



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: MAY 12 2015

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a one-employee "software development" business established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position, 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 did not establish that: (1) there was specialty occupation work available at the time of filing; and (2) the beneficiary is qualified to perform the proffered position.

The record of proceeding 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 Director's notice of decision; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

Upon review, we find that the evidence of record is insufficient to overcome the Director's grounds for denying this petition. Beyond the Director's decision, we also find that the evidence is insufficient to establish that there is an employer-employee relationship between the petitioner and the beneficiary, and that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition will remain denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

As noted above, the petitioner stated on the Form I-129 that it is a one-employee software development company. The petitioner indicated that the beneficiary would be employed in a full-time programmer analyst position at the petitioner's business premises located at [REDACTED], Connecticut, and would not work off-site. The petitioner stated that the dates of intended employment are from October 1, 2014 to July 31, 2017.

The Labor Condition Application (LCA) submitted in support of the petition indicates that the occupational classification for the position is "Computer Systems Analysts" SOC (ONET/OES) Code 15-1121, at a Level I (entry level) wage.

In a letter of support dated March 17, 2014 submitted with the petition, the petitioner identified itself as "a software development, technology and onshoring corporation" whose "key services include Application Development, Business Intelligence, Mobile Development, Quality Assurance, Architecture Services and Maintenance and Support." The petitioner stated that "[c]urrently [it] only has one employee [but] is planning on hiring new staff."

In support of the petition, the petitioner provided, *inter alia*, evidence of the beneficiary's prior F-1

nonimmigrant status to pursue a Master's degree in Biotechnology at the [REDACTED] and her award of a Master of Science degree from the [REDACTED] in 2011.

The Director issued an RFE requesting additional evidence regarding the petitioner's business operations and the proffered position, as well as the beneficiary's qualifications for the proffered position.

In response to the Director's RFE, the petitioner submitted, *inter alia*, a letter dated July 16, 2014 explaining that the beneficiary "has been offered a position with the company to work in-house on a project for one of the company's clients, [REDACTED]¹ The petitioner stated that the beneficiary "was selected to provide consulting services on the project [REDACTED] effective October 1, 2014 . . . in the capacity of a Programmer Analyst." The petitioner stated that the proffered position "is a specialty occupation as it requires computer programming and analysis." The petitioner further stated that the proffered position requires at a minimum "a bachelor's degree in a specialty field of technology or computer science." The petitioner asserted that the beneficiary is qualified for the proffered position by virtue of her bachelor's and master's degrees in Biotechnology, stating that "[h]er unique educational background makes her an ideal candidate for the position which requires a lot of mathematical analysis and technology."

In the same letter, the petitioner stated that the beneficiary "will report directly to [REDACTED] COO . . . [who] will oversee [the beneficiary's] day-to-day duties and be the person she reports to." The petitioner provided the following description of the duties of the proffered position:

- [The beneficiary's] duties will include interacting and coordinating with existing client base in US to gather user requirements, design and enhance existing software solutions provided by the company. Additionally, she will also be charged with coordinating and conduction [*sic*] web-based user training to help clients understand the solutions offered by company and to help client's businesses reap the real business benefits intended by software solutions.
 - Time percentage: 40%
 - Level of responsibility: Independent work with some guidance from management
- Responsible for building, testing, and validating new software and technical demonstrations of the new web and mobile software solutions. She will use her knowledge of Data Analysis and Research to implement enterprise software systems.

¹ [REDACTED] is also referred to in the record as '[REDACTED]' and '[REDACTED]'

- o Time percentage: 50%
- o Level of responsibility: Independent work
- Responsible to create programs for product trainings to other employees or clients and creating/updating User Manuals or product offering of software solutions
 - o Time percentage: 10%
 - o Level of responsibility: Independent work with some guidance

The petitioner submitted a Master Staffing Agreement (MSA) between it ("Employer") and [redacted] entered into and effective on July 10, 2014. The MSA identifies [redacted] office location as [redacted] New Jersey. In pertinent part, the MSA states:

2. SERVICES

a. *In General.* [redacted] may, from time-to-time, contract with Employer for services ("the Services") to be performed by Employer's employees (the "Temporary Employee(s)"). To request such Services, the [redacted] shall issue requirement request, which may be modified, canceled, or amended in its sole discretion. The requirement request will set forth certain requirements for the Services to be performed including, but not limited to, the number of Temporary Employee(s) needed to perform the Services, the types of Services to be performed, and whether the Services to be performed constitute exempt or nonexempt duties under applicable wage and hour laws.

