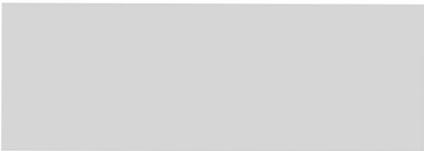


(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **MAY 05 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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2014. In the Form I-129 visa petition, the petitioner describes itself as a "QA and Testing solutions firm" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "QA Healthcare Analyst / Tester" 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 on August 4, 2014, on each of two independent grounds, namely, that the petitioner had not established (1) that it had the required employer-employee relationship with the beneficiary; and (2) that the beneficiary was qualified to perform the duties of the claimed specialty occupation position. On appeal, the petitioner asserts that the director's bases for denial were erroneous, and it contends that it satisfied all evidentiary requirements.

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

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

I. EVIDENTIARY STANDARD

As a preliminary matter, and in light of the petitioner's references to the requirement that we 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 its 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 pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. LACK OF STANDING TO FILE THE PETITION AS A UNITED STATES EMPLOYER: THE EMPLOYER-EMPLOYEE ISSUE

A. The Law

We will first address the director's conclusion that the petitioner did not establish that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

As will be reflected in the discussion of the common-law touchstone of control below, in determining whether a petitioner has established the requisite employer-employee relationship for standing to file as an H-1B specialty occupation petitioner, we evaluate the totality of the record's evidence relevant to the relationship between the petitioner and the beneficiary as it would operate within the specific factual context of the beneficiary's work situation that the petitioner identifies as

the basis of the petition. In doing so, we consider the quality and weight of the evidence and also the extensiveness of the evidence, that is, the extent to which the evidence surfaces indicia of control over the beneficiary and the beneficiary's work during his or her assignment away from the petitioner. Such evidence would include, but not be limited to, contractual terms and conditions whose implementation would be relevant to control over the beneficiary and the beneficiary's day-to-day performance. This, part of the petitioner's burden is to ensure that it provides evidence that is sufficiently comprehensive to both surface all of the factors of control operating in the particular factual context of the petition, and, as necessary, to also resolve any issues with regard to any of those factors.

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)

"United States employer" is defined 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.

As reflected in the preceding review of the documentary evidence, the record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file 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 legacy 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. at 440 (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.¹

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.

¹ 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).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in 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," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" 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). That being 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).

Cf. Darden, 503 U.S. at 318-319.²

Therefore, 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).³

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,

² 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))).

³ 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).

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, we find that the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, 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. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

For the reasons to be discussed below, we conclude that the evidence of record does not substantiate the key element in this matter, which is who would exercise actual control over the beneficiary and his work. While the record contains multiple assertions from the petitioner regarding its claimed right to control the work of the beneficiary, it is noted that simply 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)).

B. Review and Analysis

The record reflects that, at the time the petition's filing, the beneficiary was in F-1 Optional Practical Training (OPT) status, which was due to expire. Thus, the petitioner filed this petition to change the beneficiary's nonimmigrant status from F-1 to H-1B. The record reflects that the beneficiary was already performing work for [REDACTED] on assignment from the petitioner, doing F-1 OPT work which the petitioner asserts as substantially the same as the work that the beneficiary would perform upon approval of this H-1B petition.

The petitioner claims that its employment relationship with the beneficiary would exist in a scenario wherein the beneficiary would perform his services for [REDACTED] as part of [REDACTED] efforts to fulfill a contract with [REDACTED]. The petitioner claims that [REDACTED] is to upgrade [REDACTED] current version of a [REDACTED] proprietary software system known as [REDACTED]. The petitioner's submissions into the record assert the involvement of an additional company – [REDACTED] (hereinafter referred to as [REDACTED]) – which the contractual path depicted in the record interposes between the petitioner and [REDACTED] pursuant to contractual agreements [REDACTED] has with both of those parties, that is, with [REDACTED] to provide [REDACTED] with a person to perform [REDACTED] project-work, and with the petitioner to obtain the beneficiary for assignment to that [REDACTED] project-work.

In its **September 4, 2014 letter submitted on appeal**, the petitioner characterizes [REDACTED] as "a vendor of [REDACTED] that has entered into a "Human Resource Service Agreement" ("HRS Agreement") with [REDACTED]. Also, the petitioner's appeal letter quotes the clause of the HRS Agreement by which [REDACTED] and [REDACTED] agreed that [REDACTED] was contracting "as an independent contractor."

The petitioner claims that the qualifying employer-employee relationship with the beneficiary will reside in the control that it will have over the beneficiary during his assignment, through [REDACTED] to [REDACTED] to perform as a QA Healthcare Analyst/Tester for [REDACTED] during [REDACTED] project-work for [REDACTED].

In its **March 25, 2014 letter of support**, submitted with the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary would "be assigned to [REDACTED] facility in [REDACTED] Florida," at the same work-location address as provided in the Labor Condition Application (LCA) which was submitted to satisfy the regulatory requirement for a certified LCA that corresponds to the petition. Further, at section 3 of Part 5 of the Form I-129, entered [REDACTED] for the "Address where the beneficiaries will work if different from the address at Part 1 [(which is the petitioner's own address)]."

The record reflects that the petitioner premises its employer-employee relationship claim – as well as its specialty occupation claim – exclusively upon [REDACTED] upgrade project-work for [REDACTED]. Both the **petitioner's July 21, 2014 letter responding to the RFE** and also **the petitioner's September 4, 2014 letter for the appeal**, describe [REDACTED] as basically [REDACTED] prime contractor for both *upgrading [REDACTED] and also managing the associated work:*

[REDACTED] developed [REDACTED] an advanced system that support[s] the management[,] delivery, and administration of healthcare services and benefits. [REDACTED] migrated to the [REDACTED] system in 2004. [REDACTED] is performing the upgrade and managing the project for [REDACTED].

We therefore note at the outset that the petitioner's own descriptions place it in basically a human-resourcing, personnel-supply role that little to do with day-to-day direction and supervision of the beneficiary's [REDACTED] work, which would be provided and managed by [REDACTED] as the entity contractually engaged by [REDACTED] to both perform and manage the upgrading of [REDACTED] own proprietary software package, [REDACTED]. Such a relatively remote and subservient role for the petitioner appears natural enough based upon our observation that the record of proceeding provides no evidence that [REDACTED] was looking to the petitioner to provide any particular expertise, guidance, consulting, methodologies, or instrumentalities for [REDACTED] - a system that [REDACTED] itself apparently developed and markets as its own proprietary software.

