



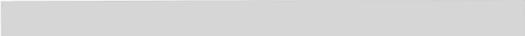
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 24 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.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an information technology services business established in [REDACTED]. In order to employ the beneficiary in what it designates as a systems administrator 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 reviewed the record of proceeding and determined that the petitioner did not establish eligibility for the benefit sought. Specifically, the Director stated that the petitioner had not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The Director denied the petition.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision; 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.¹

For the reasons that will be discussed below, we agree with the Director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

II. THE PROFFERED POSITION

In the Form I-129 petition, the petitioner states that it wishes to employ the beneficiary as a systems administrator on a full-time basis. The petitioner also states that the beneficiary will work at [REDACTED] New Jersey [REDACTED]. The petitioner did not request any other work sites.

In the support letter, the petitioner provides the duties of the proffered position. In addition, the petitioner states that the proffered position requires "a Bachelor's degree in Science, Information Technology, computer science, computer engineering, Computer Applications, electronics, engineering, physical sciences or equivalent."

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

Thereafter, in response to the RFE, the petitioner provides a revised job description, along with the approximate percentage of time the beneficiary will spend on each duty, as follows:²

- He will wherein he will maintain and administer client's [REDACTED] [REDACTED] spend *20% of his time during a week.*
- He will install, configure, and support local area network (LAN) and wide area network (WAN) wherein he will spend *20% of his time during a week.*
- He will coordinate, and implement network security measures to protect data, software, and hardware. This would include creation of user login details and installing high security measures to protect data leakage as part of disaster recovery operation wherein he will spend *20% of his time during a week.*
- He will configure, monitor, and maintain email applications and virus protection software wherein he will spend *20% of his time during a week.*
- He will monitor the performance of computer systems/networks and coordinate computer network access and use wherein he will spend *20% of his time during a week.*

(Errors in original.)

Moreover, the petitioner states that the proffered position requires a "Bachelor's degree of Science or equivalent."³

III. LACK OF STANDING TO FILE THE PETITION

We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss an issue, which the Director did not discuss, which we find precludes approval of the petition.⁴

² We observe that the wording of the duties provided by the petitioner for the proffered position with the initial petition and in response to the RFE are taken almost verbatim from the Occupational Information Network (O*NET) OnLine's list of tasks associated with a network and computer systems administrator position.

³ In response to the RFE, the petitioner also submitted a document entitled "Position Description Document of [the Petitioner] for [the Beneficiary]." Notably, the petitioner mistakenly and repeatedly references the beneficiary in the feminine pronoun case and by a different name throughout the document. The record provides no explanation for this inconsistency. Thus, we must question the accuracy of this document and whether the information provided is correctly attributed to this particular position and beneficiary.

Specifically, we find that the petitioner has not established that it meets the regulatory definition of a United States employer. See 8 C.F.R. § 214.2(h)(4)(ii). More 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.*

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

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

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

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

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

8 C.F.R. § 214.2(h)(4)(ii); see also 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time

⁴ As noted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

"employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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.⁵

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 318-319.⁶

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

⁶ 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))).

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).⁷

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).

⁷ 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).

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

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

The petitioner claims that it will have an employer-employee relationship with the beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 375-376. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

A. Inconsistencies in the Record

As a preliminary matter, we find that the petitioner has provided inconsistent information regarding the beneficiary's work assignment. For instance, in the Form I-129 (page 4) and Labor Condition Application (LCA), the petitioner states that the beneficiary will work "offsite" at [REDACTED] New Jersey. According to the Master Agreement and Statement of Work (SOW) submitted with the initial petition, [REDACTED] ([REDACTED] is located at this address. However, in response to the RFE, the petitioner states that the "beneficiary will be working from the petitioner's work location (as submitted on Form I-129 and duly certified Labor Condition Application) [REDACTED] NJ [REDACTED]". Further in the letter, the petitioner also states that "there is no end-client and the beneficiary will be working on an In-house project at our location" and "[t]he beneficiary will only be required to provide her [*sic*] services at our location."

In addition, the petitioner states on appeal "that a valid work arrangement exists between Petitioner and [REDACTED]" to develop the [REDACTED] product for [REDACTED]. The petitioner further

states that the beneficiary is assigned to this project and that it will take place in [REDACTED] New Jersey.

No explanation for these inconsistencies was provided by the petitioner. 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).