* * *

b. *Acceptance of Temporary Employees.* A written approval must be issued and accepted by Employer and [redacted] before any Temporary Employee can begin providing Services.

* * *

3. STATUS OF EMPLOYER AND TEMPORARY EMPLOYEES

* * *

b. Except as provided in this Agreement and/or required by law, all Temporary Employees shall remain subject to the supervision and control of Employer.

- c. For purposes of applicable Connecticut and other state workers' compensation law, [REDACTED] shall be the "Special Employer" and have rights of control and supervision over the Temporary Employees and rights to determine the manner and means by which the Temporary Employees perform their duties for [REDACTED]. Employer shall be the "General Employer" and hereby specifically reserves the right to reassign or terminate the employment of any Temporary Employee upon written notice to [REDACTED], in the event any such Temporary Employee fails to comply with any of his/her obligations to Employer or [REDACTED].

4. OBLIGATIONS OF [REDACTED]

[REDACTED] agrees to comply with all applicable occupational safety and health laws and regulations to the extent application to such Temporary Employees. [REDACTED] maintains full control of its work sites, including direction of the project that Temporary Employees will perform work for.

The petitioner provided a letter dated July 10, 2014 from [REDACTED] Project Engagement Manager of [REDACTED] confirming that the beneficiary has been selected "to provide consulting services for [REDACTED] on the project [REDACTED] effective October 1, 2014. [REDACTED] is targeted to help the business track with information, process and any type of internal or external relationships." This letter states that [REDACTED] "ha[s] entered into a Consulting Agreement for the services of [the beneficiary] with [the petitioner], who will be her principal employer. During her contract assignment, she will be working at the location of [REDACTED] CT." The letter describes the beneficiary's job duties as follows:

- Requirements gathering and technology assessments. Complex Analysis of Business systems science, engineering and other data processing to implement and improve software by functional and Integration testing. Supporting the business users by troubleshooting and fixing the issues in the software systems. Gap analysis and documentation of design efforts.
- Working with software and tools such as C#, ASP.net, XML, MS SQL Server, Microsoft Office Suite
- Research, evaluate and present alternative methods/solutions in the relevant technologies to improve computer programs and systems
- Develop, document and revise system procedures, test procedures, system work flows and quality standards

Of the minimum educational requirement for the position, the letter states that the "duties require theoretical and practical application of highly specialized knowledge, and at least a US Bachelor's degree."

The petitioner submitted its Business Plan dated July 14, 2014. The business plan explains that the company was incorporated on September 13, 2012 and has two officers: (1) [REDACTED] President, Secretary, and 100% shareholder of the company; and (2) [REDACTED], Chief Operating Officer (COO). The business plan states that "Mrs. [REDACTED] is in charge of the general administration, financial matters, properties, employees and operational strategic planning." Regarding Mr. [REDACTED] who "joined [the petitioner] in Feb[.] 2014 as its Chief Operating Officer," the business plan explains that he "is in charge of strategy execution, general management, business development and recruitment" and is also "providing consulting services to the existing client which is currently bringing in a revenue stream of \$15,520 per month." The business plan states that "[t]he Corporation's main customer will be the [REDACTED], a New Jersey based Technology company dedicated to the development of new products in the web and mobile platforms." The business plan explains that the petitioner's "clients require IT consulting services in the field of design, development, test, maintain and continuous support of the IT systems."

The Director denied the petition, determining that the petitioner had not established that there was specialty-occupation work available at the time the Form I-129 was filed. The Director observed that the MSA and the end-client letter from [REDACTED] were both dated July 10, 2014, after the Form I-129 was filed. The Director also determined that the evidence did not establish the beneficiary's qualifications for the proffered position.