So, according to the petitioner's scenario, there would be at least three contractual relationships involved in producing the [REDACTED] project-work that the petitioner claims as the basis of its employer-employee relationship with the beneficiary. These relationships would spring from contract documents executed by (1) [REDACTED] (2) [REDACTED] and (3) [REDACTED] and the petitioner.

Accordingly, for [REDACTED] each, and in that order, we shall look to the record first for contractual documents whose terms and conditions would have an impact upon how and by whom the beneficiary and his work would be controlled during his assignment to the claimed [REDACTED] work. Then we shall discuss whatever other documents that particular business entity may have provided for the record.

2. Documentary Evidence

Regarding [REDACTED]

Contractual documents

Although [REDACTED], as the purported end-user of the beneficiary's services, would be the entity generating and ultimately determining the nature and performance requirements of the project work to which the beneficiary would be assigned, the record of proceeding contains no copies of any contractual documents executed by [REDACTED].

Other documents

There are no documents from any [REDACTED] official.

Regarding [REDACTED]

Contractual documents

The record contains a copy of the aforementioned [REDACTED] **"Human Resource Services Agreement"** ("**HRS Agreement**"), which states that it "set[s] forth the terms and conditions upon which [REDACTED] may from time obtain Services" from a person provided by [REDACTED] "Vendor."

We find this document noteworthy for the extent to which it materially conflicts with documents in the record that ascribe work-related tax and benefit-payment responsibilities to the petitioner and that suggest or expressly ascribe work-management responsibilities to the petitioner. As reflected below, an implication of the [REDACTED] HRS Agreement is that the petitioner – who is not even mentioned – had been at least factored out of the beneficiary's on-assignment-work equation once the petitioner provided the beneficiary to [REDACTED] as a candidate for assignment-selection by [REDACTED]

The HRS Agreement defines such an [REDACTED]-provided person as a "Vendor Employee" (i.e., "a Contractor and/or Subcontractor assigned by Vendor to assist Vendor in providing Services). "Contractor" is defined as "a person who at Vendor's direction provides services to [REDACTED] under a Work Order or Purchase Order."

The HRS Agreement does not obligate [REDACTED] to accept any person from [REDACTED] at any time. It references a "submittal process" whereby the Vendor "must submit candidates through [REDACTED] Onboarding system." The Agreement also provides that [REDACTED] "shall have the right to interview all prospective personnel and to reject such personnel based upon specific or general skills required by [REDACTED] or at its discretion."

The HRS Agreement's "Independent Contractor" section specifies that the Vendor, [REDACTED] is contracting with [REDACTED] as an independent contractor, and that, as such, [REDACTED] "shall be solely responsible and accountable" for "any and all taxes or charges related to the compensation being paid" under the Agreement, including "income, social security, withholding tax deductions, unemployment taxes or charges, and any contributions to any employee benefit, medical, or savings plan." We also note that, pursuant to the Agreement's "Warranties" section, [REDACTED] as Vendor, warrants that the work performed under a Work Order or Purchase Order will be performed "with the highest professionalism, according to the related details and specifications, and in a good and workmanlike manner."

According to the HRS Agreement, services to be provided would be "authorized under a Work Order or a Purchase Order, each of which shall be governed by and subject to the terms and conditions of this Agreement," and any amounts payable by [REDACTED] would be limited to work performed within the "the scope of services set forth in a duly executed Work Order or Purchase Order."

Other documents

◆ As part of its RFE-reply, the petitioner submitted a **June 25, 2014 letter from [REDACTED] HR Manager**. Its express purpose is to "confirm the assignment of [the beneficiary]." The letter states that the beneficiary "is working at [REDACTED] in the position of Software Quality Analyst," that he "is currently assigned to [the] [REDACTED] projects; and that the assignment is "through our contract with [REDACTED]. It important to note that [REDACTED] here ascribes *only seven (7) "responsibilities"* to the beneficiary – an aspect which, as we shall see below, conflicts with information in the June 30, 2014 letter from the Senior Director at [REDACTED]

We find that [REDACTED] stating that the beneficiary is assigned "through" its contract with [REDACTED] provides little helpful information, in that the only [REDACTED] contract specifically referenced in the record is the HRS Agreement discussed above, and, by its express terms, that Agreement only becomes operative and applicable when a duly-executed Purchase Order or Work Order has been issued that sets the scope, specifications, and pricing of authorized work. However, the record does not contain a copy of any such Purchase Order or Work Order.

The last paragraph of the letter speaks in the future tense, stating that the beneficiary "will work remotely from his home located" in Massachusetts. Not only does the letter mis-identify the beneficiary's home address with the petitioner's office address, but more importantly, it specifically states that the petitioner will be supervised by a person whom the letter indicates to be a [REDACTED] official, namely, "[REDACTED] who is the implementation consulting manager" and for whom [REDACTED] provides a phone number and [REDACTED] e-mail address. Further, as with the letter's statements regarding the beneficiary's current assignment, no copy of a Work Order or Purchase Order has been submitted into the record to corroborate that, in fact, there exists a Work Order or Purchase Order for the intended H-1B employment period specified in the petition.

◆ The petitioner's RFE-reply also included a **June 30, 2014 letter from the Senior Director at [REDACTED]**. The letter opens with a statement that [REDACTED] "has contracted with [REDACTED] under a service agreement to be provided with programming, systems analysis, quality assurance, and engineering related services." However, the scope of those services does not accord with the one [REDACTED] contractual document in the record, that is, the HRS Agreement which we discussed directly above. The body of the HRS Agreement does not itself specify any scope of work but leaves that aspect to the whatever Work Order or Purchase Order had been issued to authorize a particular scope of work, particular specifications, and pricing for the work. As we noted, the record does not contain any such document. Therefore, the record does not substantiate that, in fact, there is a [REDACTED] agreement for the scope of services declared in this letter. Further, in light of the absence of a copy of a related Work Order or Purchase Order for the employment period specified in the petition, the petitioner has not established that [REDACTED] and [REDACTED] had contracted for [REDACTED] to provide a QA Healthcare Analyst/Tester for that period.

