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



U.S. Citizenship
and Immigration
Services

DATE: FEB 19 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 25-employee "IT industry" business established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "Mobile Developer" position at a salary of \$75,000 per year, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; and (2) the proffered position qualifies as a specialty occupation.

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

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

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. We have also identified additional deficiencies concerning the initial filing of the Form I-129. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on January 24, 2014, listing its business address as [REDACTED]. The petitioner indicated that it seeks to employ the beneficiary as a mobile developer at the address of [REDACTED] California. No other addresses of employment were listed on the Form I-129. The petitioner checked the box on the Form I-129 at Part 5, Question 5 confirming that the beneficiary will work off-site. The petitioner listed the dates of intended employment as January 22, 2014 to January 14, 2017.

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

[REDACTED]

the beneficiary will be working at [REDACTED] No other places of employment were listed on the LCA.

In support of the petition, the petitioner submitted a letter dated January 21, 2014 describing itself as "an information technology organization" with "about 25 employees in the United States." With respect to the proffered position, the petitioner stated that "the beneficiary is going to be working as a Software Developer/Mobile Software Developer with end client [REDACTED]" The petitioner stated that as part of this assignment, the beneficiary "will join [REDACTED] and will help drive the successful adoption of cooperate and consumer mobile execution strategies across [REDACTED] program and coordinate with other departments and teams to evolve [REDACTED] alignment with company goals and objectives." The petitioner provided a list of job duties for the beneficiary, including "[b]uilding secure coding guidelines around emerging technologies that are lacking standards and security practices" and "[a]nalyzing security gaps within existing mobile OS that could hinder [REDACTED] existing consumer and cooperate mobile solutions."

With respect to the employer-employee relationship, the petitioner asserted that "the beneficiary is an employee of [the petitioner] and petitioner is responsible as employer towards the payment of wages, withholding taxes and other related items." Regarding the relationship between the petitioner and [REDACTED] the petitioner explained that it has an agreement and purchase order with [REDACTED] which in turn has a supplier agreement with [REDACTED] The petitioner further explained that [REDACTED] is a "Managed Services provider to [REDACTED] and is responsible for the management of all suppliers to [REDACTED]"

As to the minimum requirements of the proffered position, the petitioner stated: "As the skills for successfully carrying out the job duties are very sophisticated a minimum of a Bachelors [sic] degree in computer science, engineering or other related coursework with substantial experience is a reasonable requirement for this job." Then later, the petitioner added "information systems" and "business" to the list of degrees that it claims the position requires and specified that at least 5 years of experience is a minimum requirement. Specifically, the petitioner stated the following: "This position requires a Bachelors [sic] degree or its foreign equivalent in the information systems, Computer Science, engineering, business or related fields, and also 5 years of work experience."

In support of the petition, the petitioner submitted, *inter alia*, a letter dated August 6, 2013 addressed to [REDACTED] purportedly from [REDACTED] This letter, which contains numerous typographical errors and inconsistent font sizes within the letterhead as well as the body of the letter, states: "This le er is to con rm that [REDACTED] is a Managed Services Provider ac ng on behalf of [REDACTED] and is responsible for the management of all suppliers suppor ng the [REDACTED] The letter further states that [REDACTED] is a primary agency under the above men oned rela onship and has been engaged to provide services in the Informa on Technology categories [sic]." The letter is ostensibly signed by Ms. [REDACTED].

The petitioner submitted a letter dated January 16, 2014 purportedly electronically signed by [REDACTED] [REDACTED] Contact Program Manager. This letter was not written on company letterhead and it contains typographical and formatting errors and inconsistencies. This letter states that [REDACTED] . . . and [REDACTED] have entered into a Supplier Agreement where [REDACTED] are parties to a Master Services Agreement pursuant to which [REDACTED] has agreed to provide centralized management services to [REDACTED] in connection with its use of contract workers." The letter identifies the beneficiary as the "consultant," and the petitioner as her "employer." The letter provides the same description and list of job duties for the proffered position as found in the petitioner's January 21, 2014 letter. The letter further states that the beneficiary's work assignment location will be at the [REDACTED] office located at [REDACTED] [REDACTED]. Significantly, the letter lists the duration of the beneficiary's assignment as follows: "The project is expected to last through 08/29/2014 and has an opportunity for an extension subject to continuing business necessity, successful performance evaluations and continuation of the terms and conditions of Supplier Agreement between [REDACTED] and [REDACTED]."

