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

(b)(6)

DATE: MAY 12 2015 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 29-employee "Software Development & Consulting" business established in . In order to employ the beneficiary in what it designates as a full-time "Programmer Analyst" position at a salary of $60,000 per year, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate that the beneficiary is qualified to perform services in a specialty occupation. The petitioner subsequently filed a combined motion to reopen and reconsider. The director granted the combined motion and affirmed the denial of the petition.

The petitioner now files this appeal. The petitioner asserts that there is sufficient evidence establishing that the beneficiary is qualified for the proffered position.

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

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denial. Beyond the director's decision,[1] we have identified additional grounds for denial, i.e., that the evidence of record fails to establish that: (1) the petitioner qualifies as a United States employer that has and will maintain an employer-employee relationship with the beneficiary throughout the entire validity period requested; and (2) the position proffered qualifies as a specialty occupation.[2] For these reasons, the appeal will be dismissed, and the petition will be denied.

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

[2] We will first discuss whether the petitioner has an employer-employee relationship with the beneficiary, and whether the proffered position qualifies as a specialty occupation. We will then discuss the director's ground for denial, i.e., whether the beneficiary is qualified for the proffered position. We are required to follow long-standing legal standards and determine whether the proffered position is a specialty occupation before determining 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].").

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 1, 2013, listing its business address as Illinois. The petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a "Programmer Analyst" at the address of , New York. The petitioner further indicated that it will submit an itinerary with the petition, and that the beneficiary will work off-site. The petitioner listed the dates of the beneficiary's intended employment as October 1, 2013 through September 3, 2016.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Programmer Analyst, and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1131, Computer Programmers" from the Occupational Information Network (O*NET). The LCA states that the proffered position is a Level I, entry-level, position. The LCA listed the places of the beneficiary's employment as: (1) Illinois; and (2) , New York.

In support of the petition, the petitioner submitted a letter, dated March 13, 2013, explaining the duties of the proffered position. Specifically, the petitioner states that the beneficiary will "[analyze] the data processing requirements to determine the computer software which will best serve [clients'] needs," "design a computer system using that software," "implement that design by overseeing the installation of the necessary system software and its customization to our company's unique requirements," and then "constantly revise and revamp the system as it is being created to respond to unanticipated software anomalies." The petitioner further states that "[t]he actual computer programming may be performed with the assistance of the programmers."

In the same letter, the petitioner states that the beneficiary "will be involved in the designing and development" of an unspecified "application." The petitioner states that the "development" of the unspecified "systems" will include the following "phases:"

1. Analysis of the existing system and user needs;
2. Communication and interaction with current system users;
3. Design and development of a new computerized system;
4. Writing and testing of newly designed programs;
5. Implementation of the newly developed system; [and]
6. Provide technical support after system implementation.

The petitioner proceeded to provide the following breakdown of the "Day-to-Day Responsibilities" of the proffered position and the percentage of time allotted to each duty:

1. Analysis of software requirements (25%);
2. Evaluation of interface feasibility between hardware and software (10%);
3. Software system design (using scientific analysis and mathematical models to predict and measure design consequence and outcome (30%);
4. Unit and integration testing (25%);
5. System installation (5%);

6. Systems maintenance (5%).

The petitioner then listed the following "Specific Duties" for the proffered position:

- Design and implement all QA test strategy plans and automate test solutions for client/server and web applications with mercury interactive test suite (LoadRunner, Quick Test Pro and Quality Center).
- Perform load test, stress test, benchmark profile test, fail-over test, fail-back test against supported configurations.
- Responsible for loading test oracle application.
- Handle complex view state and event validation for .net based applications.
- Verify the connectivity from controller to the load controller and utilize the IP address of load generator to add them to the controller.
- Trace deadlock and expensive and test procedures (MS SQL Profile, Oracle Performance manager).
- Create test suite and test cases to validate web service using SOAPUI.
- Using descriptive programming to handle dynamic object using VBScript.
- Responsible for developing baseline scenarios and load testing harnesses for load/performance testing of the application.
- Generate predefined reports SLA reports, SLA outage reports.
- Responsible for performance monitoring and analysis of response time & memory leaks using throughput graphs.
- Develop and enhance script using Load Runner and design scenarios using performance center to generate realistic load on the application under test.
- Trace Java methods and database queries execution using J2EE diagnostic tool (load Runner Add-IN).
- Develop performance test plan as well as develop details performance analysis report, graphs (include load Runner build on graphs and MS Excel-custom graphs).
- Conduct load test for multiple using user Load Runner.
- Use Load Runner monitors to identify bottlenecks.
- Setup Issue management task, risk assessment and measure operational impact.
- Update project plan, status report and maintain issue log.
- Prepare program specs, execute testing and prepare implementation plan.
- Develop processed, controls and record keeping data collection and analysis.

