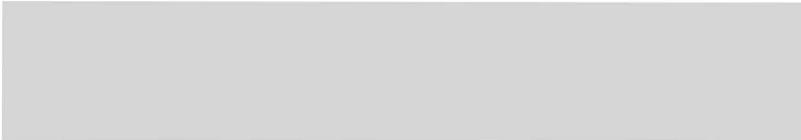




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: AUG 19 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software development, training and consulting services business, with one employee, established in [REDACTED]. In order to employ the beneficiary in what it designates as a computer programmer 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 evidence of record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

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

Further, we will also address additional, independent ground, not identified by the director's decision, that also precludes approval of this petition.¹ For this additional reason, the petition may not be approved, with each considered as an independent and alternative basis for denial.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

As a preliminary matter, in addition to the grounds of denial identified by the Director, we find that the petitioner has not established that it meets the regulatory definition of a United States employer.

A. Legal Framework

For an H-1B petition to be granted, the petitioner must establish that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner must establish 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.*

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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

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

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

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

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

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

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

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

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

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

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. § 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

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).

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).

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).

B. Analysis

In the Form I-129 and its supporting documents, the petitioner indicates that the beneficiary will be working for a client, [REDACTED] located at [REDACTED] IL [REDACTED]. The petitioner asserts that the beneficiary will be placed on an "end to end implementation and maintenance project" with [REDACTED].

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." We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and find that the petitioner did not establish the requisite employer-employee relationship with the

beneficiary. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The record contains an employment offer letter dated March 27, 2014, signed by the petitioner and the beneficiary. The letter states that the beneficiary will be working as a "Computer Programmer" and "will render all reasonable duties including analysis, programming, design and development of software. These services will be provided at locations designed by [the petitioner], and will include the offices of clients." The letter also states that the beneficiary "will provide [sic] all reports that are deemed necessary on [a] weekly basis, including time sheets, periodic summaries of your work related activities and accomplishments."

The record contains an employment agreement dated March 27, 2014.⁵ The agreement states "on a weekly basis approved by her Manager[,] [the beneficiary] shall deliver the approved timesheets to [the petitioner's] Vice President, within two days after the approval of the hours worked by her Manager." The employment agreement also states that "[the beneficiary] reports to the Technical Architect of the project or any other Manager directed by [the petitioner]." However, it is unclear whether the "Manager" and "Technical Architect" referred to in the employment agreement are purported to be employees of the petitioner or the client. Notably, on the Form I-129, the petitioner indicated that it has only one employee. Further, while the beneficiary is required to submit a time sheet and a summary of work performed to the petitioner on a weekly basis, it appears that it is the "Manager" that monitors this work and approves the hours worked. It is therefore unclear who the beneficiary will be reporting to during the course of his employment. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

On appeal, the petitioner asserts that it will remain "the beneficiary's sole employer, and thus will maintain the Right to Control the beneficiary's work." For example, in a document entitled "Exhibit – B, Qualifying Employer-Employee Relationship," the petitioner states:

[T]he Petitioner maintains the ultimate supervision and control of its employees. This is accomplished through periodical performance reviews and constant communication between employees and our internal managers and supervisors. The Beneficiary is required to meet progress points on a regular basis and report to [the petitioner's Vice President] at least every week.

We note again that on the Form I-129, the petitioner states that it has only one employee. It is

⁵ The employment agreement also states that the beneficiary will be paid \$60,000 per year. The prevailing wage for the proposed occupation is \$64,085 and the petitioner stated on the Form I-129 and in the Labor Condition Application (LCA), that it would pay the beneficiary \$65,000 per year.

therefore unclear who the "internal managers and supervisors" are purported to be. Furthermore, the petitioner's Vice President appears to be located in [REDACTED]. As the beneficiary will be working in Illinois, it is unclear how involved the Vice President will be in the daily supervision of the beneficiary. The petitioner has not provided information on how the beneficiary will be assigned tasks, or who will determine the "progress points" mentioned above.