Next we note that the letter states that "as per the service agreement" the beneficiary is "currently [(1)] working on our [that is, [REDACTED] project and [(2)] working on [REDACTED] project upgrade [REDACTED]" leaving us to wonder whether [REDACTED] is asserting that the beneficiary is currently working on two separate projects for [REDACTED]. We also see that the [REDACTED] letter specifies *16 responsibilities for the beneficiary*, which is 11 more than the June 25, 2014 [REDACTED] letter discussed above.

Here [REDACTED] Senior Director asserts that "[t]he duration of these projects at [REDACTED] are [sic] ongoing in duration and expected to extend one year," and that the beneficiary "will work a 40 hour week." The letter also declares that the petitioner will pay the beneficiary's compensation and "will be his actual employer." The letter also asserts that the beneficiary "will be operating at all times under the control of [the petitioner's] management" and that "all activities, including managerial supervision and hiring and firing decisions, as well as performance evaluations[,] are controlled by [the petitioner]." Here this [REDACTED] official also states that [REDACTED] "will not have the right

to control [the beneficiary] and will not have the authority to assign him to different sites." We find, however, that this [redacted] official's statement about control of the beneficiary does not square with the June 30, 2014 [redacted] letter, in which [redacted] HR Manager stated that [redacted] implementation consulting manager would supervise the beneficiary. Further, the evidentiary value of the letter is negligible, as the relevance of its comments about conditions that would prevail with regard to the beneficiary's work has not been established by evidence of Performance Orders or Work Orders evidencing that such work has been secured for the beneficiary for any appreciable part of the intended employment period specified in the petition. In any event, by submitting both the [redacted] HR Manager's letter and the [redacted] Senior Manager's letter as evidence of the contractual framework which would govern the beneficiary's assignment, the petitioner endorsed the content of both letters – without resolving their apparent inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, as the [redacted] official does not provide the source of his knowledge about [redacted] contractual arrangements, we would not accord any weight to his statements on that matter, anyway.

Regarding [redacted] and the Petitioner

Contractual documents

♦ The documents submitted with the Form I-129 also included an "**Agreement for Professional Services between [Indus] and [the Petitioner]**," effective **January 20, 2013**, to which we shall refer as "the Services Agreement." The Services Agreement indicated that the petitioner, as Vendor, would "provide software-consulting services by providing its employees as contractors for hire."

We note that, in apparent conflict with the claims of the beneficiary's authorization to work "remotely" (i.e., at his home address or at the petitioner's offices), this [redacted] Petitioner Services Agreement does not contemplate the petitioner's "contractors" working remotely. Section 1 of the Agreement specifies only two locations for the performance of any services to which the Agreement applies, stating, "Vendor or its employee may provide its services at [redacted] or at Client's site."

Next, we find that the copy of the [redacted] Petitioner Services Agreement submitted into the record is incomplete. It lacks a copy of the Agreement's Exhibit A, which the Agreement's "Term" section identifies as the "Task (Purchase) Order" in which "[t]he anticipated term of this Agreement is outlined." Also, the Agreement's "Scope" section identifies the "Purchase Order" as the document in which software services to be performed will be briefly described and "which shall also state the term of the Agreement." Therefore, the absence of a copy of a Purchase Order undermines the relevance of the [redacted] Petitioner Services Agreement, because standing alone that Agreement as submitted demonstrates neither that it would be effective for the period sought in the petition or in any specific [redacted] client project. Accordingly, we find that the [redacted] Petitioner Services Agreement has limited probative value.

Other documents

We have already discussed the only letter submitted by [REDACTED] that is, **the June 30, 2014 letter from [REDACTED] Senior Director.** The letter states that [REDACTED] has contracted with [REDACTED] under a service agreement, for quality assurance and related services; confirms the existence of an Agreement between the petitioner and Indus; states that via these two agreements, the beneficiary has been assigned to work remotely from Massachusetts on [REDACTED] projects; and further states that "during implementation time, we might ask them to come for few days to [REDACTED] location in [REDACTED] FL." However, as with the [REDACTED] HRS Agreement the record does not contain a copy of any Work Order or Purchase Order authorizing [REDACTED] to provide any work for [REDACTED] and it leaves unaddressed the authorized performance period, scope or work, performance specifications, and other terms and conditions as should be specified in any such Work Order or Purchase Order.

Additional Submissions from the Petitioner

◆ As part of its reply to the RFE, the petitioner submitted a May 12, 2014 document entitled "**Description and Itinerary of [S]ervices for Employment at [the Petitioner] for [the Beneficiary]**," to which we shall refer as "the petitioner's Itinerary of Services." indicating that the beneficiary will provide services as a Quality Assurance Analyst and Tester for "the project" which the document describes as follows:

Name of Client: [REDACTED]
Location of End Client: [The address of [REDACTED] Florida]
Duration of Project: Ongoing Long-Term
Contractual Work Order Enclosed: Yes
Location Mentioned in LCA: Yes, Please see [REDACTED]
Role to be Performed: Quality Assurance Healthcare Analyst/Tester

We first note that *no* [REDACTED] "Contractual Work Order" appears anywhere within this record of proceedings. Also, whether or not [REDACTED] has a long-term project is inconsequential unless in fact the petitioner has established a specific Quality Assurance Healthcare Analyst/Tester assignment for the beneficiary and at least the minimum period secured for that assignment that "the project" generated for the beneficiary for the period of employment specified in the petition. This the petitioner has not done. In this petition's claimed contractual context, wherein both the [REDACTED] HRS Agreement and also [REDACTED] Petitioner Service Agreement become applicable only when aligned with Purchase Orders or Work Orders issued under their umbrella, the petitioner has submitted neither type of document to corroborate that, for the employment period sought in the petition, the petitioner and the beneficiary would have an ongoing relationship based upon the project work that the petitioner claims as the basis of the petition. 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. 1972)).

◆ The petitioner's RFE-reply also included four virtually-identical **declarations from persons identifying themselves as QA Analysts/Testers assigned to the [REDACTED] project, signed in June 2014 or July 2014.** All declarants but one state that the beneficiary works "remotely in the same team for [REDACTED]"⁴ that [REDACTED] "manages the whole/implementation/software/upgrade teams," and that the team members are supervised @ [REDACTED] Implementation manger named [REDACTED] " We find that these assertions all contradict the petitioner's assertions that it is directly supervising and controlling the beneficiary and his day-to-day work.

