014 letter offering employment to the beneficiary. We note that this letter also stated that the beneficiary would be required to participate in a three-month training program, after which he would be assigned to an unspecified project.

The petitioner also submitted an undated letter from VP Operations, in support of the petition, which claimed that the petitioner develops its own in-house computer programs and software products. However, did not expand on the types of programs and products it claimed to develop, and rather stated as follows:

> Further, [the petitioner] also contracts with other companies to develop their in-house computer programs to track their end products, using [the petitioner's] expertise. [The petitioner] places its employees (Consultants) at the client's company facility to develop, and maintain the assigned projects. As an employer, [the petitioner] enjoys complete Right to Control over its employees at all times.

also provided the following overview of the petitioner's relationship with its consultants:

- Consultant sends [the petitioner] manager approved timesheets on weekly basis, and then we generate our payroll according to these timesheets;
- If a timesheet has not been received, [the petitioner] also contacts the supervisor to send approved timesheet with his/her signature;
- Employee is paid bi-weekly/monthly by the Employer ([the petitioner]). Overtime is decided by our company, and determination of hours are depended on the characteristics of the project;
- [The petitioner] enjoys the right to assign additional projects to the employees;
- [The petitioner] is responsible for paying Employment Taxes to the State and Federal authorities for its employees;
- [The petitioner] provides all the medical benefits. Further, it also pays for meal and travel expenses;
- Meetings are conducted physically and by the phone as well. Before starting an assignment [the petitioner] deals with the employer and gets complete

information regarding the project;

- [The petitioner] controls all the consultants, we have a right to train, hire, and fire;
- Work is assigned to the employee by the project manager, and all the assignments are first approved by [the petitioner], in order for the employee to start working on the project;
- Project manager supervises the employee, and inform[s] [the petitioner] about consultant's progress. Further, employees [report] about the assignments on weekly basis through log sheets, duly signed by their project managers.

Regarding the educational requirement of the proffered position, the petitioner states that it requires the incumbent to possess at least a bachelor's degree in computer science or a related field, or its equivalent. Regarding the beneficiary, the petitioner claims that he is qualified to perform the duties of the position based on his Bachelor of Technology degree in Computer Science and Engineering issued by University in India in April 2004.

In further support of the petition, the petitioner submitted a copy of its organizational chart, copies of the beneficiary's educational credentials and an evaluation of those credentials, and a copy of the beneficiary's resume.

The Director found the initial evidence insufficient to establish eligibility, and issued an RFE on May 7, 2014. The Director requested, *inter alia*, additional documentation establishing the petitioner's employer-employee relationship with the beneficiary, as well as evidence demonstrating its right to control the beneficiary's work. The Director also instructed the petitioner to submit additional documentation establishing that has specialty occupation work available for the entire requested H-1B validity period.

In a response dated July 15, 2014, the petitioner addressed the Director's requests. The petitioner claimed that the beneficiary would work on two in-house projects, and further claimed that it was in the process of completing several in-house projects which would be launched in 2015-2016. Specifically, the petitioner claimed that the beneficiary will be working on the project, an online classified site, and the project, or " which the petitioner describes as "a web-based portal for human capital management." In support of this contention, the petitioner submitted copies of charters for both of these projects, along with a letter dated June 20, 2014 from its VP of Operations, which provides further details regarding these projects.

Specifically, provided brief descriptions of each of these two projects, which are set forth below.

Brief details regarding project:

Main purpose of is to provide public with a 'One stop shop' marketplace. It will serve as a great way to find good deals on a [sic] various products at a reasonable price portal for South Asians providing classifieds for Jobs, Real Estate, Electronics, Matrimonial, Services, News, Entertainment, Coupons, and Home & Lifestyle etc. We're committed to giving you the most user friendly experience and dependable service being the starting point for local commerce. To satisfy their many local needs in the quickest, smartest way possible. To connect and helping them transact with fellow consumers and local businesses in an environment of trust and security.

Brief details regarding project:

The implementation project for will offer customer self Job posting and Resume search for individuals to post there resume and search for jobs. Create and maintain appointments of profiles via the functionality of the website. This means that a customer must first enroll in our system in order to use the functionality. Therefore, new customers (those who are not current customers and have not had previous service) will not be able to use the web functionality until they have an account set up and then they can enroll in and use the web functionality going forward.

100% of customers enrolled in are also online customers for various job portals – therefore a conservative assumption is that about 41 % customers would use the tool initially with a 15% annual growth rate over the first 5 years.

The development for this project will be done internally by IT.