The record also contains a document titled "Quarterly Performance Review." However, this appears to be a general template and guidance about performance assessment and lacks sufficient information regarding how work and performance standards are established, the methods for assessing and evaluating the employee's performance, the criteria for determining bonuses and salary adjustments, et cetera. We also note that this document is not signed and it is not evident that it was actually issued.

In response to the RFE, the petitioner submitted additional documentation, including: an office rental agreement, [REDACTED] Certificate of Incorporation, evidence of issuance of a Federal Employment Identification Number, and a blank [REDACTED] Employer's Quarterly Contribution and Wage Report. We acknowledge that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. 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.

We further note that there are inconsistencies in the record that undermine the petitioner's credibility regarding its business operations and the beneficiary's employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For example, on the Form I-129 and the LCA, the petitioner indicated that it is located in [REDACTED]. However, in the employee handbook, the petitioner describes itself as "an Information Technology (IT) Services and solutions provider headquartered in [REDACTED] VA" (emphasis added). Likewise, in the employment agreement, the petitioner states that "[t]he work will be performed by [the beneficiary] at [the petitioner's] Corporate office located at [REDACTED] VA [REDACTED] or shall be performed at any other Project execution location specified by [the petitioner]." The record does not contain evidence that the petitioner has another location in [REDACTED] VA. Further, we note that the LCA is certified only for the work location at [REDACTED] IL [REDACTED].

Moreover, the employment agreement states that "[t]his Agreement shall be governed by the laws of

the State of Florida"; however, neither the end-client nor the petitioner is located in Florida.

In addition, in a document entitled "Exhibit –A," the petitioner describes Exhibit A.5 as "[d]escription of the Project and Statement of work at [REDACTED] and states that "[the beneficiary] has a key role in all phases of the project including requirements gathering, low level design, high level design, developing, testing, implementation and production support." However, the record does not contain any documents regarding the [REDACTED] project.

The petitioner also submitted an organizational chart. The organizational chart does not mention the beneficiary by name or title, and it is unclear where the beneficiary is represented, if at all, on this document. As noted above, the petitioner claims to have one employee. However, information contained in the organizational chart is inconsistent with this claim. The organizational chart shows three different divisions consisting of sales, recruiting, and human resource, and each division has multiple positions. The petitioner also provided information about each division and the positions within the division and their associated duties. However, the petitioner did not provide documentary evidence to substantiate its claims regarding its business operations such as tax or pay records.

The petitioner also submitted a Professional Services Partnership Agreement with [REDACTED] dated March 10, 2014. This agreement states:

COMPENSATION: [The petitioner] agrees to accept, as full and complete compensation for the performance of the Services and the creation of the Work Product, the compensation set forth on the Schedule A. [REDACTED] obligation to pay [the petitioner] is expressly conditioned upon [REDACTED] receiving payment from Client for Services rendered to. For or on behalf of Client. Upon receipt of payment from Client, [REDACTED] will make payment to [the petitioner] [within] forty-five (45) business days. It is agreed that [the petitioner] relies solely and exclusively on the credit of Client, not [REDACTED] for payment for its Services. Notwithstanding any contrary payment terms listed on [the petitioner's] Invoice or otherwise provided for in this Agreement, [the petitioner] agrees that in the event of Client's delay, failure, refusal or inability to pay [REDACTED] for the Service provided by [the petitioner], [REDACTED] shall have no obligation to pay for any invoice covering such services.

This section of the agreement indicates that the relationship between the petitioner and [REDACTED] is one where [REDACTED] performs as a middle vender and that the beneficiary may be assigned to work for third-party clients, rather than for [REDACTED] itself, as claimed in the instant petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The petitioner provided inconsistent information regarding the nature and scope of the beneficiary's employment. Therefore, the key element in this matter, which is who exercises

control over the beneficiary, has not been substantiated and we cannot make an affirmative determination given the current inconsistencies in the record.

Upon review, there is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).⁶ Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has not established that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

The evidence in the record, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. The H-1B classification is not intended to be utilized to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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)). The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

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).

III. SPECIALTY OCCUPATION

Furthermore, we find that the record does not establish that the beneficiary would be employed in a specialty occupation, as defined by applicable statutes and regulations, for the duration of the requested H-1B validity period.