◆ As evidence of the beneficiary's current employment, the RFE-reply documents also included (1) copies of emails from the beneficiary to [REDACTED] (employees of the petitioner), dated June 28, 2014 and July 10, 2014;⁵ (2) a copy of a pay record from the petitioner that reflects that it issued a check to beneficiary for the pay period of June 1, 2014 to June 30, 2014, at an address not in the petitioner's state, Massachusetts, but in [REDACTED] Tennessee; and (3) copies of six computer-screen weekly Timesheet printouts, which reflect daily hours worked by the beneficiary on "[REDACTED]" during the period from April 7, 2014 to May 11, 2014; .

We recognize these documents as evidence that, for the related time periods, the beneficiary was reporting to and being paid by the petitioner for [REDACTED]-project work that meets the general description of the [REDACTED] project in which the petitioner claims that the beneficiary would be engaged during the period of requested H-1B employment. However, even when read in the context of all of the other evidence presented in the petition, those documents do not establish that the petitioner has secured for the beneficiary, and for the time requested in the petition, the specific type of work claimed in the petition. In this regard, we note again that the record contains no copies of Work Orders, Purchase Orders, or like documents that would indicate the scope of work and precise work-period that was authorized for the beneficiary. Further, the e-mails only reflect (1) after-the-fact reporting to the petitioner on work during the previous week and (2) tasks that have already been set for the previous week. Also, instead of seeking guidance, they merely welcome questions from the petitioner about the duties already performed or the tasks already planned. Also, as mentioned in the footnote, the e-mail reports are addressed to someone other than the person identified in the appeal as the petitioner's direct supervisor of the beneficiary.

We also note the unexplained discrepancy between the [REDACTED] Tennessee address for the beneficiary and contrary assertions in the record about the beneficiary's location.

◆ On appeal, the petitioner submits a two-page "**unsworn declaration pursuant to 28 USC § 1746" from [REDACTED] dated June 27, 2014.** Identifying himself as the petitioner's Technical Manager for Projects, [REDACTED] enumerates the ways in which he exercises supervisory control over the persons that the petitioner assigns to [REDACTED] projects, including the beneficiary. The evidentiary weight of [REDACTED] assertions about his supervisory role

⁴ The declaration of [REDACTED] does not mention the beneficiary.

⁵ Although the declaration of [REDACTED] dated June 27, 2014, claims that he will receive the beneficiary's weekly status reports since he is the beneficiary's first line supervisor, [REDACTED] is not identified as a recipient of these emails.

partly depends upon whether his submission and/or other evidence of record establishes that the beneficiary would in fact be employed as claimed by the petitioner for the period sought in the petition. We note [REDACTED] explicit claim, in the third paragraph of his statement, that "[the beneficiary] is needed to perform services for our [REDACTED] project," as we also note that [REDACTED] claim that the beneficiary will be under his direct supervision when performing those services." However, as reflected in this decision's comments upon the evidence of record, the petitioner has not established that it secured for the beneficiary the project work that it claims in the petition for the approval period sought; and this particular official of the petitioner has not remedied that failure by introducing any credible and persuasive evidence on that issue. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. (Reg. Comm. 1972)).

Also, we must note a conflict between [REDACTED] statement and other information in the record. [REDACTED] states that he works at the petitioner's location and that the beneficiary is "working from our office." However, the natural reading of this assertion conflicts with the petitioner's indications, at page four of its letter on appeal, that it is only upon approval of the H-1B petition that the beneficiary would be located at the petitioner's offices, and that while still in F-1 Post Completion Occupational Training (OPT) status, the beneficiary would be working "either remotely at his residence or at the end-client site." Thus, the record presents yet another factual discrepancy – and one which, we find, has not been resolved by objective evidence addressing it.

◆ The submissions on appeal also include an "**Employer-Employee Agreement**" between the petitioner and the beneficiary. Signed on March 37, 2014, this document specified an employment period that corresponds to the H-1B classification period requested in the petition. We note that it does not specify any particular project whether "in-house" or offsite, work location, or client but allows the petitioner to "assign employee to certain client sites or in-house projects" not specified. While the existence of this agreement is a factor weighing in the petitioner's favor, it has no significant weight as there is no credible, probative evidence showing how this Agreement would actually translate into an employer-employee relationship when the beneficiary would be assigned through [REDACTED] to perform work for [REDACTED] proprietary technology.

◆ Also submitted on appeal is a "**Consultant--Non-Disclosure Agreement**" signed in June 2014, in which the beneficiary agrees to certain non-disclosure and non-competition terms. Interestingly, the line for the beneficiary to specify his location remains empty. Read in the light of the record's inconsistent work-location evidence, this aspect of the Agreement underlines that inconsistency.

◆ Another documentary exhibit for the appeal is a copy of the petitioner's review of the beneficiary's performance for the first quarter of 2014. While this also indicates a relationship between the petitioner and the beneficiary, there is no indication in the record that the review is required reading for [REDACTED] or that it has or reflects any substantial influence or control over the beneficiary and his day-to-day supervision on any project. We find that this document and the process in which it was generated is not inconsistent with a situation where petitioner would be acting primarily as a supplier of a personnel asset to vendors and an end-user that handles human-resources, administrative aspects of the beneficiary's assignment while having

and exercising no substantial control over what the beneficiary would do in performing the services for which he was assigned, or over the means and methods by which those services would be performed – and such a relationship is not sufficient to establish an employer-employee relationship under the common-law touchstone of control.

◆ On appeal, the petitioner also provides an **Organizational Chart**, for which the petitioner does not establish any probative value.

C. Additional comments and findings

In the first place, based upon the evidentiary deficiencies and discrepancies reflected in our discussion, comments, and findings above, we find that the record of proceeding does not contain sufficient credible, probative, and persuasive evidence to establish that it is more likely than not that the claimed project-work presented as the basis of the requisite employer-employee relationship would exist as claimed, and for the employment period specified in the petition.