The petitioner also submitted additional documentation in support of eligibility. In addition to the project charters and their accompanying documentation, and the June 20, 2014 letter from the petitioner submitted:

(1) A printout of its website;
(2) A list of its vendors and clients for 2013 and 2014, along with the employee or employees designated for each assignment;
(3) Samples of timesheets;
(4) Sample invoices for services;
(5) Copies of payments from clients for the petitioner's services;
(6) Copies of employee paystubs;
(7) Copies of email correspondence negotiating placement of the petitioner's employees at client sites; and

(8) Copies of various tax documents, including quarterly wage reports, W-2 forms for employees, and copies of its Federal income tax returns for 2012 and 2013.

The petitioner also resubmitted documentation originally submitted with the petition, as well as evidence demonstrating the beneficiary's maintenance of status.

On August 1, 2014, the Director denied the petition, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation or that the petitioner had submitted the required itinerary for the beneficiary's services.

On appeal, the petitioner claims that the denial is "incorrect and erroneous," and asserts that the Director did not understand the nature of the petitioner's in-house project and did not review the evidence submitted regarding the project. Although the petitioner contended in response to the RFE that the beneficiary would work on two in-house projects simultaneously, counsel refers only to the project on appeal and provides new documentary evidence pertaining exclusively to this project. Counsel further concludes that the proffered position is in fact a specialty occupation, contrary to the director's determination.

In support of the appeal, the petitioner submitted the following documentary evidence:

(1) An excerpt from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (*Handbook*) pertaining to Software Developers;
(2) An excerpt from the O*NET OnLine pertaining to Software Developers;
(3) Copies of job advertisements for positions the petitioner claims are parallel to the proffered position;
(4) Copy of the petitioner's own job vacancy announcements as posted on its website;
(5) Current list of employees for the petitioner, including their educational background and/or degrees;
(6) Excerpts from the "About Us" section on the websites of and
(7) Printout of the website.

The petitioner also resubmits a copy of the RFE and the documentation submitted in response to the Director's requests.

II. STANDARD OF PROOF

As a preliminary matter and in light of the petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
>
> * * *
>
> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
>
> * * *
>
> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe.* Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

As a preliminary matter, and beyond the decision of the director, we find that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R.

§ 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "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." *Id.*

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

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 USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

[1] While the *Darden* court considered only the definition of "employee" under the Employee Retirement

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[2]

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

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).

[2] To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

[3] That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section

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

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

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

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).

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 find 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."

Preliminarily, we find that the record contains inconsistent claims regarding the nature of the work the beneficiary will perform. The initial letters accompanying the petition provided a general overview of the petitioner's business, describing it as a "human resources and outsourcing services provider" as well as a "leader in the technology staffing industry" that would provide its employees to serve as consultants on client projects. The letter from VP Operations, further confirmed this employment structure, and outlined the manner in which its employees, as consultants, would be assigned to work onsite at the business locations of clients in a variety of industries.

In response to the RFE, however, the petitioner for the first time asserted that, contrary to the statements set forth in the initial evidence, the beneficiary would actually be working in-house for the petitioner on two projects; namely, the project and the project. The petitioner provided a vague overview of these two internal projects, and claimed that, in working on these projects, the beneficiary would perform the same duties previously outlined in the letter of support and the offer of employment letter. In the RFE response, the petitioner also claimed that it "entertains several service agreements with various corporations, for the assignment of its consultants/employees, on the client's projects." Pursuant to these agreements, none of which were submitted into the record, the petitioner claimed that "the beneficiary can be later on assigned by the Petitioner on the client's projects as well. . . ."[4]

Later, on appeal, the petitioner again changed the emphasis of the beneficiary's assignment, claiming that he would only work on the assignment without further mention of the ' project, or any potential reassignment to client projects as previously contended.

The record, therefore, contains contradictory evidence regarding the nature and location of the beneficiary's assignment(s). The petitioner contended in response to the RFE that the beneficiary

[4] The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

would be working on in-house projects for the petitioner, despite the general assertions by the petitioner's VP of Operations that it routinely placed its personnel on client sites as consultants. Nevertheless, a review of the evidence of record reveals insufficient documentation to support a finding that the beneficiary would be employed in either of these claimed capacities.

Although the petitioner also contends that the beneficiary will work on the ' project, we note the petitioner's claim that the project has been "on hiatus" in recent months. In light of the lack of credible evidence regarding the existence of this project, coupled with the petitioner's lack of further reference to this project and the beneficiary's role therein, we will no longer evaluate this project and the merits of the petitioner's claims surrounding this project. Instead, we will focus on the petitioner's main assertion, both in response to the RFE and on appeal, that the beneficiary will work exclusively on its in-house project, ' " at its business premises.

