



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 26 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 petition. The Administrative Appeals Office dismissed a subsequent appeal and the matter is again before us on a combined motion to reopen and motion to reconsider. The combined motion will be granted. The petition will be denied.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 15-employee "Software Consulting and Development Services" business established in [REDACTED]. In order to continue the beneficiary's employment in what it designates as a full-time "Programmer Analyst" position at a salary of \$62,500 per year, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as a U.S. employer having an employer-employee relationship with the beneficiary; and (2) the proffered position qualifies as a specialty occupation. The petitioner filed an appeal, which we dismissed as moot. The petitioner filed the instant motion, contending that the appeal was not moot.¹

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's letter denying the petition; (5) the Notice of Appeal or Motion (Form I-290B), and documentation submitted in support of the appeal; (6) our decision dismissing the appeal; and (7) the instant Form I-290B and documentation in support of the petitioner's combined motion. We have reviewed the record in its entirety before issuing our decision.²

As noted above, the petitioner's motion will be granted. For the reasons that will be discussed below, we agree with the Director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed.

II. THE PROFFERED POSITION

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a programmer analyst, and that it corresponds to Standard Occupational

¹ We dismissed the appeal as moot, as the petitioner had filed a new Form I-129 for the beneficiary ([REDACTED]) which was approved from February 24, 2014 to February 23, 2017. The petitioner filed the combined motion to reopen and reconsider, pointing out that the approval of petition receipt # [REDACTED] does not cover the time period between October 2, 2013 and February 24, 2014 which are the "[d]ates between when the Beneficiary's initial H-1B status ended and the beginning of the second approved H-1B period."

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Classification (SOC) code and title "15-1121, Computer Systems Analysts" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I position.

The petitioner listed its address on the Form I-129 as [REDACTED] New Jersey; however, the petitioner indicated that the beneficiary will work off-site at [REDACTED] Illinois. The petitioner listed the dates of intended employment as October 2, 2013 to February 23, 2014.

The petitioner submitted a letter, dated August 26, 2103, from [REDACTED] certifying that it has "contracted the services and products of [the petitioner]." This letter verifies that the beneficiary is currently working on the "[REDACTED] project at the [REDACTED] worksite [REDACTED] IL." The letter states that [REDACTED] and [REDACTED] "require the services of [the beneficiary] on a long term basis." The letter describes the beneficiary's job duties, which it characterizes as "Web Development," as follows:

*Build Framework Business object for use of the websites*Program in PHP*Program javascript objects for use of the front-end*Build queries for MySQL databases*Optimize code of web developers*Program website using PHP and MsSQL queries utilizing the framework*Build front-end artwork*Convert approved artwork to smarty templates(.html, .css&.js)*Program javascript objects for use of the front-end templates*Perform other duties as assigned.

[Verbatim.]

III. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first discuss whether the petitioner will have and maintain an employer-employee relationship with the beneficiary throughout the entire validity period requested.

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 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.³ 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

³ 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).

"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 318-319.⁴

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).⁵

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),

⁴ 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))).

⁵ 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).

even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the right to assign them, it is the actual source of the instrumentalities and tools that must be examined, and not who has the right to provide the tools required to complete an assigned project. See *id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

B. Analysis

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 indicated that the beneficiary will work off-site for the end-client, [REDACTED] located at [REDACTED] Illinois.⁶ However, the record of proceeding does not contain reliable documentation establishing in sufficient detail the circumstances of the beneficiary's assignment. Notably, the petitioner has not provided any documentation directly from the end-client, [REDACTED] nor between the end-client and the vendor, [REDACTED], despite the beneficiary's claimed assignment at [REDACTED] since July 2013.

While the petitioner submitted a letter from [REDACTED] dated August 26, 2013, stating that the beneficiary "will not be a direct employee of [REDACTED] nor [REDACTED]" and that the petitioner

⁶ We observe that the Employment Agreement between the petitioner and the beneficiary indicates that he has been living in [REDACTED] Wisconsin since at least September 2008. In contrast, the petitioner's office is located in New Jersey.

will be his "employer [which] retains full and ultimate control" over his work, this letter does not describe in any factual detail the manner in which the petitioner purportedly exercises such "full and ultimate control." Similarly, the Subcontractor Agreement between [REDACTED] and the petitioner/beneficiary characterizes the beneficiary as the petitioner's employee and states that the petitioner will be responsible for "determining the manner and means best suited to perform its services." However, this agreement does not provide any further clarification, such as what "manner and means" the petitioner utilizes to purportedly oversee the beneficiary's assignment at [REDACTED]. 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)).