In this regard, we also note the absence of any corroborative evidence from the end-client, [REDACTED], even on the issue of whether it had in fact had any contractual agreement with [REDACTED] or any other party that would generate continuous work for the beneficiary for the period specified in the petition. We note not only the absence of any contractual documentation from [REDACTED] but also the absence of *any* submission from [REDACTED] to demonstrate that it has, through contractual documents such as service contracts and associated work orders, generated a requirement for services from the beneficiary that comports with the petitioner's claims as to nature, scope, and performance period. Further, absent input from [REDACTED] whatever terms, conditions, and reservations of power it may have imposed upon the purported project-work remains unknown, as does whatever management and supervisory structure [REDACTED] may have in place that would influence the course of the beneficiary's day-to-day work, if indeed he were to be assigned in accordance with the beneficiary's claims for the requested H-1B employment-period. Further, [REDACTED] could acknowledge whether it would authorize the purported project-work – variously referred to in the record as a "project" and as "projects" – for an entire, continuous period that would parallel the employment period specified in the petition, or for shorter periods to be specified by work orders issued according to whatever needs might then exist, or not at all. Consequently, we conclude that the petitioner has not established that it would have such a relationship with the beneficiary for the period requested as would be required for us to reasonably conclude that it would satisfy the common-law touchstone of control.

There are significant indicia of control about which doubt has been raised, such as for instance, which business entity would determine, supervise, and directly control the beneficiary's day-to-day work. Further, we note that the petitioner has not presented credible, probative evidence that it would control the manner and means by which the claimed project-work would be accomplished, in this contractual scenario where [REDACTED] not only is the originator, developer, and supplier of proprietary informational technology that would be the subject of the asserted project-work but is also the holder of the prime-contract with [REDACTED] that is the claimed to be the origin of all of the other contractual relationships described as operating in the context of this petition. Further, we note that there is no affirmative evidence that the petitioner would provide any instrumentalities or

tools essential to the claimed project. (Here we reject the petitioner's contention that the beneficiary's knowledge and experience should be regarded as an instrumentality.) On the other hand, we find it self-evident that (1) [REDACTED] would have to provide access to critical instrumentalities within its control, namely, [REDACTED] informational technology that is the subject of the upgrade project at the center of this petition, and (2) that, if anyone, it would be [REDACTED] that would provide proprietary information necessary for the project.

Additionally, although the petitioner asserts that the beneficiary will be assigned to work for [REDACTED] pursuant to [REDACTED] contractual arrangements with [REDACTED] we note again the absence of any contract and contract-generated documents from [REDACTED] (such as contracts, statements of work, and work orders to which either or both are a party). These omissions, coupled with the discrepancies noted above, present little reason to presume that either [REDACTED] would cede to the petitioner – an entity located in another region of the country – control over determining the specific day-to-day work that the beneficiary would actually perform and over evaluating the quality and efficiency of such work, or over providing instrumentalities and tools for the work, or over deciding the means and methodologies for such work in a specific environment where the subject of the work would be [REDACTED] own proprietary informational technology. Further, we find that, in any event, the absence of such contractual evidence from [REDACTED] leaves to speculation the extent of control that the petitioner would exert over both the beneficiary and the specific content of the day-to-day work that the beneficiary must perform to meet the ultimate client's requirements.

Then there are the discrepancies which we have noted with regard the beneficiary's work location.

Lastly, we find that the petitioner has not established that it has secured for the beneficiary the specific work that the petitioner asserts as the basis of its employer-employee relationship with the beneficiary for the period specified in the petition. Without that foundation of actual work to sustain the relationship, any weight to the petitioner's claim to an employer-employee relationship with the beneficiary vanishes.

We have noted that, as in its itinerary document, the petitioner's RFE-reply letter, states that "the duration of the project is ongoing and long-term." We also have noted that in support of the existence and longevity of the so-called [REDACTED] Advance Release 6 upgrade project" the petitioner's RFE-reply letter summarizes a June 25, 2014 letter from [REDACTED] as follows:

[The] Human Resources Manager, [REDACTED],] provides a letter dated June 25, 2014 that names the beneficiary, job title, and client, and job duties. The Client letter from [REDACTED] states that the beneficiary is assigned to the [REDACTED] project through [REDACTED]

The Client letter also states that the beneficiary will be working remotely.

However, close reading of the [REDACTED] HR Manager's letter reveals no mention of the [REDACTED] or any other [REDACTED] project as a specific project upon which the beneficiary would work *at any time during the employment period specified in the petition*. Rather, the letter's content only indicates that, as of June 25, 2014, the beneficiary, who was F-1

OPT status at the time, was working at [REDACTED] in the position of Software Quality Analyst, where he was "currently assigned to [REDACTED] Upgrade projects." We find, then, that the [REDACTED] HR Manager's letter is not evidence that, for the employment period specified in the petition, there would exist any [REDACTED] project that would generate any type of employment relationship between the petitioner and the beneficiary.

We also find it significant that the petitioner's letter incorrectly summarizes the [REDACTED] HR Manager's letter as speaking of one "project," whereas the letter actually speaks, in the plural, of "projects." We find this inconsistency significant, in that it, too, reflects that, contrary to the petitioner's interpretation, the [REDACTED] HR Manager is not directly addressing any particular project, or specifically supporting the existence or duration of the claimed [REDACTED] project upon which the petitioner bases its claims.

The first problem that the so-called [REDACTED] project presents for the employer-employee issue is that the petitioner has not presented any documentary evidence that substantiates not only the terms and conditions of any such project, but also that it would exist for the October 1, 2014 to September 19, 2017 employment period asserted in the petition, or for even any particular part of that period.

The record of proceeding lacks copies of whatever contract may exist between [REDACTED] with regard to [REDACTED] upgrading its [REDACTED] system; and we reasonably assume that any such contract would include terms and conditions regarding the contract's performance period. We recall once again the petitioner's claim, which, simply stated, requires the beneficiary to provide upgrades to the existing [REDACTED] system utilized by [REDACTED] the end-client and receiver of the beneficiary's services. [REDACTED] according to the petitioner, is a proprietary system of [REDACTED]. According to the petitioner, the beneficiary, as its employee, would be assigned on a contractor basis to provide services to [REDACTED] pursuant to the petitioner's agreement with [REDACTED] and a subvendor agreement between [REDACTED]. There is no evidence documenting material terms of any agreement or contract between [REDACTED] for upgrade services; nor is there any evidence in the record to suggest that the petitioner or any of its workers or supervisors possess such specialized knowledge on any level of the [REDACTED] system that [REDACTED] would depend upon them to operate independent of substantial [REDACTED] control on the [REDACTED]-developed and maintained informational technology that is asserted to be the subject of any-project work to which the beneficiary would be assigned.