The petitioner has not submitted sufficient, credible evidence establishing that is a bona fide internal project as claimed. While the petitioner submitted internally generated documents describing its project, i.e., the ' ' the ' ' the ' " the Project Estimate Summary, the Pre-Estimate Checklist, and printouts from the website, these documents provide only broad, generalized overviews of They do not explain with any specificity what actual work has been and will be done on the project.

While Section 2 of the Charter, entitled "Scope," provides slightly more information about the project, the information provided is still too abstract and vague to establish what actual work has been and will be done by the petitioner. Specifically, this document provides an overview of the website as a finished product, detailing the claimed user-friendly nature of the site and the manner in which the site will be tested, delivered, and tracked. In addition, while there is also a section entitled "Skill Set," which lists various languages and technologies to be used on the project, the document provides no further descriptions of the specific tasks to be performed, and by whom, using these languages and technologies.

Moreover, the "Project Governance" section indicates that the beneficiary's role is "Technical SME – Database," and indicates that his "level of time commitment" is to "Create new SQL/Oracle Database for Test and Production." This section of the document also lists the names of various other individuals as well as their roles and time commitments in an abstract fashion, and omits specific details related to these roles in the totality of the project, or to the project's actual development.

We also note deficiencies and inconsistencies in the petitioner's claims regarding the petitioner's staffing and resources for the project. Specifically, in addition to being vague, we further note that the charter, and particularly the "Project Governance" section, is inherently inconsistent with the claims of the petitioner regarding its business operations. The petitioner claimed on the Form I-129 that it currently employs 16 persons and outsources personnel to various client sites as needed. Specifically, the petitioner's June 20, 2014 letter from submitted in

response to the RFE, claims that the petitioner "provides consulting services to various client[s] for software and application development projects," and that its employees "also work at the client's site to develop, and maintain the assigned projects." provided a list of the petitioner's current clients (20 in total), and the petitioner also submitted sample timesheets and paystubs for its employees, demonstrating that they are currently employed on client sites throughout the U.S., as evidenced by a timesheet from a client in California and copies of paychecks issued to employees at addresses in Tennessee, Indiana, and various cities in Texas.

In the "Project Governance" section of the Project Charter, however, we note that ten individuals (including the beneficiary) are listed as key personnel on this internal project of the petitioner, many of them assigned a "High" level of time commitment. We further note that three roles are yet to be designated, and two roles are (meaning unclear). The veracity of the project charter, therefore, is doubtful, as it suggests that approximately two-thirds of the petitioner's workforce would be employed in-house on this internal project, in direct contrast to the claims made throughout the petition and as verified by the documentary evidence demonstrating that most of the petitioner's employees are working onsite on client projects. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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)).

Finally, we note that counsel refers to the North American Industry Classification System (NAICS) on appeal, claiming that the petitioner's business falls under NAICS Code 541511, which corresponds to "Custom Computer Programming Services." According to the definition, the petitioner's industry is defined as follows:

> This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited Apr. 22, 2015).

As originally filed, the evidence appeared to support a finding that the petitioner was engaged in such an industry, as the record indicated that the petitioner routinely provided consultants to work on clients sites as necessary to perform custom computer programming services tailored to a particular client's needs. In response to the RFE, however, the petitioner appears to have changed the entire focus of its business operations, claiming now to be primarily engaged in the creation of an online classified website from which the petitioner will profit by selling advertising space. Specifically, on appeal, the petitioner submits a copy of a "Service Agreement" with in which agrees to pay the petitioner a fee of $150 in order to advertise it business on the petitioner's website.

There is a lack of credible evidence establishing the existence and development of this project, and the contradictory evidence suggests that this project is not related in any way to the services of the petitioner's enterprise. There is no evidence in the record to suggest that the petitioner is developing this website for an external client, or that it is developing software or other proprietary services to market to clients. Instead, it appears that the petitioner is simply creating an online classified website where it will profit from the sale of advertising space. This "project" does not correspond to the services associated with the petitioner's claimed industry classification, thereby suggesting that the claims of the petitioner in general are not wholly credible. We find, therefore, that there is insufficient probative evidence that the beneficiary will be employed to exclusively perform in-house services on this project, as claimed. Accordingly, the evidence of record does not establish the substantive nature of the work to be performed by the beneficiary.