With respect to the employer-employee relationship, the same letter states that it is the "sole responsibility" of the petitioner to file the H-1B visa and take care of all immigration-related matters, file all tax returns, pay wages, hire, fire, and provide benefits, and comply with worker's compensation and other applicable laws. The letter further states that the petitioner "will be responsible for the terms of [the beneficiary's] assignment as directed, reviewed and supervised by the [petitioner] manager, [the petitioner]," and will "also ha[ve] the ability to assign additional duties to [the beneficiary]." No additional details were provided.

The petitioner submitted a Placement Agency Purchase Order dated January 14, 2014 purportedly between [REDACTED] and the petitioner, subject to the terms and conditions of the Placement Agency Agreement between these companies. This letter is not signed by a representative of [REDACTED] and contains variations in fonts and font sizes. The letter states that the beneficiary's assignment to [REDACTED] will start on February 3, 2014 "and it is anticipated that the assignment will continue for [sic] 08/29/2014 unless terminated earlier." The petitioner also submitted a partial copy (pages 10 of 12) of the corresponding Placement Agency Agreement.

The petitioner submitted its offer of employment dated January 22, 2014 to the beneficiary as a "Mobile Developer/Software Developer." Under "Duties," the letter states: "You shall use your best abilities on a full time basis to perform, at locations decided by the company, the employment duties assigned to you from time to time."

The director issued an RFE instructing the petitioner to submit additional documentation establishing that an employer-employee relationship will exist between the petitioner and the beneficiary, and that the proffered position qualifies as a specialty occupation. In particular, the director listed contractual agreements between the petitioner and the ultimate end-client as one of the types of evidence that may be submitted. Noting that agency records show that the petitioner

has at least 32 active H-1B employees compared to the total of 25 employees claimed on the Form I-129, the director also requested evidence clarifying whether the petitioner is H-1B dependent.

In response to the RFE, the petitioner submitted, *inter alia*, a letter dated April 30, 2014. In this letter, the petitioner affirmed that it will have an employer-employee relationship with the beneficiary, in that the petitioner is paying the employee's wages and taxes, has the right to take disciplinary action against her, "monitor[s] her work hours and tasks," and "supervise[s] the beneficiary or otherwise controls his [sic] work." The petitioner stated that the "[b]eneficiary will be reporting to the manager at [the petitioner]," and referred to its newly submitted organizational chart. The petitioner further stated that the "[b]eneficiary started working at [redacted] since early 2014 and the latest work order extended till August 29, 2014 shows that this is an on going [sic] project and is expected to have an extension."

In the same letter, the petitioner asserted that "initially the LCA was inadvertently marked 'not dependent'. This inadvertent error remained unnoticed till [sic] petitioner received the RFE." Accompanying this letter was an additional letter from the petitioner, signed on April 30, 2014, in which the petitioner made the necessary attestations for H-1B dependent employers. In addition, the petitioner submitted a new, "amended" LCA acknowledging that it is an H-1B dependent employer. This "amended" LCA was certified on March 5, 2014 for the period of February 27, 2014 to February 26, 2017.

The petitioner also submitted the beneficiary's time sheets, which identify the "Buyer" as [redacted], the "Job Posting Owner" as [redacted] and his or her "Business Unit" as [redacted].¹

The petitioner submitted "Biweekly Status Reports" listing the beneficiary's name, client, name of project ([redacted]), key accomplishments, major roadblocks, and tasks for next week. The reports bear both the signatures of the beneficiary and [redacted]. No further information was provided about these status reports.

The petitioner submitted the "onboarding email" for the beneficiary's assignment at [redacted]. This email appears to have been written by [redacted] Staffing Specialist at [redacted] to [redacted] who appears to be an employee of [redacted]. It appears Mr. [redacted] then forwarded the email to [redacted] email, dated January 31, 2014, states that he will "send the service order now" for the beneficiary, and provides the following reporting instructions for her: "Start date: 02/03/14," "Time of arrival: 9:00AM," and "Point of contact: [redacted]". No further pertinent information was provided.

¹ These timesheets bear the company logo of [redacted]. The petitioner has not explained what [redacted] represents.