Consequently, the lack of contractual documents to which both [REDACTED] are parties, with whatever information they would contain concerning the exact nature and duration of the project-work to be performed and the terms and conditions under which the project-work would be performed, renders it impossible for us to fully evaluate how elements of control over the beneficiary and his work would be divided among the petitioner and the other parties involved in securing the claimed assignment of the beneficiary to [REDACTED] work.

Also, [REDACTED] – the developer and presumed owner of the [REDACTED] system whose upgrading, it is claimed, would be the focus of the beneficiary's work – has provided no evidence with regard to the

particular identity and performance period of any [REDACTED] upgrade-project to which the beneficiary would be assigned.

Next, we find that the petitioner has not established that it has secured for the beneficiary the specific work that the petitioner asserts as the basis of its employer-employee relationship with the beneficiary for the period specified in the petition. Without that foundation of actual work to sustain the relationship, any weight to the petitioner's claim to an employer-employee relationship with the beneficiary vanishes.

We have noted that, as in its itinerary document, the petitioner's RFE-reply letter, states that "the duration of the project is ongoing and long-term." We also have noted that in support of the existence and longevity of the so-called [REDACTED] project" the petitioner's RFE-reply letter summarizes a June 25, 2014 letter from [REDACTED] as follows:

[The] Human Resources Manager, [REDACTED] provides a letter dated June 25, 2014 that names the beneficiary, job title, and client, and job duties. The Client letter from [REDACTED] states that the beneficiary is assigned to the [REDACTED] project through [REDACTED]. The Client letter also states that the beneficiary will be working remotely.

However, close reading of the [REDACTED] HR Manager's letter reveals no mention of the [REDACTED] project or any other [REDACTED] project as a specific project upon which the beneficiary would work *at any time during the employment period specified in the petition*. Rather, the letter's content only indicates that, as of June 25, 2014, the beneficiary, who was F-1 OPT status at the time, was working at [REDACTED] in the position of Software Quality Analyst, where he was "currently assigned to [REDACTED] projects." We find, then, that the [REDACTED] HR Manager's letter is not evidence that, for the employment period specified in the petition, there would exist any [REDACTED] project that would generate any type of employment relationship between the petitioner and the beneficiary.

We also find it significant that the petitioner's letter incorrectly summarizes the [REDACTED] HR Manager's letter as speaking of one "project," whereas the letter actually speaks, in the plural, of "projects." We find this inconsistency significant, in that it, too, reflects that, contrary to the petitioner's interpretation, the [REDACTED] HR Manager is not directly addressing any particular project, or specifically supporting the existence or duration of the claimed [REDACTED] project upon which the petitioner bases its claims.

As some of the evidence that the petitioner premises its petition, and its claim to an employer-employee relationship with the beneficiary, exclusively upon the existence and requirements of the so-called "[REDACTED] project," we point to (1) the aforementioned letter of support filed by the petitioner with the Form I-129, for its assertions about the proffered position; (2) the June 27, 2014 "unsworn declaration" by the petitioner's Technical Manager for Projects, [REDACTED] for its assertion that the beneficiary "is needed to perform services for our [REDACTED] on [REDACTED] project in the aforementioned letter of support that the petitioner filed with the petition; and (3) the content of the aforementioned RFE-reply letter from the petitioner.

The first problem that the so-called [REDACTED] project presents for the employer-employee issue is that the petitioner has not presented any documentary evidence that substantiates not only the specific terms and conditions of any such project, but also that it would exist for the October 1, 2014 to September 19, 2017 employment period asserted in the petition, or for even any particular part of that period.

The record of proceeding lacks copies of whatever contract may exist between [REDACTED] with regard to [REDACTED] upgrading its [REDACTED] system; and we reasonably assume that any such contract would include terms and conditions regarding the contract's performance period.

[REDACTED] – the developer and presumed owner of the [REDACTED] system whose upgrading, it is claimed, would be the focus of the beneficiary's work – has provided no evidence with regard to the particular identity and performance period of any [REDACTED] upgrade project to which the beneficiary would be assigned.

For all of the reasons discussed in this segment, as well as in greater detail earlier in the decision, we conclude that the petitioner has not presented a sufficiently comprehensive, credible, and probative range of evidence to establish that the weight of common-law indicia of control balances in its favor. Based upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, we conclude 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 extensiveness and quality of the totality of the evidence of record. As it is the petitioner's burden to establish that such employer-employee relationship exists, the appeal will be dismissed, and the petition will be denied.

IV. POSITION NOT ESTABLISHED AS A SPECIALTY OCCUPATION

USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Therefore, before we turn to the director's second basis for denial, we will here state our determination that the petitioner has not established that the proffered position qualifies as a specialty occupation. Although this determination is beyond the decision of the director, which did not address the specialty occupation issue, it is within our authority to make enter findings and conclusions – adverse or favorable – on material aspects of the record that were not addressed by the director. This is because we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in the exercise of that independent review of the entire record of proceeding that we have made this adverse determination, and it precludes approval of the

petition even if the petitioner had overcome the grounds for denial specified in the petition – which it has not done.

According to the LCA that the petitioner submitted as comporting with the occupational category in which the beneficiary would serve, the proffered position belongs to the Software Quality Assurance Engineers and Testers occupational group, identifiable by the Standard Occupational Classification System code 15-1199. The O*NET Online information for this occupational group designates it as a Job Zone Four group, thus placing it among occupations of which "most" require "a four-year bachelor's degree, but some do not." Also, the "Education" portion of the O*NET Online's Summary Report provides the following information from members of the occupation who voluntarily responded to a survey:

Education

Percentage of Respondents	Education Level Required
64 ■■■■■	Bachelor's degree
14 ■■■	Associate's degree
9 ■■■	Master's degree

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Software Quality Assurance Engineers and Testers, available at <http://www.onetonline.org/link/summary/15-11-1199.01> (last accessed April 21, 2015).