[Verbatim.]

As to the minimum educational requirement of the proffered position, the petitioner states that the "minimum educational qualifications for this position are a Bachelor's degree in Computer Science, Engineering, Mathematics, Business, a related analytic or scientific discipline, or its equivalent in education or work-related experience."

The petitioner further states that the beneficiary is an "excellent candidate" for the proffered position by virtue of her academic background and training. The petitioner highlights the beneficiary's Master of [redacted] Degree from [redacted],

Michigan, her Bachelor of Degree from , India, and her "related experience within the computing field." The petitioner states that the beneficiary's background "uniquely qualify him [*sic*] to assume this position within a business/logistics computing environment, functioning at a professional level I, assessing business and systems needs and implementing same," and "will enable him [*sic*] to assist our company in better assessing clients' needs, based on a complete understanding of business ramifications of systems changes and their effects."

In support of the petition, the petitioner submitted, *inter alia*, an itinerary. The itinerary indicates that the beneficiary will first be assigned to work for the end-client (" or ") at the address of , New York. The dates of this particular assignment are listed as "From 10/01/2013 & Extendable beyond 2014." The itinerary indicates that the beneficiary will subsequently be assigned to work for the petitioner at its business premises at Illinois for the "[r]est of the period of H-1B Approval." Only one project, vaguely described as "Information technology services," is listed on the itinerary; no other information about this "project" is provided. At the bottom the itinerary states, in pertinent part: "Upon completion of this project the beneficiary will be assigned to one of the other on-going projects undertaken by the company on behalf of our clientele." No further information was provided explaining what projects and clientele to which the beneficiary will be assigned.

The petitioner submitted a letter, dated March 20, 2013, from the CEO of describing its company as "an Analytics customized Product development company based in ." The letter verifies that the beneficiary "has been selected to work for as an IT contractor." The letter states that it has "a need of [*sic*] [the beneficiary's] services for about 18 months with possible extensions." The letter then lists the following responsibilities to be performed by the beneficiary:

- Identifying user requirements and performing research and analysis to determine conceptual design for solving business problems.
- Develop LoadRunner scripts for Data Creation.
- Simulate multiple Vuser scenarios. Defined Rendezvous point to create intense load on the server and thereby measure the server performance under load.
- Verify the connectivity from Controller to the Load Generator. Utilized the IP address of Load Generators to add them to the Controller.
- Trace deadlock and expensive SQL queries and test procedures (MS SQL Profile, Oracle Performance Manager).
- Usage of different checkpoints for evaluation of test scripts and develop reusable actions.
- Extensive usage of Quality Center for storage and maintenance of requirements, tests, test cases, defects and scheduling automation of test cases.
- Develop and implement test and unit validations.
- Maintain security, integration and system level testing.
- Fine tune the application design to meet the client needs as best as possible.

The petitioner submitted a Professional Services Agreement (PSA), dated March 15, 2013, between and the petitioner. The PSA states, in pertinent part, that desires to "engage the services of [the petitioner] to assist in design, development of its ' ', the product stack is developing," which requires the petitioner to "periodically present a candidate to provide services to as a consultant (the 'Candidate'), as described more specifically in Exhibit A, incorporated into and made a part of this Agreement." The PSA states that the services shall commence "pursuant to a Work Order in the form of Exhibits (as defined in Exhibit A)."

The Exhibit A accompanying the PSA is entitled "Contract to Hire Agreement." This document identifies the "Candidate" as the beneficiary, and the "Scope of Work" as "QA Testing." The start date is listed as "10/01/2013 (Tentatively)" and the end date is listed as "12/31/2014 (Extendable)." The job duties are identical to those listed in the letter dated March 20, 2013 from the CEO of

The petitioner submitted screen-shots from the website of , including a page about its product ' '."[3]

Regarding the beneficiary's educational qualifications, the petitioner submitted copies of her: (1) Master of degree from ; (2) transcript from ; (3) Provisional Certificate of a Bachelor's Degree in from the ; and (4) transcript from .