The petitioner submitted a document which purports to give "Details of Manager for [REDACTED] [REDACTED]" This document simply states the following, without any further explanation:

[REDACTED]

Contact details of Manager:

[REDACTED]
Information Security Specialist - [REDACTED]
[REDACTED]

Project Name:
[REDACTED]

The petitioner submitted a screenshot of the beneficiary's email inbox, which shows a forwarded email apparently from [REDACTED] to the beneficiary entitled "FW: [REDACTED] [REDACTED]". This email identifies one of [REDACTED] position titles as "Info. Security Specialist Inovant." We note that the petitioner attempted to black out some of [REDACTED] identifying information, such as his or her name and full position title, as well as other information; the petitioner has not submitted an explanation for why and of what it attempted to delete.

The petitioner submitted its organizational chart dated "Feb 2014." This chart lists twenty-seven employees, including the beneficiary and four "trainees." The chart depicts the beneficiary as being overseen by [REDACTED] who is identified elsewhere in the record as the petitioner's Vice President.

The director denied the petition, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; and (2) that the proffered position qualifies as a specialty occupation.

The petitioner subsequently filed an appeal. On appeal, the petitioner asserts that the submitted evidence is sufficient to show the petitioner's employer-employee relationship with the beneficiary, and that the proffered position qualifies as a specialty occupation.

In support of the appeal, the petitioner submits, *inter alia*, a "Complete Itinerary" for the beneficiary listing her assignment at [REDACTED] and the dates of this assignment as: "Start Date – Feb 2014" and "End Date – June 2014." No other assignment, end-client, or work location is listed on this itinerary.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

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

A. The Law

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

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

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

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

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

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

B. Analysis

In this matter, the director determined that the evidence of record does not establish that the petitioner is a "United States employer" who will have "an employer-employee relationship" with the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

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

Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

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

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

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

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

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))).

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 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.

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).

at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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

In the instant matter, the petitioner asserts that the beneficiary will work off-site for the end-client, [REDACTED] (hereinafter '[REDACTED]', located at [REDACTED])⁵ The petitioner does not identify any other end-client or work location on the Form I-129, LCAs, and supporting documentation.

Despite the director's specific request for evidence such as letters or contractual agreements between the petitioner and the end-client, the petitioner failed to submit any documentation from [REDACTED] Moreover, the petitioner has not explained why it has not submitted documentation from [REDACTED]

While the petitioner has submitted documentation purportedly from the mid-vendors [REDACTED] hereinafter "[REDACTED]" and [REDACTED] (hereinafter "[REDACTED]"), we must question the authenticity and reliability of these documents.⁶ Specifically, the letter purportedly from [REDACTED] of [REDACTED] contains numerous typographical errors and inconsistencies. The other letter purportedly from [REDACTED] signed by [REDACTED] also contains numerous typographical and formatting errors and inconsistencies, and is not written on company letterhead. The Placement Agency Purchase Order between [REDACTED] and the petitioner is not signed by a representative of [REDACTED] and contains typographical inconsistencies as well. The petitioner only submitted a partial copy of the corresponding Placement Agency Agreement between itself and [REDACTED] The petitioner did not submit the actual master services agreements, service orders, and other similar contractual agreements between [REDACTED] and between [REDACTED] nor has the petitioner explained why it has not submitted such documentation.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁵ [REDACTED] is also referred to in the record as [REDACTED]

⁶ [REDACTED] is also referred to in the record as [REDACTED]

Notably, the petitioner identifies the beneficiary's "manager" at [REDACTED]. However, the petitioner has not submitted an explanation, corroborated by objective documentary evidence, establishing for which company [REDACTED] works, and the manner in which he or she will act as the beneficiary's manager.⁷ For instance, the petitioner submitted a document which purports to give "Details of Manager for [REDACTED]" but this document does not provide meaningful details regarding [REDACTED] employment and his or her managerial role over the beneficiary. According to this document, [REDACTED] title is "Information Security Specialist - [REDACTED]". The petitioner has not explained and documented what [REDACTED] refers to, e.g., whether it is an internal team or program within [REDACTED] or whether it is an external team or group assigned to [REDACTED]. In addition, the petitioner did not provide any meaningful explanation about this document, such as its author, origin, or context in which it was created.

Significantly, the beneficiary's time sheets identify [REDACTED] "Business Unit" as [REDACTED]. Similarly, the screenshot of the beneficiary's email inbox identifies one of [REDACTED] position titles as "Info. Security Specialist Inovant."⁹ As such, it appears that [REDACTED] is an employee of another company - [REDACTED] - whose relationship to the petitioner, the mid-vendors, and the end-client in this matter has not been explained and documented. Overall, the evidence of record fails to establish who [REDACTED] is, what company he or she works for, and the manner in which he or she will act as the beneficiary's manager, among other important factors. This missing information is highly relevant to the question of who will actually control the beneficiary's day-to-day work.