The O*Net Online information supports the conclusion that the proffered position's inclusion within the Software Quality Assurance Engineers and Testers occupational group is not in itself sufficient to establish that the proffered position is one which requires the application of at least a bachelor's level of a body of highly specialized knowledge in a specific specialty, so as to satisfy the statutory and regulatory requirements for an H-1B "specialty occupation" as described at section 214(i)(1) of the Act, and at 8 C.F.R. § 214.2(h)(4)(ii) and the supplementary criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We also observe that the U.S. Department of Labor's *Occupational Outlook Handbook*, which we regard as an authoritative resource with regard to the duties and educational requirements of the occupations upon which it reports, has no information on the Software Quality Assurance Engineers and Testers occupational group.

Next, we do not accord any probative weight to the "Position [E]valuation" provided to the petitioner by Professor Nareen Kadali.

First, we see that Professor [REDACTED] appears to have considered only one source of information from the petitioner, and that is the "itinerary of services that has been filed along with the petition." Professor [REDACTED] quotation of those is identical to the following "Responsibilities" list provided in the previously-discussed petitioner's "Description and Itinerary of [S]ervices for Employment at [the Petitioner] for [the Beneficiary], which reads:

- Develop Test Plans, Test Cases, Test Scripts, Test Scenarios, Test Data, and Traceability Matrix.
- Participate in Requirement Analysis, Business Analysis, Use-Case Analysis, and Gap Analysis.
- Eligibility, Enrollment, Membership, and Providers applications.
- Test the EDI intake process of HIPAA 837 claims with ICD-10 Diagnostic and Procedure codes and payment remittance by testing the process at the 835 HIPAA gateway.
- Test the Web Applications and Web Portals linked to EDI HIPAA transactions.
- Coordinate End-to-End testing with HIPAA validation.
- Participate in developing test scripts for the ANXI X12 EDI transactions 270/271, 276/277, 834, 835, and 837.
- Test EDI 270/271 for Eligibility and 276/277/835/837 for Claims.
- Test adding/updating/deleting of the providers, members, groups, facilities, hospitals in [REDACTED].]
- Test Claims Adjudication, Claims Re-pricing and Claims processing on [REDACTED].]
- Test Billing and Capitation management in [REDACTED]
- Test the Group, Enrollment, Eligibility and Membership in [REDACTED]
- Test and Validate Data and Diagnosis Codes from ICD-9 to ICD-10.
- Analyze the impact of ICD 10 for Diagnosis/Procedure codes.
- Retrieve test data from Oracle database using SQL Statements.
- Create Defect Statistics Reports and Test Metrics Reports using HP Quality Centre.

However, the professor's adoption of this list as comprising the daily responsibilities comprising the proffered position is a fatal error, in that, as we have previously noted, the June 25, 2014 letter from the [REDACTED] HR Manager ascribed only seven (7) of those 16 responsibilities to the beneficiary. This feature undermines the relevancy of the professor's opinion as it is based upon a factual foundation that is not adopted or endorsed by [REDACTED] the business entity claimed to be in charge of the project work to which the beneficiary would be assigned. This aspect of Professor [REDACTED] evaluation of the proffered position is sufficient for us to dismiss the evaluation as factually inaccurate and therefore irrelevant – and we do so.

We shall also mention some additional aspects of the professor's evaluation document that weigh against its reliability and, therefore, its probative value.

As impressive as it may be, nothing in the professor's lengthy resume indicates that she has obtained any level of particularly specialized knowledge about the type of position that is the subject of her evaluation, and the professor neither references nor discusses any studies, research, surveys, or other empirical sources to support her findings. Further, the professor provides no documentary basis for us to acknowledge that she should be regarded as a recognized authority, or even as a reliable evaluator, in the area which she opines, namely, the specialty occupation status of a particular position. Further still, the professor provides no factual and analytical basis for her apparent inflation of the position to the level presented in this first narrative paragraph at page 3 of his submission, which begins with the statement:

As evident from the itinerary of services, [the beneficiary] would be ensuring the total quality management of application development as well as systems testing and requirements gathering and process analysis using the Waterfall, Spiral, Iterative, Rational, and Incremental models.

As such, we also find that the professor's opinion is perfunctory and conclusory, and therefore of no material help to us in evaluating the specialty-occupation issue.

As a matter of discretion, USCIS may use advisory opinion statements submitted by the petitioner as expert opinion testimony. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

We further find, that, even if Professor [redacted] position-evaluation document were taken at face value – its ultimate conclusion would not support recognition of the proffered position as a specialty occupation. Professor [redacted] opined that the minimum educational component of the proffered position's performance requirements would be:

A four year bachelor's degree in Computer Information Systems or Engineering or Business Administration or a related field with coursework in Pharmacy/Pharmaceutical Science from a regionally accredited college or Institute of Higher Learning in the United States or an equivalent degree awarded by another country.

By recognizing an undifferentiated degree in "Business Administration" as a sufficient educational attainment and also by recognizing an "Engineering" degree, without further specification as sufficient educational credential, the professor opines, by implication, that the proffered position is not a specialty occupation.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Again, the petitioner states that its minimum degree-requirement for the proffered position is a bachelor's degree in "Computer Information Systems or Engineering or Business Administration or a related field." The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, has not established either (1) that Computer Information Systems, Engineering, and Business Administration in general are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed required-degrees and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the

proposed position. Further, USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in Business Administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Next, we note that in light of all of the evidentiary defects, the absence of copies of critical contractual documents, and the unresolved discrepancies that we have noted in this decision, the petitioner has not established the substantive nature of the work to be performed by the beneficiary, and this is a material failure that 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.

Further, because of the limited extent of the evidence presented and the evidentiary discrepancies in the record – which we discussed in the employer-employee part of this decision – we also find that the petitioner did not establish that it had filed the petition on the basis of definite, non-speculative work that it had by then secured for the beneficiary for the period of employment specified in the petition. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In sum, 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. Consequently, for this additional reason the petition may not be approved

V. BENEFICIARY QUALIFICATIONS

As a preliminary matter, we observe that, because the evidence of record does not establish that the proffered position is a specialty occupation, the beneficiary's qualifications are inconsequential to the ultimate outcome of this appeal. As we noted earlier, "The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]." However, for the sake of a fuller and more instructive decision, we shall discuss why we conclude that the evidence of record does not establish beneficiary would not qualify to perform services in the proffered position if - which is not the case

- the evidence of record had established it as one requiring a degree from the range that Professor [REDACTED] opined as necessary for the position's performance.