A. Legal Framework

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. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements of 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) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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.

B. The Proffered Position

As noted above, the petitioner describes itself as a software development, training, and consulting services business, established in [REDACTED] with one employee. In the letter submitted in support of the instant petition, the petitioner states:

[The petitioner] is engaged in the business of Software training development & Computer consultancy services to meet the needs of our clients, including but not limited to consulting with respect to computer and information requirements, creating original software programs, developing software applications, training of personnel, implementing hardware, network and communication arrangements and updating existing programs and systems.

With respect to the proffered position, the petitioner states that the beneficiary will be employed as a computer programmer, a position requiring "a bachelor's degree in a specific field, such as Computer Science, Engineering, a directly related field, or the equivalent." The petitioner provides the following description of the major duties of the position of computer programmer:

- Involve in Design and Development of technical specifications using Hadoop technology.
- Involve in moving all log files generated from various sources to HDFS for future processing.
- Write the Apache PIG scripts to process the HDFS data.
- Create Hive tables to store the processed results in a tabular format.
- Monitor Hadoop scripts which take the input from HDFS and load the data into Hive.
- Create external tables in Hive.

As noted above, the petitioner asserts that the beneficiary will be placed at an end-client, [REDACTED] located at [REDACTED] IL [REDACTED]. The petitioner asserts that the beneficiary will be placed on an "end to end implementation and maintenance project" with [REDACTED]. The project description provided by the petitioner states:

The Enterprise and Architecture process supports the mission through the processes and applications under their responsibility. These processes include Capacity Planning, Convergence, Monitoring, Standards and Governance, storage and maintenance.

Monitoring tools have been deployed or will be deployed for the network, servers, database, middleware and applications. The monitoring tools will report alerts to an integrated console/dashboard. The dashboard will be able to correlate events that are related to a given environment or application. The integrated console will help operational support teams to isolate problems faster driving towards a quicker mean time to resolution.

The standards and governance procedures deal with overseeing of a variety of processes and applications.

Processes are used to support the software development life cycle, as well as the services provided by specific areas within the organization. These processes help in all phases of your software development project and also help the organization's ability to accurately plan operations, reduce redundancies, and increase knowledge sharing.

Middle architecture and infrastructure middleware is a group with an understanding of Java framework for supporting web and middleware sites of [REDACTED] and its clients. This group is responsible to interact with development, configuration, support and levels of management to address architecture, administrative or development gaps. Group of servers in different environments are dealt with security settings, performance analysis, log analysis, and configuration of multiple types of data sources. Installation, configuration and maintenance of complex web infrastructures and middleware, tuning and troubleshoot applications with the standard Websphere environment is involved. Middleware tools as necessary need to be used for troubleshooting, integration and operational readiness.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The petitioner indicates that the proffered position corresponds to the occupational category "Computer Programmers"-SOC (ONET/OES Code) 15-1131, at a Level II (qualified) wage.

The Director reviewed the submitted position information and issued an RFE, requesting additional information from the petitioner concerning the proposed assignment. In response to the Director's RFE, the petitioner further elaborated on the proffered position, submitting a letter from [REDACTED] which describes the beneficiary's proposed position as follows:

- The incumbent of this position is responsible for assisting in program/software support, software modifications, and systems analysis and design.
- The incumbent will have Bachelor's (undergraduate) degree in telecoms engineering, computer science, or [a] similar field of study[.]
- The incumbent may have partial or complete responsibility for a project and may have contact with users in ascertaining needs and assessments of operations.
- The incumbent should possess good knowledge of current methods and techniques of computer programming; good knowledge of use and capabilities of business application of computer systems and peripheral equipment.
- Good knowledge of business methods and systems; skill in programming and in applying knowledge of programming languages; Ability to assist in the evaluation, planning and application of data processing procedures and methods to meet the needs of the utility[.]
- Ability to effectively use computer applications; initiative; accuracy; and resourcefulness[.]
- Ability to assist in the monitoring of the performance of programs after implementation.
- Document requirements, organizational change impact, user guides, and standard operating procedures (SOP) for Human Resources (HR) Applications.
- Participate in all phases of implementation, with key responsibilities in development production support and upgrade analysis[.]
- Troubleshoots production deficiencies and problems as they relate to HRMS business processes[.]
- PeopleSoft Enterprise Resource Planning software (ERP) consisting of Finance, Supply Chain, Enterprise Asset Management (EAM), and Human Capital Management (HCM).
- Experience with PeopleSoft 8.9 or newer is preferred and familiarity with Kronos Timekeeping Systems is desirable.
(Also PeopleTools, PeopleCode, Integration tools, SQR report tools, TOAD, Oracle 10g and 11g).
- Emphasis of need is with PeopleSoft Finance System (FSCM), however any general experience with PeopleSoft ERP modules in version 8.9 to 9.1 may be considered.
- Proficiency in MS Office products, including Word and Excel.
- Advise client on options, risks, and any impacts on other processes or systems[.]
- Configure PeopleSoft systems to meet each client's unique business requirements.
- Complete task efficiently and in a timely manner[.]

C. Analysis

We find that the evidence of record does not demonstrate that the proffered position is a programmer analyst/computer programmer position.⁷ We make this finding primarily based upon the lack of information and evidence regarding the specific duties of the proffered position and the inconsistencies present in the position descriptions supplied by the petitioner and [REDACTED]

The initial duties provided by the petitioner are generic in nature. The petitioner's description is generalized and generic in that the petitioner does not convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. For example, the duties include "moving all log files generated from various sources to HDFS for future processing" and "[m]onitor Hadoop scripts which take the input from HDFS and load the data into Hive."

Further, the amended job description provided by [REDACTED] in response to the Director's RFE is inconsistent with the information previously provided. The amended job description contains little to no overlap in the specific tasks to be performed or knowledge to be used, as was specified in the original submission.⁹ Specifically, the initial duties consist of "using Hadoop technology," "writ[ing] the Apache PIG scripts to process the HDFS data," and "creat[ing] Hive tables"; while the amended job description provided by [REDACTED] is centered on the need for a candidate well versed in PeopleSoft and related applications, without mention of previously enumerated duties, software programs or applications. In this matter, the record contains material inconsistencies concerning the description of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile

⁷ On appeal, the petitioner refers to the proffered position as an IT Consultant.

⁸ We note that even if we were able to conclude that the proffered position would be that of a computer programmer, the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not support the assertion that the normal minimum entry requirement to become a computer programmer is the obtainment of a baccalaureate degree in a specific specialty, or its equivalent. Specifically, the *Handbook* states that some employers hire workers with an associate's degree, which does not establish that working as a computer programmer normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. Therefore it would not be considered a specialty occupation, absent additional evidence from the petitioner that it met one of the criteria stated at 8 C.F.R. § 214.2(h)(4)(iii)(A). We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All of our references to the *Handbook* are to the 2014 – 2015 edition available online.

⁹ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 591-92.

Furthermore, the position description provided by [REDACTED] include "advis[ing] client on options, risks, and any impacts on other processes or systems" and "[c]onfigure the PeopleSoft system to meet each client's unique business requirements." As discussed above, the professional services agreement also states that compensation to the petitioner is wholly dependent upon a third-party client's payment to [REDACTED] for services rendered by the beneficiary. Therefore, it appears that the beneficiary may be working for a third-party end-client, rather than for [REDACTED] as claimed in the petition.

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. In this case, the petitioner provided information from [REDACTED] but did not identify or provide information concerning the proffered position from [REDACTED] client. Without such information we are unable to determine whether or not the proposed occupation would qualify as a specialty occupation.

The petitioner must establish, with specificity, the duties of proffered position, in order to demonstrate that the proffered position is in a specialty occupation. Because the record of proceeding in this case is devoid of sufficient consistent information regarding the specific job duties to be performed by the beneficiary, the petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). We note that 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.

IV. CONCLUSION AND ORDER

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 (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 our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.¹⁰

ORDER: The appeal is dismissed.

¹⁰ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.