While the petitioner claims that its Vice President, [REDACTED] will monitor, supervise, or otherwise control the beneficiary's work, it is not clear how Mr. [REDACTED] will exercise day-to-day control over her work. For instance, the petitioner has not sufficiently described the manner in which Mr. [REDACTED] will exercise control over the beneficiary's day-to-day work at [REDACTED] in California, especially considering that the petitioner is physically located in New Jersey. Furthermore, there is no explanation regarding the nature of the relationship between Mr. [REDACTED] and [REDACTED] with respect to the beneficiary's work at [REDACTED]. Although the petitioner submitted copies of the "Biweekly Status Reports" purportedly sent from the beneficiary to the

⁷ [REDACTED] is not listed as an employee on the petitioner's organizational chart.

⁸The petitioner stated in its January 21, 2014 letter that the beneficiary "will join [REDACTED] and will help drive the successful adoption of cooperate and consumer mobile execution strategies across [REDACTED] program and coordinate with other departments and teams to evolve [REDACTED] alignment with company goals and objectives." This statement does not sufficiently explain the nature of the [REDACTED] program or team.

⁹ We again note that the petitioner attempted to black out some of [REDACTED] information, but did not explain why it attempted to delete this information.

petitioner, we cannot find that these reports constitute reliable, probative evidence of the petitioner's purported supervision over the beneficiary's work. The petitioner has not provided a sufficient explanation of the manner in which these evaluations were conducted, prepared, transmitted, and received.¹⁰ The petitioner's conclusory statements that it monitors, supervises, or otherwise controls the beneficiary's work, without more, are not entitled to evidentiary weight.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Thus, even if the petitioner were to establish that it pays for the beneficiary's salary, taxes, and other employment benefits, these factors, alone, are insufficient to establish that the petitioner qualifies as the beneficiary's employer having an employer-employee relationship with her. Furthermore, we are not persuaded by the assertion that the petitioner's actions of paying an attorney to file for the instant visa petition, interviewing "dozens of candidates," and making attestations under penalty of perjury in connection with this visa petition, are "strong indicator[s]" of the employer-employee relationship between the petitioner and the beneficiary. We find that other critical incidents of the relationship, such as who will oversee and direct the day-to-day work of the beneficiary and who will provide the instrumentalities and tools utilized by the beneficiary at the end-client worksite, have not been sufficiently explained here.¹¹ Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in conclusory terms that the petitioner exercises complete control over the beneficiary, without competent evidence supporting the claim, is insufficient to establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it qualifies as an "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

¹⁰ In the denial notice, the director specifically mentioned the petitioner's failure to describe the process used to evaluate the beneficiary in these biweekly status reports. Nevertheless, the petitioner did not directly address this issue on appeal.

¹¹ For example, in response to the RFE the petitioner stated the following about the source of the instrumentalities and tools in this case: "the beneficiary qualifies to perform the job duties as an Analyst based upon education, and substantial work experience." Not only is this statement non-responsive to the issue of who provides the source of the beneficiary's instrumentalities and tools, but the proffered position is not an Analyst position.

Assuming *arguendo* that the petitioner established an employer-employee relationship with the beneficiary during her assignment at [REDACTED] the petitioner has nevertheless failed to establish that it will have and maintain that employer-employee relationship throughout the entire validity period requested, i.e., January 22, 2014 to January 14, 2017. In the instant matter, the evidence in the record reflects that the termination date of the beneficiary's assignment at [REDACTED] was sometime in June or August of 2014.¹² The petitioner submitted insufficient evidence establishing that the beneficiary's assignment at [REDACTED] has been or will be extended beyond June or August of 2014. While the petitioner claims that there is an "opportunity" for extension, the purchase order does not corroborate this claim, as it states that the assignment "will continue for 08/29/2014 *unless terminated earlier.*" (Emphasis added).

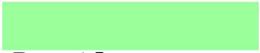
The petitioner has not identified any assignments, end-clients, and work locations for the beneficiary other than her assignment at [REDACTED]. We note that the petitioner's offer letter to the beneficiary indicates that she will be assigned to more than one location, as it states that the beneficiary "shall use [her] best abilities on a full time basis to perform, *at locations decided by the company*, the employment duties assigned to you from time to time (emphasis added)." Overall, the evidence of record does not establish what the beneficiary will be doing after her assignment at [REDACTED] terminates in mid-2014 until January 14, 2017. Consequently, the evidence of record fails to establish that the petitioner will have and maintain an employer-employee relationship with the beneficiary throughout the entire validity period requested. For these reasons, the petition must be denied.

