



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 10 2015**

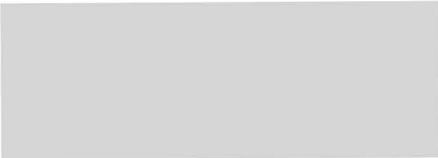
PETITION RECEIPT #: 

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

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a three-employee "Information Technology and Services" company, established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Principal Solutions Engineer" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, determining that the evidence of record did not establish: (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the Director's bases for denial of the petition were erroneous and contends that it has satisfied all evidentiary requirements.

The record of proceeding includes: (1) the Form I-129 and supporting documentation; (2) the service center's Request for Evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

Upon review of the entire record of proceeding, we find that the petitioner has not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed.

II. THE PROFFERED POSITION

On the Form I-129, the petitioner indicated that the beneficiary will work off-site and that an itinerary for the beneficiary's work was included with the petition. The petitioner submitted the required Labor Condition Application (LCA) certified for a job prospect within the occupational classification of "Computer Systems Engineers/Architects" - SOC (ONET/OES Code) 15-1199.02, at a Level II wage. The LCA identifies the beneficiary's work location as [REDACTED], California.

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

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

In its letter in support of the petition, dated March 31, 2014, the petitioner stated that it needed the full-time services of the beneficiary to work at its client's facility in [REDACTED], California as a Principal Solutions Engineer. The petitioner listed the duties of the proffered position as:

- Responsible for product architecture, design and development of Pega CRM Software
- Play the role of a Scrum Master
- Mentor and enable team
- Provide technical product articles, documentation, white papers, presentations, demonstrations, trade show participation, field sales and customer consulting, and customer briefing presentations.
- Influence development efforts/scope with technical documentation and training materials.
- Provide technical work direction and training to other staff members and deliver presentations at customer.

The petitioner also stated the educational requirements of the position as:

The position of Principal Solutions Engineer is considered a specialty occupation because it requires the theoretical and practical application of a body of specialized knowledge that can only be gained through completion of a Bachelor's degree in Computer Science, Information Technology, Engineering or a related field (or its equivalent).

The petitioner also submitted a document dated March 21, 2014, on the letterhead of [REDACTED] in which the senior vice president of that business stated that it had a Master Services Agreement with the petitioner. The senior vice president noted that [REDACTED] was located at [REDACTED] California; that its complex projects required individuals with expertise in the relevant technologies and domains; and that its projects had variable durations between 24-36 months. [REDACTED] provided the beneficiary's responsibilities and educational requirements to perform its position, stating that the beneficiary will be responsible for:

- Product architecture, design and development of CRM Analytics Software
- Ability to [REDACTED] master Role and *enabling Agile methodologies*
- *Gathering the requirements and enabling the delivery of requirements*
- Close interaction with the development team for any help needed regarding technical issues
- *Coordinate and responsibility for remote Analytics team's to deliver customer requests*
- *Analysis, design and implement the product requirements*
- Mentoring juniors and imparting knowledge of our components
- *Developing enhancements in our product which are core of our product.*

[Italics added to identify the differences in [REDACTED] duties.]

This letter also states that "[t]o accomplish these job duties an individual must have a Masters [*sic*] degree with experience in software development in CRM Analytics and related technologies are essential to support the large enterprise in customer support solutions project."

III. EMPLOYER-EMPLOYEE RELATIONSHIP

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

A. Legal Framework

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).

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

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

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

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

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

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

In the H-1B context, 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

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

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))).

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. 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.

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).

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

B. Analysis

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."

The petitioner asserts that the beneficiary will work at the offices of [REDACTED] but that it will supervise the beneficiary's work and will directly manage the beneficiary in all matters related to his employment. The petitioner, in response to the service center's RFE, submitted its "General Performance Appraisal & Review" template and its organizational chart. The petitioner's organizational chart shows that the beneficiary, in the role of Principle Solutions Engineer, will report directly to the petitioner's president. The petitioner also submitted a copy of a Master Consulting Services Agreement (MCSA) entered into with [REDACTED] on May 18, 2007.⁵

Regarding the evidence of record's indicia of the petitioner's control with regard to the beneficiary and his work, the MCSA includes, in pertinent part, the following provisions:

Whereas, [REDACTED] desires to have the services of the [petitioner] for its own assignments/work or for the assignment /work of its other clients;

- 1.1 Once [REDACTED] has selected the representative presented by the [the petitioner] for the assignment, [REDACTED] shall sign a SERVICE REQUISITION as shown giving specific details of each representative requirement which would be governed by this CONSULTING SERVICE AGREEMENT.