The petitioner submitted a copy of the beneficiary's Form I-20 A-B showing authorization to complete her OPT training at from October 4, 2010 to October 3, 2011, and October 4, 2011 to March 4, 2013. The beneficiary's supervisor at is listed as ,[4] who is also the petitioner's President and the signatory of the instant petition and other documentation submitted in support of the petition. The petitioner also submitted a copy of the beneficiary's Employment Authorization Card demonstrating her OPT extension from October 4, 2011 through March 4, 2013.

The director issued an RFE instructing the petitioner to submit additional evidence establishing that the beneficiary is qualified for the proffered position.

In response to the RFE, the petitioner submitted an evaluation of academic and experiential credentials from Dr. Professor of Computer Science at . Dr. states that although he has "never personally met" the

[3] There are no references to the " " product suite. The petitioner did not submit any independent documentation establishing the existence and development of the " ."

[4] i's last name appears in the record as " " and " ."

beneficiary, he has "thoroughly reviewed [the beneficiary's] academic documentation, resume, and work verification letters" to conclude that she has the equivalent of a Bachelor's degree in .

The petitioner submitted a letter from , President of [5], confirming the beneficiary's employment as a "Programmer Analyst" in its company from January 3, 2011 to March 4, 2013. This letter states that the beneficiary "worked on different performance testing projects using Quality Center, QTP, Load Runner, Test Director, UNIX, Java, .NET, Oracle and other tools." The letter then briefly lists some of the beneficiary's duties, which included performance testing of applications, creating test suites and test cases, conducting Load Runner for multiple users, and developing performance tests plan.

The petitioner also submitted the beneficiary's resume, which lists her professional experience at . in Illinois as a "Performance Engineer" and in India as a "Functional Analyst."

The director denied the petition, concluding that the evidence does not establish that the beneficiary is qualified to perform services in a specialty occupation. The director based her decision, in part, on the lack of corroborating evidence of the beneficiary's claimed work experience at , and thus, the lack of evidence supporting the evaluator's conclusion that the beneficiary has earned the equivalent of a bachelor's degree in .

The petitioner subsequently filed a motion to reopen and reconsider. In the motion, the petitioner explained that, at the time of its RFE response, it had not yet received the experience letter it requested from . The petitioner admitted that the evaluation was performed based upon the beneficiary's resume. With the motion, the petitioner provided a letter from . The letter states the following in its entirety:

> Date: 31/05/2013
>
> TO WHOM IT MAY CONCERN
>
> This is to certify that Ms. worked as a Functional Analyst from 11th December 2006 to 01st August 2008. During her tenure she worked on Claims Process application using Microsoft technologies and Modeling tools. Some of her other duties are application Documentation and validation. Her conduct was good and satisfactory.
>
> We wish her good luck in her future activities.
>
> [Signature]

[5] is also referred to as "" and "" in the record.

For

The director granted the petitioner's motion, but affirmed the denial of the petition. In part, the director noted that the letter from contained an insufficient description of the beneficiary's duties to demonstrate progressively responsible experience equating to the completion of a degree in the specialty occupation. The director also noted the lack of evidence demonstrating that the beneficiary has recognition of expertise in the specialty through progressively responsible experience directly related to the specialty, particularly considering that the beneficiary's bachelor degree is in and is an firm. The director concluded that the evidence was insufficient to establish that the beneficiary is qualified for the proffered position.

The petitioner filed an appeal. On appeal, the petitioner asserts that the submitted evidence was sufficient to show that the beneficiary is qualified for the proffered position. In support of the appeal, the petitioner resubmits copies of the evaluation from Dr. and other previously submitted documentation.

II. STANDARD OF PROOF

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

III. PRELIMINARY FINDINGS

As a preliminary matter, we find that the evidence in the record fails to establish the substantive nature of the proffered position.