On appeal, the petitioner asserted that, despite the dates of the formal documentation from [REDACTED], work was available for the beneficiary at the time of filing through a previous oral agreement with [REDACTED]. Specifically, the petitioner asserted that [REDACTED] July 10, 2014 letter "address[ed] [REDACTED] and [the petitioner's] long standing relationship that since February 11, 2014, [the petitioner] has been constantly providing consulting services to [REDACTED]". The petitioner further asserted that, prior to filing, the petitioner has been providing services to [REDACTED] "under an oral agreement" and that "work has always been available to [the petitioner] under its oral agreement with [REDACTED]". The petitioner submitted copies of previously submitted evidence in support of the appeal.

With respect to the beneficiary's qualifications, the petitioner submitted new evaluations from Dr. [REDACTED] and Dr. [REDACTED] both from the Department of Biotechnical and Clinical Laboratory Sciences, [REDACTED]

II. NON-SPECULATIVE EMPLOYMENT AT TIME OF FILING

We will first address the Director's ground for denial, particularly, whether there was specialty occupation work available at the time the Form I-129 was filed.

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has secured H-1B caliber work for the beneficiary for the entire period of

employment requested in the petition.² In addition, 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.

In this matter, the petitioner asserted that the beneficiary would be assigned to work for the end-client [REDACTED] on its [REDACTED] project. The petitioner also asserted that the beneficiary's work would be performed "in-house" at the petitioner's business premises located in [REDACTED], Connecticut. However, the evidence of record does not contain credible, objective evidence corroborating the petitioner's assertions. For instance, the petitioner has not specifically explained how the beneficiary would provide her services to [REDACTED], whose office is in New Jersey, while physically working from the petitioner's business premises in Connecticut.

In addition, the evidence of record is insufficient to establish that the petitioner and [REDACTED] have a valid contractual relationship for the beneficiary's services that existed at the time of filing, and that will remain valid until July 31, 2017. As the Director duly noted, the MSA and the letter from

² The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . . earlier than 6 months before the date of **actual need** for the beneficiary's services or training. . ."

██████████ were both dated July 2014, *after* the instant petition was filed in April 2014.³ However, even if the MSA and the letter were entered into and made effective on or before the date of filing, we still could not find these documents to constitute credible evidence of the beneficiary's contractual assignment to ██████████. In particular, the MSA states that "██████████ *may, from time-to-time, contract with Employer for services ("the Services") to be performed by Employer's employees (emphasis added).*" The conditional term "may" does not denote that there is, in fact, an actual contractual relationship, and the otherwise unspecified term "from time-to-time" does not indicate the existence of an ongoing relationship would cover the entire validity period requested in the instant petition.

Significantly, the MSA states that "[t]o request such Services, the ██████████ shall issue requirement request . . . [which] will set forth certain requirements for the Services to be performed." The letter from ██████████ likewise states that "we have entered into a Consulting Agreement for the services of [the beneficiary]." However, the petitioner did not submit a requirement request, consulting agreement, or other similar documentation specifically contracting out the beneficiary's services and setting forth the requirements and conditions for her services. 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)).

Furthermore, the evidence of record is insufficient to establish that ██████████ is a bona fide project of ██████████ and consequently, that the beneficiary would be employed to perform services for this project. For example, there is no objective documentation corroborating the existence and/or development of the claimed ██████████ project (e.g., invoices, product brochures, and purchase orders). The record does not contain a detailed explanation about the ██████████ project. The letter from ██████████ vaguely states that "██████████ is targeted to help the business track with information, process and any type of internal or external relationships" and that "██████████ is constantly developing new apps, solutions and add-ons." The letter does not provide any other information about the ██████████ project, such as the nature of the product(s) being developed, the resources involved, timelines for development, and the beneficiary's specific role in this project.

