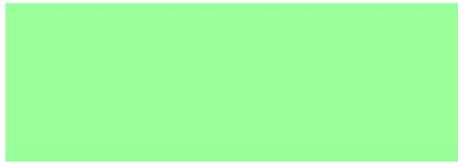
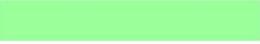




U.S. Citizenship
and Immigration
Services

(b)(6)

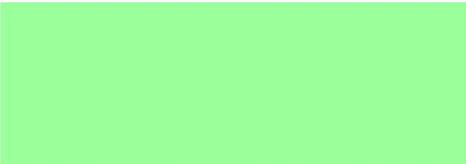


DATE: **MAR 03 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "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.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 200-employee "Textile Science" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Onsite Program Coordinator – Textiles and Apparel" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and failed to establish that it has standing to file the visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

On appeal, the petitioner asserts that the director's bases for denial were erroneous and contends that it satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

II. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an "Onsite Program Coordinator – Textiles and Apparel" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 13-1199, Business Operations Specialists, All Other, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor's degree in Textile Engineering/International Economics and Trade from [REDACTED] in China and a master's degree in Textiles from the [REDACTED] in the United States.

The petitioner also submitted a letter, dated March 21, 2014, from [REDACTED] the associate counsel of [REDACTED]. That letter states, "[The petitioner] was established in [REDACTED] and is owned by the [REDACTED]." It also further states the following:

[The beneficiary] will serve our company as Onsite Program Coordinator – Textiles and Apparel. In this capacity, he will provide textile and apparel quality assurance (QA) testing technical support and program management to retailer clients. He will be the point contact for all Retailer QA and [the petitioner]/[REDACTED] relations. [The beneficiary] will monitor and work with [REDACTED] offices worldwide to ensure that all retailer testing needs and procedures are met. He will perform testing in accordance with the retailer's specified test methods and test protocols, including turn time requirements and reporting procedures. [The beneficiary] will assist retailer managers in developing and updating protocols and procedures for new and existing products. He will keep current on all regulatory, safety, and quality performance requirements and communicate relevant information to retailers. He will assist retailers on projects and assignments, such as systems updates and products and material development procedures. [The beneficiary] will train the retailer's employees on documents and safety/technical protocols. He will coordinate and attend retailer's seasonal product line reviews and participate in product development meetings to identify potential issues and contribute technical recommendations. He will provide technical expertise to assist and resolve technical issues. He will organize, schedule, and track tests/audits/inspections. He will be responsible for the development and maintenance of database/systems manuals as they relate to [the petitioner]/[REDACTED].

As to the educational requirement of the proffered position, [REDACTED] stated that it requires a minimum of a bachelor's degree in Textile Sciences or a related degree.

On May 16, 2014, the service center issued an RFE in this matter. The evidence the service center requested was primarily concerned with whether the petitioner qualifies as the beneficiary's prospective employer. However, the RFE states: "[The visa] petition does not establish when, where or for whom the beneficiary is assigned to work pursuant to an end-client engagement for the requested validity period."

The RFE further states:

[L]acking information of work arrangement between you and your client, where the beneficiary will be performing his or her services, also prevents USCIS [from determining] determine whether the specialty occupation work is immediately available for the beneficiary.

As such, the RFE also raised the issue of whether the beneficiary would be employed in a specialty occupation position.

In response, the petitioner submitted (1) a copy of the beneficiary's employment contract; (2) a vacancy announcement of the proffered position; and (3) a letter, dated June 23, 2014, from counsel.

The beneficiary's employment contract states that he would work as Onsite Program Coordinator; that the work location would be [REDACTED] Oregon; and that he would report directly to [REDACTED] Business Development Director.

The vacancy announcement of the proffered position contains the following duty description:

- Individual would be the point contact for all Retailer QA / [REDACTED] relations. Responsible for effective communication and follow through between Retailer and [REDACTED]
- Monitor and work with [REDACTED] offices worldwide to ensure that all Retailer testing needs and procedures are met.
- Ensure laboratories are performing testing in accordance with Retailer' [sic] specified test methods and test protocols, including turn time requirements and reporting procedures.
- Continually monitor lab turn times and monitor test volume on Retailer programs.
- Assist Retailer managers in developing and updating protocols and procedures for new and existing products.
- Keep current on all regulatory, safety, and quality performance requirements and communicate relevant information to Retailer.
- Assist Retailer on projects and assignments, such as systems updates and product & material development procedures. Assist in the training of Retailer' [sic] employees on such documents. Assist Retailer on technical and safety presentations when needed.
- Coordinates and attends Retailer' [sic] seasonal product line reviews and participates in product development meetings to identify potential issues and contribute technical recommendations as requested.
- Provides technical assistance to assist and resolving technical issues [sic]
- Organize, schedule, track test/audit/inspections as required by Retailer including distribution, processing and follow-up
- Responsible for the development and maintenance of database/systems manuals as they relate to procedures and vice versa.
- Perform some physical laboratory testing as it relates to projects, correlation and/or training.