The petitioner has presented conflicting descriptions of the proffered position and its constituent job duties. On one hand, the LCA submitted to support the instant petition was certified for a position falling under the "Computer Programmers" occupational classification. The petitioner describes some duties for the proffered position that are reasonably consistent with the "Computer Programmers" occupational classification, such as analyzing clients' software needs and designing computer systems to meet those needs.[6]

On the other hand, the petitioner has also presented evidence indicating that the proffered position will primarily involve quality assurance (QA) testing duties, and as such, is better classified under

[6] Specifically, O*NET states that positions falling within the "Computer Programmer" occupational classification "[m]ay assist software developers by analyzing user needs and designing software solutions." O*NET further lists duties such as "[c]onsult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes," and "[p]erform systems analysis and programming tasks to maintain and control the use of computer systems software as a systems programmer." *See* http://www.onetonline.org/link/summary/15-1131.00 (last visited Apr. 30, 2015).

the O*NET code and title 15-1199.01, Software Quality Assurance Engineers and Testers, occupational classification.[7]

In particular, the petitioner's "Specific Duties" for the proffered position are primarily comprised of QA testing duties such as: "[d]esign and implement all QA test strategy plans and automate test solutions for client/server and web applications with mercury interactive test suite (LoadRunner, Quick Test Pro and Quality Center)"; "[p]erform load test, stress test, benchmark profile test, fail-over test, fail-back test against supported configurations"; "[c]reate test suite and test cases to validate web service"; "[r]esponsible for developing baseline scenarios and load testing harnesses for load/performance testing of the application"; "[d]evelop and enhance script using Load Runner and design scenarios using performance center to generate realistic load on the application under test"; and "[d]evelop performance test plan." Notably, the "Specific Duties" the petitioner listed for the proffered position do not appear to include any programming duties.[8]

In addition, the documentation from the only identified end-client, , indicates that the beneficiary will primarily be performing quality assurance (QA) testing duties. Specifically, in the "Contract to Hire Agreement" between the end-client and the petitioner, the beneficiary's scope of work is described as "QA Testing." In the end-client's letter, the majority of the beneficiary's duties are QA testing duties, including "[d]evelop LoadRunner scripts for Data Creation," "[s]imulate multiple Vuser scenarios . . . [and] measure the server performance under load," "evaluation of test scripts and develop reusable actions," "[e]xtensive usage of Quality Center for storage and maintenance of requirements, tests, test cases, defects and scheduling automation of test cases," "[d]evelop and implement test and unit validations," and "[m]aintain . . . system level testing." Again, we note that no specific programming duties are listed for the beneficiary.

Based on the inconsistencies in the record, as described above, we find that the petitioner has not established the substantive nature of the proffered position, i.e., whether the proffered position is that of a computer programmer or Quality Assurance tester.

[7] O*NET lists the job duties for "Software Quality Assurance Engineers and Testers" as including: design test plans, scenarios, scripts, or procedures; test system modifications to prepare for implementation; develop testing programs; document software defects; identify, analyze, and document problems with program function, output, online screen, or content; create or maintain databases of known test defects; plan test schedules or strategies in accordance with project scope or delivery dates; and review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks. *See* http://www.onetonline.org/link/summary/15-1199.01 (last visited Apr. 30, 2015).

[8] In fact, it is unclear whether some of the petitioner's statements are even relevant to the beneficiary and the actual position being offered to her. For instance, the petitioner states that "[t]he actual computer programming may be performed with the assistance of the programmers." It is unclear what this statement is intended to convey considering that the petitioner certified the proffered position as falling under the "Computer Programmers" occupational classification. Further, the petitioner makes several references to the beneficiary as a male, although the beneficiary here is female.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In addition to the above inconsistencies, we find that the petitioner has neither adequately explained nor submitted sufficient, credible evidence establishing what work the beneficiary will be assigned to during the entire validity period requested from October 1, 2013 through September 3, 2016.

According to the itinerary, the petitioner asserts that the beneficiary will first be assigned to work for the end-client , located at , New York. The petitioner asserts that after this assignment, the beneficiary will work for the petitioner at its business premises at , Illinois. However, the petitioner has not provided sufficient explanation and documentation of the work to be performed at either place of employment.