The evidence of record is also unclear as to what the beneficiary's actual tasks and role would be at ██████████. The letter from ██████████ describes the beneficiary's job duties in broad and undefined terms, such as "[s]upporting the business users by troubleshooting and fixing the issues in the

³ On appeal, the petitioner attempted to explain the lack of a timely, formal written agreement by asserting that it and ██████████ had a pre-existing, "long standing relationship [] since February 11, 2014" based upon an "oral agreement." However, despite the petitioner's assertion that Mr. ██████████ letter addressed this "long standing relationship," Mr. ██████████ letter did not contain any such statements. Merely asserting that there is an "oral agreement," without more, is insufficient to establish the existence and terms of the claimed oral agreement. We also cannot see how a contractual relationship that purportedly began in February 11, 2014 can be considered "long standing."

software systems." The letter does not explain who these "business users" would be, what types of "issues" the beneficiary would be responsible for supporting, what "software systems" would be involved, what specific duties the beneficiary would perform, and how these duties relate to the [REDACTED] project. The petitioner's descriptions of the proffered job duties are similarly vague, and at times inconsistent with the duties as described in the [REDACTED] letter.⁴ To illustrate, the petitioner asserts that 40% the beneficiary's time will include "coordinating and conduction [*sic*] web-based user training to help clients understand the solutions offered by company and to help client's businesses reap the real business benefits intended by software solutions." Not only did the petitioner fail to identify who and what these "clients" and "solutions" would be, but [REDACTED] letter does not list any such training duties for the beneficiary.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Overall, the record of proceeding lacks credible and sufficient evidence establishing that a contractual relationship exists between the petitioner and [REDACTED] for the beneficiary's services. The record does not demonstrate that [REDACTED] is a bona fide project that exists and is being developed by [REDACTED] such that the beneficiary would be performing services for this project. The record is also unclear as to what the beneficiary's actual tasks and job responsibilities would be at [REDACTED]. We thus conclude that the record of proceeding provides an inadequate factual basis for us to determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative H-1B caliber work for the beneficiary for the entire period of employment requested in the petition. For this reason, the petition will be denied.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

Beyond the decision of the Director, we find that the evidence does not establish that the petitioner meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the evidence does not establish that the petitioner will have "an employer-employee relationship with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

⁴ While the petitioner-provided job duties are generally outside the scope of consideration for establishing whether the position qualifies as a specialty occupation, we are nonetheless considering the petitioner's descriptions of the duties here for the purpose of highlighting the inconsistencies in the record. See *Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000) (stating that the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination where the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company).

A. The Law

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

B. Discussion

The record is not persuasive in establishing that the petitioner 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 former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term

"United States employer" to be even more restrictive than the common law agency definition.⁵

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used

⁵ 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).

⁶ 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))).

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).⁷

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to

⁷ 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).

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." As discussed above, the petitioner did not submit the requirement request, consulting agreement, or other similar documentation which outline in detail the terms and conditions of the beneficiary's assignment to [REDACTED]

It is important to note the MSA's provision which states: "For purposes of applicable Connecticut and other state workers' compensation law, [REDACTED] shall be the 'Special Employer' and have rights of control and supervision over the Temporary Employees and rights to determine the manner and means by which the Temporary Employees perform their duties for [REDACTED]" The MSA further states that [REDACTED] maintains full control of its work sites, including direction of the project that Temporary Employees will perform work for." Thus, the language in the MSA indicates that the key element in this matter, which is who exercises control and supervision over the beneficiary's work, would be exercised by [REDACTED] rather than the petitioner.

Although the petitioner asserts that the beneficiary would be directly supervised by Mr. [REDACTED] the petitioner has not reconciled this assertion with the language in the MSA indicating that [REDACTED] would have "full control" and supervision of the beneficiary. Moreover, the petitioner has not sufficiently explained and documented the manner in which Mr. [REDACTED] would directly supervise the beneficiary's "day-to-day duties." We observe that Mr. [REDACTED] is "providing consulting services to the existing client which is currently bringing in a revenue stream of \$15,520 per month," in addition to being "in charge of [the petitioner's] strategy execution, general management, business development and recruitment." The petitioner has not explained and documented how Mr. [REDACTED] would perform all these duties, and that his current "consulting services" allow for the additional duty of supervising the beneficiary.