B. Employment Offer and Agreement

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). With the Form I-129 petition, the petitioner submitted an employment offer and agreement, dated March 11, 2014. Thus, the offer and agreement was prepared approximately a month prior to the submission of the Form I-129 petition; however, the petitioner did not provide the dates of the beneficiary's employment. Further, the offer and agreement does not support the petitioner's claims within the record of proceeding with regard to the beneficiary's employment.

More specifically, we observe that the document does not mention that the beneficiary will be located in [REDACTED] New Jersey. In addition, the agreement states that the petitioner "may place Employee with any of its Clients as a computer specialist to work on a temporary basis with the Client." According to the agreement, the beneficiary may be placed at various locations and assigned to various projects and, thus, not necessarily in [REDACTED], New Jersey as indicated on the Form I-129 and LCA.

Furthermore, the employment offer and agreement references "benefits" for the beneficiary, but does not provide any description of the benefits or the eligibility requirements to obtain them. Thus, a substantive determination cannot be made or inferred regarding any "benefits" that may or may not be available to the beneficiary, as information regarding them, including eligibility requirements, was not submitted.

Moreover, the employment offer and agreement states that the beneficiary will serve as a systems administrator, but it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. 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.

C. Master Agreement and SOW

In its initial submission with the Form I-129, the petitioner provided a master agreement, dated March 1, 2013 (approximately a year prior to the H-1B submission) between itself and [REDACTED]. The agreement states that [REDACTED] agrees to engage the services of the petitioner. The agreement also states that "[e]very time the Company [REDACTED] requires the Contractor [the petitioner] to render Services under this Agreement, the parties shall agree on a SOW."

The petitioner also submitted an SOW between itself and [REDACTED] executed on March 27, 2014. Although the document was issued approximately a month before the H-1B submission, it does not identify the beneficiary. The SOW states that [REDACTED] requires the resources of [the petitioner] to design, develop, and test new features planned for its [REDACTED] framework product." In addition, the SOW states the following:

- 3. Expected Start Date: October 1, 2014
- 4. Duration of Period of Performance: 18 Months
- 5. Option to extend the duration (Yes or No): Yes

It appears that the project will end in April 2016 (approximately one year and four months prior to the end date specified in the petition). The petitioner did not submit any evidence establishing that the project has been extended beyond April 2016 prior to the appeal.

D. Letter from [REDACTED]

On appeal, the petitioner provides a letter from [REDACTED] Chief Financial Officer at [REDACTED] dated January 5, 2015. In the letter, Mr. [REDACTED] states that the beneficiary "will be providing his expertise as a Systems Administrator" and that "[t]he services of [the petitioner] will be executed from our corporate offices at [REDACTED] New Jersey [REDACTED] continuing until September 1, 2017 and beyond if required." Notably, Mr. [REDACTED] does not specify that *the beneficiary's* services will be needed until September 1, 2017.

E. Instrumentalities and Tools

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the proffered position. The Director specifically noted this factor in the RFE. Moreover, the Director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In response to the Director's RFE, the petitioner states that it "will provide the [c]omputer, telephone and other tools as may be needed for the beneficiary to perform

the duties of employment." The petitioner did not provide any further information on this matter. Thus, the petitioner did not fully address or submit probative evidence on the issue.

E. Supervision

Furthermore, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. Upon review, we find that the petitioner has provided inconsistent information regarding the beneficiary's supervisor. For instance, in the support letter, the petitioner states that the "[b]eneficiary's daily work is supervised very closely by the Project Manager who is employed by [the petitioner] in a senior supervisory capacity." However, in response to the RFE, the petitioner states that the beneficiary will be "supervised very closely by the Senior Software Developer." No explanation for this inconsistency was provided by the petitioner. Again, 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. at 592.

F. Organizational Chart

The petitioner also submitted an organizational chart depicting its staffing hierarchy. Notably, neither the proffered position nor the beneficiary is included in the organizational chart. The chart shows the Business Analyst, Programmer, Technical Architect, and QA Analyst reporting to the Project Manager.

G. Performance Appraisal

In response to the RFE, the petitioner provided a copy of its Guidelines for Performance Appraisal. The document includes a general description of its performance review processing, along with tips for completing the appraisal form and conducting appraisal interviews. Although the petitioner provided a general overview of its performance review process, this document lacks information regarding the establishment of work and performance standards, the methods for assessing and evaluating the employees' performance, and the specific criteria for determining bonuses and salary adjustments.