With respect to the beneficiary's claimed assignment to , there are critical inconsistencies and deficiencies that undermine the validity of the petitioner's claims and submitted documentation. Here, we reiterate and incorporate our earlier discussion about the inconsistencies in the evidence indicating that the beneficiary will be a QA tester, as opposed to the petitioner's classification of the proffered position as a computer programmer. Moreover, we find that the petitioner has not clearly articulated exactly what project the beneficiary would be assigned to for . The itinerary submitted in support of the petition only states vaguely that the "project" the beneficiary will work on is "Information technology services." The itinerary does not provide a specific project name or description. Similarly, the petitioner's initial letter states vaguely that the beneficiary will be "involved in the designing and development" of an unspecified "application" and "systems." The petitioner does not identify any project name, or any application and systems involved.

While the PSA between and the petitioner states that the petitioner was contracted to "assist in design, development of [I 's] ' ,'" the petitioner does not make any express mention of " " in its itinerary and other supporting documentation. Moreover, the record contains no objective evidence establishing the existence and development of the claimed " " product. We note that while the petitioner submitted pages from ' website discussing its " " product, there are no references to its claimed " ."

There are also inconsistencies within the documentation from that raise doubts as to their validity and authenticity. For instance, the PSA between the petitioner and states that the beneficiary's services shall commence "pursuant to a Work Order in the form of Exhibits (as defined in Exhibit A)." However, the attached "Exhibit A" is not entitled a "Work Order," but a "Contract to Hire Agreement." Further, the "Contract to Hire Agreement"

indicates that the beneficiary will be working for approximately fifteen months, whereas ' letter states that it has a need for the beneficiary's services for "about 18 months."

In addition to the unclear nature of the beneficiary's purported assignment to , the evidence of record fails to establish what work the beneficiary would perform for the petitioner.

As noted above, the itinerary states that after the beneficiary's assignment to "the beneficiary will be assigned to one of the other on-going projects undertaken by the company on behalf of our clientele." However, the petitioner does not further identify nor document what other "projects" and "clientele" the beneficiary would be assigned to service. The petitioner has not submitted any service agreements, work orders, or similar documentation establishing what work it will assign the beneficiary to perform at its business premises at , Illinois, or elsewhere. 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)).

Overall, the lack of identification and documentation of all of the projects, end-clients, and job duties that will be assigned to the beneficiary during the entire requested validity period precludes any meaningful understanding of the substantive nature of the proffered position.

IV. EMPLOYER-EMPLOYEE

In addition to finding that the evidence does not establish the substantive nature of the proffered position, we find, beyond the decision of the director, that the petition must be denied due to the failure to establish that the petitioner qualifies as a United States employer that will have and maintain an employer-employee relationship with the beneficiary throughout the entire validity period requested.

As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the evidence in the record fails to establish whether the petitioner has made a bona fide offer of employment to the beneficiary or that the petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

We acknowledge the letter from stating that the petitioner "is the employer" of the beneficiary, that the petitioner "has the right to pay, hire, fire, supervise and otherwise control their employee," and that "[a]t all times, [the petitioner] has the right to control the work of [the beneficiary], regardless of whether that right is exercised, through the duration of [this] contract."

We also acknowledge the petitioner's assertions that it will pay the beneficiary's salary and standard company benefits, and that her employment "is not dependent upon a contractual agreement(s) with any of our clients firm [*sic*]." However, such assertions, without more, are insufficient to establish that the petitioner will have and maintain an employer-employee relationship with the beneficiary. 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.

Furthermore, while salary and related benefits are relevant factors in determining who will control the 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.[9] Without full disclosure of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

Again and as previously discussed, there is insufficient evidence detailing the circumstances of the beneficiary's employment, such as what the beneficiary will do, the specific projects to be performed by the beneficiary, or for which clients the beneficiary will ultimately perform these services. The absence of such evidence precludes the finding that the petitioner qualifies as a United States employer with the requisite employer-employee relationship with the beneficiary

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

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

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

throughout the entire validity period requested. The appeal must be dismissed and the petition must be denied for this reason.

V. SPECIALTY OCCUPATION

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

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

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

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

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

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

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

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

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

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

We note that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the

basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Here, and as discussed earlier in this decision, the petitioner has not established the substantive nature of the proffered position. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies at least one 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.