Because the failures (1) to establish the petitioner as U.S. employer with standing to file this petition, and (2) to establish the proffered position as a specialty occupation each decisively preclude approval of the petition, we shall not engage in a detailed application of all of the beneficiary-analysis regulations to the evidence of record. Rather we shall concentrate on the cardinal defect in the petitioner's beneficiary-qualification case.

In a report her aforementioned "Position evaluation" document, Professor [REDACTED] opined that "[a] four[-]year bachelor's degree in Computer Information Systems" would suffice as a minimum degree for the proffered position. Following suit, Professor [REDACTED] "Credential Evaluation Report" opines that the beneficiary has obtained the equivalent of such a degree by a combination of earned academic credits and "25 credits of University[-]level education in the field of Computer Information Systems obtained through the conversion of [the beneficiary's] work experience into academic credits." However, Professor [REDACTED] misinterprets and misapplies what she refers to, mistakenly, as the equivalency ratio mandated [by] [USCIS] of three-years of work experience to one year of college training (*3 for 1 rule*)."

There is no such "mandatory 3 for 1 rule". The only three-for-one equivalency ratio in the USCIS beneficiary-qualification regulations appears at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), which only mandates *clearly-demonstrable evidence that a petitioner must submit to even merit USCIS consideration* for possible recognition of college-level equivalency of training and/or work experience (emphasis added):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It ***must be clearly demonstrated*** that [(1)] the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [(3)] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁶
- (ii) Membership in a recognized foreign or United States association or

⁶ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

society in the specialty occupation;

- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Thus, there is no such mandatory rule as the professor apparently relies upon, and we find that the evidence of record does not satisfy the multiple-tier requirements specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Consequently, the professor's conclusion as to the educational equivalency of the beneficiary's experience is erroneous and fatally undermines the probative value of the professor's ultimate conclusion that the beneficiary has attained the educational equivalency of a U.S. Bachelor's Degree in Computer Information Systems.

Further, the petitioner should note that award of college-level equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is solely a matter for USCIC determination. That regulatory provision opens with this description of the process as (emphasis added):

A determination by the Service [(1)] that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and [(2)] that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In reaching its determination USCIS will of course review and consider any pertinent evidence presented for part of its evaluation. In the instant case, however, the professor's analysis and conclusion about the educational equivalency of the beneficiary's experience has limited probative value. They are founded upon evidence insufficient to satisfy the stringent requirements of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)

The petitioner must establish eligibility under the applicable statutory and regulatory provisions. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁷
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner submitted transcripts and diplomas demonstrating that the beneficiary earned a Master of Science degree in Regulatory Affairs for Drugs, Biologics, and Medical Devices from [REDACTED] University, and a Bachelor's degree in Pharmacy from [REDACTED] University, [REDACTED]. The petitioner also submitted an evaluation of the proffered position conducted by [REDACTED]. On appeal, the petitioner also submitted employment verification letters from both the petitioner and [REDACTED] located in India.

The petitioner did not submit evidence to satisfy the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2)-(4) to establish that the beneficiary possesses a baccalaureate or higher degree in the specific specialty directly related to the duties of the proffered position (or its equivalent).

In the present matter, the record demonstrates that the beneficiary's undergraduate degree, earned in India, is in Pharmacy. Moreover, the record demonstrates that the beneficiary possesses a U.S. master's degree in the field of "Regulatory Affairs for Drugs, Biologics, and Medical Devices." We have no reason to doubt the legitimacy of the beneficiary's U.S. master's degree.

The proffered position, however, is classified under SOC (ONET/OES) code 15-1199, which corresponds to occupations in the "Computer Occupations, All Others" category. We note that, while not selected by the petitioner for the LCA, SOC (ONET/OES) code 15-1199.01, the first subsection under the petitioner's selected category entitled "Software Quality Assurance Engineers and Testers," appears to correspond to the title conferred on the proffered position by the petitioner. It describes the associated duties of this classification as follows: "Develop and execute software test plans in order to identify software problems and their causes."

It is unclear how degrees in Pharmacy and in Regulatory Affairs for Drugs, Biologics, and Medical devices qualify the beneficiary to perform the services of a quality assurance tester, or more

⁷ The petitioner should note that, in accordance with this provision, USCIS will accept a credentials evaluation service's evaluation of *education only*, not experience.

generally, qualify him to perform duties within all other computer occupations. A beneficiary's academic achievements will not qualify him to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). However, the petitioner did not submit sufficient evidence regarding the proffered position for us to make an assessment of whether the beneficiary obtained knowledge equivalent to at least a bachelor's degree in a specific specialty required by the particular occupation in which he will be employed. Indeed, it is not clear what the beneficiary will actually be doing.

We note that the evaluation of the proffered position conducted by [REDACTED] states that the beneficiary's transcripts include coursework that addresses "theoretical and practical aspects of Computer Information Systems that directly relate to the daily job responsibilities of the specialty occupation." [REDACTED] does not expand on this conclusion. Furthermore, as noted by the director, the beneficiary's transcripts indicate that his coursework is heavily concentrated in the area of pharmacy, an area whose connection to the duties of the proffered position has not been established.

Finally, we note that the petitioner repeatedly stated that degrees in a variety of fields, such as computer science, pharmacy, healthcare management, computer information systems, electronics engineering, or management information systems are acceptable prerequisites for the proffered position. Provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). The petitioner has not explained how a degree in Pharmacy would directly relate to the proffered position in this matter.

Thus, even if the evidence of record had established the proffered position as a specialty occupation, which is not the case, the petitioner has not established that the beneficiary possesses the necessary credentials to qualify for service in such a position in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) & (D). Accordingly, the appeal must be denied, and the petition must be denied, on this basis also.

VI. 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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.⁸ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

⁸ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed, and the petition is denied for the reasons discussed above, we will not further discuss the additional issues and deficiencies that we observe in the record of proceeding.