⁵ The petitioner does not explain how it entered into an agreement in May 2007 when it attested on the Form I-129 that it was established in [REDACTED]. 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).

- 5.3 The specific services of any representative whose services have been requisitioned by [REDACTED] can be terminated with two weeks' notice under normal circumstances by either party with notice being given in writing.

Attached to the MCSA is a Work Order signed by both [REDACTED] and the petitioner on August 12, 2014, wherein [REDACTED] informs the petitioner that it is authorized to supply the beneficiary. The work order, in the space for the "project description," indicates "As directed by [REDACTED]" The work order identifies the beneficiary by name and provides the work title as principal solutions engineer. On appeal, the petitioner asserts that the beneficiary will work on [REDACTED] in-house projects.

There are a number of factors which weigh against a favorable determination on the petitioner's claim that it satisfies the employer-employee requirement. The record shows that the beneficiary will be assigned to work at [REDACTED] location in [REDACTED], California and not at the petitioner's location. Although the petitioner states that it will supervise the beneficiary's work, there is insufficient evidence in the record showing that the petitioner will maintain any supervisory presence at the [REDACTED] work location. Additionally, the MCSA appears to allow [REDACTED] to assign the beneficiary to work on any of its projects.⁶ The MCSA and work order, even when reviewed together, do not specify a particular project to which the beneficiary will be assigned. Rather, the work order states generally that the project will be "[a]s directed by [REDACTED]" Moreover, the MCSA specifically states that the services [REDACTED] desires are for its own assignment/work or for the assignment/work for its other clients. The evidence of record reflects that [REDACTED] would ultimately generate and determine the substantive scope and duration of any work the beneficiary would perform. The record does not include sufficient probative evidence that the petitioner would play any substantial role in determining the particular duties and tasks of any worker requisitioned by [REDACTED]

Further, the MCSA specifically provides that [REDACTED] may terminate the services of any representative that it has requisitioned from the petitioner with two weeks' notice. Thus, [REDACTED] also has significant control of the duration of the beneficiary's work and the right to terminate that work. We recognize that the petitioner may evaluate the beneficiary's performance; however, there is insufficient indication in the record that [REDACTED] must adhere to the outcome of the petitioner's evaluations. We have also reviewed the petitioner's employment offer and the beneficiary's acceptance of that offer. However, the employment offer, other than noting that the beneficiary will be assigned to [REDACTED] location and identifying the beneficiary's salary and benefits package, is insufficient in and of itself, to establish the requisite employer-employee relationship. Furthermore, the record does not include documentary evidence from [REDACTED] that identifies any specific management authorities and responsibilities that have been reserved for the petitioner to exercise over the beneficiary, such as designating the beneficiary's day-to-day tasks, evaluating the quality

⁶ The petitioner, in response to the service center's RFE, submitted a three-page document, on its letterhead, identifying the beneficiary's proposed duties. The record does not include any evidence that the duties, responsibilities, skills, qualifications and experience set out in this document relate to any particular project, let alone to any of [REDACTED] projects or to any of its client's projects.

and efficiency of the beneficiary's work, and providing guidance on immediate-work issues as needed. Finally, there is no evidence that any work to which the beneficiary might be assigned would require the petitioner to provide its own proprietary information or technology. The totality of the evidence reflects that the beneficiary's work would inherently require *access to and use of* [REDACTED] or its client's IT instrumentalities (such as IT systems, computer programs, and software applications).

Based upon our review, the only documents submitted into the record impacting the petitioner's right to control the beneficiary are the petitioner's MCSA, the work order, and [REDACTED] March 21, 2014 letter. These documents do not provide specific information with regard to the actual supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED] or its clients. Based upon this fact and upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, we find that the evidence of record is inconclusive on the issue of whether it is more likely than not that the petitioner and the beneficiary would have the requisite employer-employee relationship in the context of the work to be performed if this petition were approved. We reach this conclusion based upon the application of the above-discussed common law principles to the totality of the evidence of record. As it is the petitioner's burden to establish that an employer-employee relationship exists, and the petitioner has not met this burden, the appeal will be dismissed and the petition will be denied for this reason.

Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. The evidence of record, therefore, is also insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Nor do clauses in overarching agreements such as the letter from [REDACTED] carry probative weight in the absence, as here, of specific contractual documents that bring such agreements into play with regard to work for which it is shown that the beneficiary would be employed.

The petitioner's reliance on claims that it would pay the beneficiary's salary, set wages, control work locations, and manage and evaluate performance is misplaced. As we have noted, the existence of actual work for the beneficiary has not been established. The record of proceeding before us does not document the full panoply of employer-employee related terms and conditions that would control the beneficiary's day-to-day work; therefore, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to resolve the employer-employee issue under the above discussed common law touchstone of control.

For the reasons discussed above, the evidence of record does not establish the requisite employer-employee relationship between the petitioner and the beneficiary. For this reason the petition must be denied.

IV. SPECIALTY OCCUPATION

The next issue in this matter is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. 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.

A. Legal Framework

To meet its burden of proof in this regard, 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

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

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 (INS) 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. Again, 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.

B. Analysis

Here, the record of proceeding does not provide sufficient probative documentary evidence from the end-client, [REDACTED] regarding the job duties of the beneficiary's work. We note that [REDACTED] description of the beneficiary's proposed duties, in its March 21, 2014 letter, differs in some aspects from the petitioner's description of duties. Although the petitioner then incorporates some of these differing duties in the job description it provided in response to the service center's RFE, the petitioner does not identify any of these duties as relating to any of [REDACTED] projects. Additionally, the duties are stated generally and in the abstract. That is, [REDACTED] does not identify any of its particular projects or products for which it requires the beneficiary's services. Ultimately, the record does not have a description of duties the beneficiary will perform while working at [REDACTED] location as those duties might relate to one or more specific projects. Instead the descriptions are overly broad and lack substantive detail of the actual tasks that will engage the beneficiary as those tasks relate to particular projects. Thus, we cannot ascertain the scope or nature of the beneficiary's duties while working on [REDACTED] projects.⁷

As the petitioner here has not provided information regarding the proposed project(s) that will engage the beneficiary, it is not possible to discern what stage the project(s) is in, what modules require work, if any, whether, the beneficiary will be primarily gathering client requirements, designing business applications, modifying and troubleshooting completed modules, supervising or mentoring other team members. The petitioner has not submitted evidence of the role this specific beneficiary will play in the project(s), and how the beneficiary will contribute in the execution of the project(s) deliverables. Thus, it is not possible to ascertain whether the beneficiary will be required to perform duties that fall within the parameters of a specialty occupation position. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for

⁷ Again, the petitioner has not submitted probative evidence that [REDACTED] has specific projects that require the duties it describes as the beneficiary's proposed duties. There is nothing in the record describing [REDACTED] projects, whether in-house or otherwise. The work order simply indicates that the project description is "[a]s directed by [REDACTED]" with no detail suggesting that a current project actually exists. 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)).

conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested.

The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. Also, 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 and its requirements to perform those duties in order to properly ascertain the minimum educational requirements necessary to perform those duties. See *Defensor v. Meissner*, 201 F.3d at 387-388. As noted earlier, 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.* In this matter, the evidence of record indicates that [REDACTED] requires an unspecified master's degree with experience in software development in CRM analytics and related technologies. The petitioner has not demonstrated how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.⁸

Here, the record of proceeding lacks sufficient probative evidence from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company and the requirements for the position. The petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

⁸ We have reviewed the position evaluation prepared by Dr. [REDACTED], Associate Professor, Department of Computer Systems Technology, [REDACTED], dated August 12, 2014. Dr. [REDACTED] states that he relied on the petitioner's initial description of duties and the later supplemental description. Although Dr. [REDACTED] noted that the beneficiary would be working "on behalf of the manufacturing industry client of [the petitioner]," Dr. [REDACTED] does not indicate that he is aware of the specific project or company that will ultimately dictate and use the beneficiary's services. Thus, we accord little probative weight to Dr. [REDACTED] opinion as it does not appear to be based on the duties and responsibilities that [REDACTED] will require the beneficiary to perform. We may, in our discretion, use advisory opinion statements submitted by the petitioner as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

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

V. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 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 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

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

ORDER: The appeal is dismissed.