As to the educational and experiential requirements of the proffered position, that vacancy announcement states: "Bachelor's degree from a college or university with minimum 2 years' experience; or four to six years related experience and/or training; or equivalent combination of education and experience."

In her June 23, 2014 letter, counsel stated: "There is a long-standing informal agreement between [redacted] and [redacted] [the petitioner's] affiliate organization valid until November 2017." She stated that the petitioner exercises complete control over the beneficiary and "determines the steps necessary and the timeline required to complete the project as requested by the end client." She admitted, however, that:

The nature of the business in which [the petitioner] is engaged does not permit the accurate prediction of where [the beneficiary] will be located for the duration of three years because [the petitioner's] services are not typically engaged so far in advance.

She further stated: "[The petitioner] cannot predict to which projects [the beneficiary] will be assigned over the next three years."

The director denied the petition on July 11, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent and that the petitioner had not demonstrated that the petitioner would have an employer-employee relationship with the beneficiary.

On appeal, the petitioner submitted: (1) a copy of a contract, dated June 1, 2007, between the petitioner and [redacted]; (2) a letter, dated August 6, 2014, signed by [redacted] as associate counsel for [redacted]; and (3) counsel's own letter, dated August 7, 2014.

The June 1, 2007 contract between the petitioner and [redacted] is an agreement for the petitioner to provide services to [redacted]. It states, *inter alia*:

This agreement shall commence on the Effective Date stated above and continue through May 31, 2008, and shall be renewable, upon mutual agreement of the parties documented in writing, for successive one-year periods upon the same terms and conditions as set forth herein, with the fee for Services to be reviewed at least annually.

That contract also states that [redacted] principal address is [redacted]

The August 6, 2014 letter from [redacted] associate counsel states that the agreement between the petitioner and [redacted] is ongoing "on a continuing though informal basis" It also provides the following revised description of the duties of the proffered position:

1. Provide textile and apparel quality assurance testing technical support and program management to retailer clients.

2. Be point contact for all retailer quality assurance and [the petitioner], [REDACTED] relations.
3. Be responsible for effective communication and follow-ups between the retailer and [the petitioner] [REDACTED]
4. Monitor and work with [REDACTED] offices worldwide to ensure that all retailer testing needs and procedures are met.
5. Perform testing in accordance with the retailer's specified test methods and test protocols, including turn time requirements and reporting procedures.
6. Assist retailer managers in developing and updating protocols and procedures for new and existing products.
7. Keep current on all regulatory, safety, and quality performance requirements and communicate relevant information to retailers.
8. Assist retailers on projects and assignments, such as systems updates and products and material development procedures.
9. Train the retailer's employees on document and safety/technical protocols.
10. Coordinate and attend retailer's seasonal product line reviews and participate in product development meetings to identify potential issues and contribute technical recommendations.
11. Provide technical expertise to assist and resolve technical issues.
12. Organize, schedule, and track tests/audits/inspections.
13. Be responsible for the development and maintenance of database/systems manuals as they relate to [the petitioner], [REDACTED]

On appeal, the petitioner asserts that the evidence submitted demonstrates that the proffered position is a specialty occupation position and that the petitioner will have an employer-employee relationship with the beneficiary.

III. THE SPECIALTY OCCUPATION ISSUE

A. THE LAW

We will first address the specialty occupation basis of denial. 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 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the

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

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

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. ANALYSIS

As a preliminary matter, we observe that the petitioner's announcement of a vacancy in the proffered position states that the proffered position requires either a "Bachelor's degree from a college or university with minimum 2 years' experience; or four to six years related experience and/or training; or equivalent combination of education and experience."

That announcement suggests that a bachelor's degree, in order to be a sufficient educational qualification for the proffered position, need not be in any specific specialty. If, as that vacancy announcement indicates, a bachelor's degree that is not in any specific specialty would be a sufficient educational qualification for the proffered position, then the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and does not

qualify as a specialty occupation position. The assertion in the vacancy announcement that a degree that is not in any specific specialty would be a sufficient qualification for the proffered position is tantamount to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and does not qualify as a specialty occupation position.