Moreover, this lack of credible evidence, coupled with the petitioner's claim that the beneficiary "can" be assigned to client sites as needed during the duration of the requested validity period, renders it impossible for us to determine that the petitioner will have the requisite employer – employee relationship with the beneficiary. The petitioner has not established what the beneficiary will do on a daily basis should the petition be approved. There is contradictory evidence regarding the nature of the beneficiary's work, and whether his position would require true specialty-occupation caliber services on a legitimate in-house project or differ from assignment to assignment based on varying client needs. Moreover, the petitioner's contradictory claims regarding the nature of its business leave us to question the validity of the remainder of the petitioner's claims in this petition. 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. *Matter of Ho*, 19 I&N Dec. at 591. The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the petitioner qualifies as a U.S. employer that has an employer-employee relationship with the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

The key element in this matter is who will have the ability to control the work of the beneficiary for the duration of the H-1B petition. As discussed earlier, such indicia of control include when, where, and how a worker performs the job, among other factors. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388. Here, without a credible explanation and evidence of what work will be assigned to the beneficiary, the circumstances of his work, as well as other relevant factors necessary to determine whether the petitioner will have the ability to control the beneficiary's work, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. For the above reasons, beyond the decision of the director, the petition must be denied for this additional reason.

IV. 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. However, for thoroughness we will next address whether the position proffered here qualifies 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 that the Director correctly noted in this matter that USCIS cannot determine whether the position qualifies as a specialty occupation. Upon review, we affirm the director's finding that the evidence of record does not establish that the proffered position is 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.

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

B. Analysis

Here, the record of proceeding in this case is devoid of sufficient information regarding the specific job duties to be performed by the beneficiary. As discussed earlier in this decision, the evidence of record does not corroborate the petitioner's assertions that is a bona fide in-house project, and that the beneficiary will assigned exclusively to this project.

Assuming *arguendo* that is a bona fide in-house project to which the beneficiary will be assigned, we still find that the petitioner has not adequately described the duties to be performed by the beneficiary so that we may discern the substantive nature of the position. More specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of its business operations. The petitioner has not done so here.

In this matter, the record of proceeding presents the duties comprising the proffered position in terms of abstract and generalized duties. The petitioner has not specifically explained or documented the duties and role of the proffered position with respect to the project. There is no specific mention of the role of the Database/Software Developer - or the beneficiary individually - in any of the petitioner's internally generated documents describing its aside from the one statement in the Project Governance section which states that the beneficiary will "create new SQL/Oracle database for Test and Production." Some of the listed duties are so broadly and vaguely described that they could encompass duties that do not involve specialty occupation work, or work with the project at all.

For instance, the petitioner claimed that, in working on this project, the beneficiary would perform the same duties originally outlined in the letter of support and the offer of employment letter, which were submitted in support of the petitioner's original contention that the beneficiary would be outsourced to client sites to assess client needs and provide custom services based on client needs and requirements. Specifically, the list of duties, which has remained the same throughout

adjudication in this matter, includes tasks such as "consult with customers about software system design and maintenance" and "supervise the work of programmers, technologists and technicians and other engineering and scientific personnel." There is no indication anywhere in the documents surrounding the project that the beneficiary will exercise a supervisory role over any subordinate employees. Although the petitioner submitted an organizational chart onto the record, the beneficiary is not listed on this chart and therefore the chart cannot serve as corroboratory of this claim. We further note the petitioner's emphasis on the beneficiary's duty to consult with customers to assess their needs, and develop and implement technologies that meet these needs. There is no indication here that the requires any such relationship with clients, customers, or other third-party vendors.

It is noted that counsel on appeal relies on *Young China Daily v Chappell,* 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the Director erroneously focused on the size of the petitioner in reviewing the petition and reaching her decision. While we concur that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, it also notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position. In this matter, and for the reasons specifically outlined earlier in this decision, the record lacks sufficient evidence to demonstrate that the duties as described will actually be performed by the beneficiary or that the petitioner's organization actually has the need for an individual to perform such duties.

We further note that counsel provides detailed assertions in support of the contention that the proffered position is in fact a specialty occupation, relying on excerpts from the *Handbook*, the O*NET, and copies of job vacancy announcements for similar positions. While we note the submission of this evidence and have considered all submissions, we find in light of the vague descriptions of the proposed duties and the overall failure of the petitioner to establish that is a bona fide in-house project, the evidence of record fails to establish the substantive nature of the work to be performed by the beneficiary. Further pursuit of this issue, therefore, is not warranted.

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

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

V. ITINERARY

Finally, we affirm the Director's finding that the petitioner did not comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, given the indications in the record that the beneficiary would work at multiple locations at some point during the requested period of employment and as the petitioner did not provide this initial required evidence when it filed the Form I-129 in this matter, the petition must also be denied on this additional basis.

VI. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (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 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.[5] 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.

[5] As these issues mandate dismissal of the appeal, we will not discuss any of the additional deficiencies we observe in the record of proceeding.