Thus, even if the petitioner were to establish that it provides the beneficiary's salary and other employment benefits, and that it has the right to hire and fire the beneficiary, other incidents of the relationship, i.e., who will control and direct the work of the beneficiary, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. On the balance, we cannot find that the petitioner qualifies as a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee," as defined by 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition must be denied.

IV. SPECIALTY OCCUPATION

Also beyond the Director's decision, we find that the evidence does not establish that the proffered position qualifies for classification as a specialty occupation.

A. The Law

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 at 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

B. Discussion

A crucial aspect of this matter is whether the duties of the proffered position have been adequately described, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed. See *id.*, 201 F.3d at 387-388.

Here, the record of proceeding in this case is devoid of sufficient information from the end-client regarding the job duties to be performed by the beneficiary for that company. As discussed previously, the petitioner did not submit the requirement request, consulting agreement, or other similar documentation which outline in detail the terms and conditions of the beneficiary's employment. Also as previously discussed, the letter from [REDACTED] describes the beneficiary's duties in overly broad and generalized terms that do not convey the actual day-to-day tasks she would perform. Nor does the letter from [REDACTED] describe how the proffered duties require the theoretical and practical application of a body of highly specialized knowledge. The letter from [REDACTED] simply states that "[t]hese duties require theoretical and practical application of highly specialized knowledge, and at least a US Bachelor's degree." The letter does not further specify what bodies of highly specialized knowledge and the type of bachelor's degree required, and why.

We also note that the petitioner's descriptions of the beneficiary's job duties are similarly broad and at times inconsistent with the duties listed in [REDACTED] letter.⁸ The petitioner has not provided an explanation, corroborated by objective evidence, reconciling the inconsistencies. Again, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Overall, the evidence of record does not adequately convey the substantive nature of the work to be performed by the beneficiary. The failure to establish the substantive nature of the work to be performed by the beneficiary therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the evidence does not satisfy 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.

We note that even if the petitioner were able to establish the substantive nature of the work to be performed by the beneficiary, we still could not find that the proffered position qualifies as a specialty occupation. That is because the letter from [REDACTED] does not specify the type of bachelor's degree required, i.e., whether the required bachelor's degree must be from a specific discipline.⁹ The claim that a bachelor's degree is a sufficient minimum requirement for entry into

⁸ See footnote 5 explaining that we are considering the petitioner's descriptions of the proffered duties for the purpose of highlighting the inconsistencies in the record.

⁹ While the petitioner asserts that the proffered position requires at a minimum "a bachelor's degree in a specialty field of technology or computer science," the petitioner has not claimed nor submitted evidence to

the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. The evidence must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility.").

V. BENEFICIARY QUALIFICATIONS

Finally, we turn to the Director's finding that the beneficiary would not be qualified to perform the duties of the proffered position.

However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the evidence does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent, so as to qualify for classification as a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that the petitioner has not adequately explained and documented how the beneficiary's Biotechnology degrees are related to the proffered position, which the petitioner characterizes as "a specialty occupation as it requires computer programming and analysis."¹⁰ The petitioner's explanation that biotechnology and the proffered position both involve "a lot of mathematical analysis and technology," without more, is insufficient. Furthermore, the evaluations the petitioner submitted on appeal are not entitled to probative weight, as the petitioner has not established that Drs. [REDACTED] and [REDACTED] can reasonably be considered "experts" or are otherwise qualified to render advisory opinions about the proffered position.

We may, in our discretion, use advisory opinion statements submitted by the petitioner as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

establish that [REDACTED] shares the same requirement for the proffered position. Again, we note that the petitioner-provided job duties are generally outside the scope of consideration for establishing whether the position qualifies as a specialty occupation. *See Defensor v. Meissner*, 201 F.3d at 387-388. Furthermore, if the proffered position could be satisfied by a degree with a generalized title, such as "technology," without further specification, the proffered position would not qualify as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

¹⁰ The petitioner's business plan also states that its "clients require IT consulting services in the field of design, development, test, maintain and continuous support of the IT systems."

VI. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that 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 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.¹¹ 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.

¹¹ As the identified grounds of ineligibility are dispositive of the petitioner's appeal, we need not address any additional issues in the record of proceeding.