The record of proceeding also does not contain reliable documentation corroborating the petitioner's assertions that it supervises and controls all aspects of the beneficiary's off-site work. More specifically, the petitioner has repeatedly stated that it exerts control over the beneficiary's employment through regular electronic and telecommunications and status reports. However, the record of proceeding is devoid of evidence of these claimed communications. Moreover, while the petitioner did submit numerous copies of Employee Performance Reviews, we question the credibility of these reports. We note that the petitioner asserted that the beneficiary completes these reports on a weekly basis, but the performance reviews were completed on a monthly basis.

In addition, although the petitioner claimed that the beneficiary submits these reports to the "project manager" or "HR Manager," as noted above, these reviews were submitted to the Vice President. Notably, the petitioner's organizational chart does not depict a "project manager" or "HR Manager" position, nor does it depict the Vice President, [REDACTED] as overseeing the beneficiary.⁷ Further, the petitioner submitted its Quarterly Contribution Reports for the State of Wisconsin, where the beneficiary resides, for the first three quarters of 2013 (ending in September 2013). These reports indicate that the petitioner did not report any wages paid in the State of Wisconsin in March, May, June, and September of 2013. The petitioner has not explained why the performance reviews indicate that the beneficiary was continuously working for the petitioner during these months, when the company's Quarterly Contribution Reports indicate otherwise.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Also, there is insufficient indication of how the beneficiary's performance was rated by the signatory, [REDACTED] the petitioner's Vice President. The evidence of record does not establish the manner in which these reviews were conducted, prepared, transmitted, and received,

⁷ We note that Mr. [REDACTED] name is spelled '[REDACTED]' elsewhere in the record.

and the source of the information contained therein. We note that these reports were first signed by the beneficiary and then signed by the petitioner, at times several days later. Without further explanation, we cannot find that these performance reports, through which the beneficiary is informing the petitioner about his off-site work, support the petitioner's claim that it exerts control over the beneficiary's employment.

Thus, even if the petitioner were to establish that it provides the beneficiary's salary 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 him. Other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Here, there is insufficient evidence establishing all the relevant factors of the beneficiary's employment. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship has and will continue to exist between the petitioner and the beneficiary. As previously mentioned, 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.

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 its letters and other submitted documentation that the petitioner exercises complete control over the beneficiary, without competent evidence supporting the claim, does not 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). For this reason, the petition must be denied.

IV. SPECIALTY OCCUPATION

Next, we will address whether the position proffered qualifies for classification as a specialty occupation.

A. Legal Framework

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

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 sufficient, credible information from or by the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary. 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.

The letter from Insight Global does not provide a sufficient, reliable description of the work the beneficiary is purportedly providing to [REDACTED]. The letter simply states that the beneficiary is working on "the [REDACTED] project," without additional explanation of this particular project. Furthermore, this letter describes the nature of the proffered position as "Web Development," and lists several duties related to web development including "[b]uild Framework Business object for use of the websites," "[o]ptimize code of web developers," and "[p]rogram website." The petitioner did not, however, expressly list any web development duties for the proffered position.⁸ As previously noted, the petitioner submitted a certified LCA for the proffered position corresponding to the occupational code and category "15-1121, Computer Systems Analysts," which does not expressly include any web development duties. See O*NET OnLine, Details Report for: 15-1121.00 Computer Systems Analysts, <http://www.onetonline.org/link/details/15-1121.00> (last visited June 17, 2015). Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

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

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

V. BENEFICIARY'S QUALIFICATIONS

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a

⁸ While the petitioner-provided job duties are generally outside the scope of consideration for establishing whether the position qualifies as a specialty occupation, we are considering the petitioner's descriptions here for the purpose of highlighting the inconsistencies in the evidence of record. See *Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000) (stating that the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination where the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company).

baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note deficiencies and discrepancies we have identified in the evidence of record.

More specifically, we note that the evaluation of the beneficiary's foreign education states that the beneficiary was "awarded a Master of Computer Applications Degree from [REDACTED] in 2003." However, the evidence of record does not contain sufficient evidence establishing that the beneficiary was actually awarded a Master of Computer Applications Degree in 2003, as claimed. The record of proceeding contains only a copy of the beneficiary's "Provisional Degree Certificate." Notably, this "Provisional Degree Certificate" was issued in 2007, and states vaguely that the beneficiary's degree certificate would be awarded at the "next" Annual Convocation or at some unspecified time "thereafter." We also note that the evaluation of the beneficiary's foreign education does not explain how the beneficiary satisfied all degree requirements, when the beneficiary's transcripts indicate that he failed his first, second, fourth, and fifth semesters of his master's program.

We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. *Id.*

VI. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also find 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 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 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

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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 motion is granted and the underlying petition remains denied.