III. SPECIALTY OCCUPATION

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

¹² There are discrepancies regarding the termination date of the beneficiary's assignment at [REDACTED]. For instance, the letter from [REDACTED] and the purchase order both state that the beneficiary's assignment will terminate on August 29, 2014. In contrast, the petitioner's itinerary states that this assignment will end in June 2014. The petitioner submitted insufficient explanation and evidence reconciling these inconsistencies.

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 591-92.



A. The Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Analysis

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

Here, the record of proceeding in this case is similarly devoid of information from [REDACTED] or any other end-client(s) regarding the specific job duties to be performed by the beneficiary for their company. As stated previously, the petitioner did not submit any documentation from [REDACTED] nor did it explain why it did not submit such documentation. We cannot rely solely upon the job descriptions found in the submitted documentation purportedly from the mid-vendors, particularly considering the numerous deficiencies and inconsistencies found therein. Taken as a whole, the record of proceeding lacks credible evidence establishing the substantive nature of the proffered position and its constituent duties.

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; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the evidence of record fails to satisfy 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.

Even if the petitioner were able to establish the substantive nature of the work to be performed by the beneficiary, the petitioner's statement that the minimum requirements for the proffered position include a bachelor's degree in "engineering, business or related fields" is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the acceptance of a degree with a generalized title, such as business or engineering, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business or engineering, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹³

For the above reasons, it cannot be found that the proffered position qualifies as a specialty occupation. The petition must be denied for this additional reason.

IV. ADDITIONAL ISSUES

We will briefly address the petitioner's deficient filing of the instant Form I-129 petition and LCA.

We first note that the petitioner indicated on the Form I-129 and the original certified LCA that it is not an H-1B dependent employer. However, in response to the director's RFE, the petitioner stated that it was a dependent employer and that it had made an "inadvertent error" on the initial submission. With the RFE response, the petitioner submitted a new LCA that was certified after the date of filing of the Form I-129.

It has been concluded by the agency that the only available evidence of a petitioner's intent is the petition itself, e.g., the Form I-129 and the evidence submitted in support of the petition. The petitioner's bare assertion that it committed an "inadvertent error" is insufficient. Furthermore, the petitioner's attempt to remedy the LCA deficiency by submitting an "amended" LCA certified after

¹³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

the filing of the petition is ineffective.¹⁴ Instead, the petitioner should have filed an amended or new petition with the appropriate fees, new LCA, and supporting documentation. See 8 C.F.R. § 214.2(h)(2)(i)(E).

We also note that the petitioner failed to establish that it has met its full obligation with regard to paying the appropriate fee mandated by the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998.¹⁵ The fee is currently \$750 for petitioners who employ a total of 25 or fewer full-time workers in the United States, and \$1,500 for petitioners who employ 26 or more full-time workers in the United States.

In the instant case, the petitioner reported on the Form I-129 petition that it employed 25 full-time workers and that it was subject to the lower ACWIA fee of \$750. However, the director noted in the RFE that the petitioner has at least 32 active H-1B employees compared to the total of 25 employees claimed on the Form I-129. The petitioner's RFE response did not address the size of its workforce. We observe that the petitioner's organizational chart lists a total of twenty-seven employees, and that the petitioner's January 21, 2014 letter dated January 21, 2014 ambiguously states that it has "about 25 employees in the United States." Thus, we must question whether the information provided on the H-1B petition accurately reflects the size of the petitioner's workforce and whether it has met its full obligation with regard to the ACWIA fee.

Nevertheless, because the director's grounds for denying the petition are dispositive for the reasons already discussed above, we need not and will not further discuss these issues.

V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also

¹⁴ It is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

¹⁵ ACWIA was enacted to, among other things, provide protections in the H-1B process against the displacement of United States workers. ACWIA requires that every petitioner pay a "training" fee for each H-1B petition that it files. The collected fees are used to provide education, training and job placement assistance to United States workers in job areas that petitioners traditionally use H-1B workers. The programs that are funded by ACWIA are part of the government's efforts to help ensure that United States workers are trained in new and emerging fields by raising the technical skill levels of these workers, and that growing businesses have access to the skilled American workforce they need in order to reduce the need to use the H-1B program.

agree with the director that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation. "Accordingly, the petition will be denied.

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

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