We also note that the petitioner asserts that the proffered position can be satisfied by a minimum of a bachelor's degree in a wide range of fields. Specifically, the petitioner described the minimum educational requirement as a "Bachelor's degree in Computer Science, Engineering, Mathematics, Business, a related analytic or scientific discipline, or its equivalent in education or work-related experience." Such an assertion, without more, is insufficient to establish that the proffered position is in fact a specialty occupation.

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Thus, the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question.

The petitioner's claimed entry requirement of at least a bachelor's degree in disparate fields, without more, does not denote a requirement in a specific specialty. Again, since there must be a close correlation between the required body of highly specialized knowledge and the position, a minimum entry requirement of a degree in disparate fields, such as business 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). This has not been established here.

Furthermore, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title or a general-purpose degree, such as "Business" or "Engineering," without further specification, does not establish the position as a

specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007)[10]; *cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

For these reasons, the evidence of record fails to establish that the proffered position qualifies as a specialty occupation. The petition must be denied for this additional reason.

VI. BENEFICIARY QUALIFICATIONS

Finally, we find that the director correctly determined that the beneficiary is not qualified to perform the duties of such a specialty occupation.

The statutory and regulatory framework that we must apply in our consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

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.

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;

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

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

Id.

(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 is 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.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

> General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

(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;[11]

(*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 . . . .

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*):

> 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 the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; 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 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;[12]
>
> (*ii*) Membership in a recognized foreign or United States association or 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

[11] The petitioner should note that, in accordance with this provision, we will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

[12] *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. 8 C.F.R. § 214.2(h)(4)(ii).

country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

In the instant matter, the petitioner submitted an evaluation from Dr. concluding that the beneficiary has the equivalent of a Bachelor's degree in Management Information Systems based on her academic coursework and professional career. However, for the reasons discussed below, we will afford this evaluation no probative value. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Dr. 's evaluation does not appear to have been based upon credible, objective documentary evidence. As noted by the director, Dr. asserts that he "thoroughly reviewed [the beneficiary's] academic documentation, resume, and work verification *letters* (emphasis added)." As the petitioner now admits, however, one of the two work verification letters (i.e., the letter from) was not even available until *after* the evaluation was performed, and the evaluation was performed on the basis of the beneficiary's resume. There is no indication that Dr. verified or otherwise corroborated the beneficiary's resume with any independent evidence.

Moreover, Dr. does not sufficiently explain the factual basis for his conclusions. For instance, Dr. concludes that the beneficiary's work experience has taught her equivalent skills to those taught in seventeen different classes, including several programming and software design/engineering courses. However, Dr. does not explain how he came to that conclusion, such as exactly which bodies of specialized knowledge the beneficiary gained through which particular job duties, and how such knowledge correlates to the listed classes. Again, we note, as the director duly noted, that is an firm. Dr. also concludes that the beneficiary's three years of work experience - which is equivalent to one year of academic coursework - is equivalent a Bachelor's degree in Management Information Systems. However, he does not explain how he came to this conclusion, particularly considering that the beneficiary's bachelor's degree is in and her graduate degree is in . As such, these are conclusory statements that are not entitled to evidentiary weight. 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. at 165.

We further find insufficient evidence to establish that has a program for granting college level credit based on an individual's training and/or work experience in the particular specialty, as required the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). While the letters from Dr. the Office of the Registrar, and Dr. all assert that the College has "a program" for granting credit based upon an individual's training and/or work experience, they do not specify that such a program exists in the particular specialty, i.e., in Management Information Systems or a computer-related field. Specifically, the letter from the Office of the Registrar states that "credit-granting policies may vary on a department-to-department or student-by-student basis." The letter from Dr. Chair of the Department of Computer Science, states that they have a program "in work study fashion for matriculated students." Thus, it appears that, for a degree in Management Information Systems or a computer-related field, the program is limited to matriculated students who are also enrolled in a work study program. Based on the limitations imposed on this particular program, we cannot find that it fully equates to a program for granting college level credit "based on an individual's training and/or work experience in the particular specialty," as required by the plain language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*).

Lastly, the petitioner did not submit sufficient evidence to demonstrate that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that her experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation specified in 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Based on the above, the evidence of record contains insufficient evidence to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

VII. CONCLUSION AND ORDER

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd.* 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it

is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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