Further, the vacancy announcement indicates that, even without such education or a degree, four to six years of experience would be a sufficient preparation for the proffered position. Four to six years of experience is not equivalent to a four-year bachelor's degree pursuant to the salient regulations. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (indicating that in the context of qualification for a specialty occupation position, provided other conditions are met, three years of experience may be shown to be equivalent to one year of college education). In the instant visa category, one year of college education is equal to no less than three years of experience. The assertion that four to six years of experience, with no college education, would be a sufficient preparation for the proffered position makes clear that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent, and does not qualify as a specialty occupation position.

Both of those admissions indicate that the proffered position does not qualify as a specialty occupation position. The appeal must be denied and the visa petition dismissed on this basis alone. Nevertheless, we will conduct a further analysis of whether the proffered position qualifies as a specialty occupation position.

With the visa petition, the petitioner provided a list of duties the beneficiary will perform at [REDACTED]. That address was later revealed to be the principal address of [REDACTED]. That evidence suggests that the petitioner contemplates the beneficiary performing the duties described at [REDACTED] address on [REDACTED] textiles.

However, the only documentary evidence that [REDACTED] agrees that the beneficiary, or some employee of the petitioner, may perform any duties for it is the June 1, 2007 contract which, by its own terms, expired on May 31, 2008 unless renewed in writing. The record contains no such written renewal. Further, as to the duties to be performed, that agreement states, "The Written Requirements shall provide the overall definition and scope of the work to be performed" and "The Written Requirements shall be attached as Schedule B to become a part of this Agreement." The agreement makes explicit that [REDACTED] determined the duties to be performed by a worker provided by the petitioner, and that those duties would be explained in Schedule B. However, the petitioner did not provide Schedule B of that agreement. As such, the evidence provided does not corroborate that the lists of duties the petitioner and [REDACTED] associate counsel provided are accurate.

The petitioner asserted, through counsel, that a "long-standing informal agreement" exists between the petitioner and [REDACTED]. [REDACTED] associate counsel asserted that such an agreement exists on a "continuing though informal basis." However, that is inconsistent with the terms of the expired written contract of June 1, 2007, which indicates that any extension of that agreement would be in writing. Without evidence to corroborate those claims, the evidence submitted is insufficient to

show that the petitioner, or [REDACTED], has an agreement to provide any type of services to [REDACTED] during any part of the period of requested employment.

Also, at a more basic level, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. The petitioner has asserted that the beneficiary will perform certain duties for clothing manufacturers, but has provided insufficient evidence to demonstrate that any clothing manufacturers have agreed to utilize the beneficiary's services.

Absent sufficient evidence that the petitioner has any work for the beneficiary to perform, the petitioner cannot demonstrate the substantive nature of the work the beneficiary would perform if the visa petition were approved. In this respect, we note that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.¹

¹ We further observe that the visa petition stipulates that the petitioner would employ the beneficiary full-time at the [REDACTED] location of [REDACTED]. The agreement with [REDACTED] however, merely states that the beneficiary would produce reports pertinent to [REDACTED] suppliers. The agreement does not indicate whether [REDACTED] would require those services often or only rarely. There is insufficient indication in that agreement that [REDACTED] anticipates using the beneficiary's services on a full-time basis. The record does not indicate, therefore,

IV. THE EMPLOYER-EMPLOYEE ISSUE

The remaining basis cited in the decision of denial is the director's determination that the petitioner has not established that, if the visa petition were approved, the petitioner would have qualify as the beneficiary's employer as that word is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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).

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

B. ANALYSIS

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted

that if the visa petition were approved, the petitioner would employ the beneficiary pursuant to the terms and conditions of that approved visa petition.

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

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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 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.

³ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁴ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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).

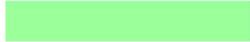
Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 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).

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 repeatedly claims that the beneficiary will be performing services for another company or for other companies. Counsel asserted in her June 23, 2014 letter, that the beneficiary would initially work on matters for [REDACTED] at [REDACTED] location, but conceded that where and for whom the beneficiary would work during the three years of requested employment cannot be determined. Counsel did not state any minimum period of time during which the beneficiary would work at the [REDACTED] location. In any event, there is insufficient evidence that employment exists for the beneficiary at the [REDACTED] location during the requested validity period and insufficient documentary evidence of any employment available for him at any other location.

Because the record contains insufficient evidence of where the beneficiary would work, whose textiles he would test, or the conditions of that employment, such as who would assign the beneficiary's tasks and supervise his performance of them, we are unable to determine that the petitioner would have an employer-employee relationship with the beneficiary, in whatever employment he might be placed. The petitioner has failed to show that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed and the visa petition denied for this additional reason.



V. CONCLUSION

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 director's decision will be affirmed and 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 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.