H. Lack of Evidence

In the RFE, the Director also asked the petitioner to provide information regarding the beneficiary's role in hiring and paying assistants. The petitioner elected not to address this issue or provide any information in response to this material request for evidence. While the petitioner was given an opportunity to clarify the beneficiary's role in hiring and paying assistants, it chose not to submit any probative evidence on the issue. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

I. Conclusion

Upon complete review of the record of proceeding, we find that the evidence in this matter 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). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the Director's specific request for evidence on this issue, the petitioner does not submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Based on the tests outlined above, 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." 8 C.F.R. § 214.2(h)(4)(ii).

There is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the petition cannot be approved, and the appeal must be dismissed.

IV. SPECIALTY OCCUPATION

We will now address the Director's basis for denial of the petition, namely her finding that the petitioner did not establish that it would employ the beneficiary in a specialty occupation position.

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.

A. Legal Framework

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 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.

The petitioner asserted that the beneficiary would be employed as a systems administrator. However, 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, or its equivalent, as the minimum for entry into the occupation, as required by the Act.

Here, the petitioner has provided inconsistent information regarding the educational requirement for the proffered position. For instance, the petitioner initially claimed that the position requires a bachelor's degree in science, information technology, computer science, computer engineering, computer applications, electronics, engineering, and/or physical sciences. However, in response to the RFE, the petitioner stated that the proffered position requires a "Bachelor's degree of Science or equivalent." No explanation for this inconsistency was provided. As previously noted, 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. at 592.

Further, it must be noted that in this case the petitioner's claimed requirements are inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position; however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, for example, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required

"body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Here, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in science, information technology, computer science, computer engineering, computer applications, electronics, engineering, and/or physical sciences. The issue is that this list of acceptable credentials includes broad categories that cover numerous and various specialties.⁸ The petitioner, who bears the burden of proof in this proceeding, does not establish either (1) that these various degrees are all closely related fields, or (2) that a general degree in one of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter. Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation.

Further, 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.

As mentioned, the petitioner submitted a letter from [REDACTED] who works for the end client; [REDACTED]. In his letter, Mr. [REDACTED] provides a list of the beneficiary's duties. Specifically, Mr. [REDACTED] states that the beneficiary will be responsible for the following duties:

⁸ For example, the term "science" is defined as "1a. The observation, identification, description, experimental investigation, and theoretical explanation of natural phenomena. . . . 2. Methodological activity, disciplines, or study <culinary science> 3. An activity that appears to require study and method." Webster's II New College Dictionary 1012 (2008). *U.S. News and World Report's* guide for colleges designates science programs into various subcategories, including biological sciences, chemistry, earth sciences, math, physics, statistics, as well as social science programs such as criminology, economics, English, history, political science, psychology, and sociology. See *U.S. News and World Report*, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-science-schools> (last visited Aug. 12, 2015).

While on this project, [the beneficiary] will install and administer our client's [redacted] based Element Management System implementations. He will install, configure, and support the associated local area network (LAN) and wide area network (WAN). He will coordinate and implement network security measures to protect data, software, and hardware. This would include creation of user login details and installing high security measures to protect data leakage as part of disaster recovery operation. He will configure, monitor, and maintain email applications and virus protection software. He will monitor the performance of computer systems and networks and coordinate computer network access and use.

We observe that these duties are copied virtually verbatim from the Occupational Information Network (O*NET) OnLine for the occupational category "Network and Computer Systems Administrators – SOC code 15-1121."⁹ While the petitioner has identified its proffered position as that of a systems administrator, and attested on the LCA that the position falls within the occupational category of network and computer systems administrators, the descriptions of the beneficiary's duties as provided by the petitioner and the end-client lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation.

While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions cannot be relied upon by the petitioner when discussing the duties attached to a specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job descriptions do not communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The failure to establish the substantive nature of the work to be performed by the beneficiary 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;¹⁰ (3) the level of

⁹ For additional information, see O*NET OnLine, available at <http://www.onetonline.org/link/summary/15-1121.00> (last visited Aug. 12, 2015).

¹⁰ In response to the RFE and on appeal, the petitioner submitted several job postings from various companies for various systems administrator positions. As the petitioner and the end-client have not provided a substantive description of the actual duties to be performed in the proffered position, it is not possible to ascertain whether the job advertisements are for parallel positions. Moreover, the petitioner did

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. Therefore, the Director's decision is affirmed and the petition must be denied for this reason.

V. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law may be denied even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Furthermore, the petitioner does not establish the relevancy of the provided examples to the issue here. That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error"). Accordingly, the advertisements will not be further reviewed or discussed as the petitioner has not established the relevance of the advertisements here.

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.¹¹ 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.

¹¹ As the identified grounds of ineligibility are dispositive of the appeal, we will not address any of the additional deficiencies we have identified on appeal.