



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF MVPT-, LLC

DATE: OCT. 8, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a software development and consulting services company, seeks to employ the Beneficiary as a senior software developer and classify him as a nonimmigrant worker in a specialty occupation. See 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding that the evidence of record did not establish that (1) the Petitioner would be a “United States employer” having an “employer-employee relationship” with the Beneficiary, and (2) the proffered position qualifies as a specialty occupation.

The record of proceeding before us 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; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director’s bases for denying this petition.¹ Accordingly, the appeal will be dismissed.

I. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the evidence of record establishes that the Petitioner will be a “United States employer” having “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

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

¹ The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989)).

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

“United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

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

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

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 a foreign national 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 foreign nationals as H-1B temporary “employees.” 8 C.F.R. §§ 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the legacy Immigration and Naturalization Service (“INS”) nor U.S. Citizenship and Immigration Services (“USCIS”) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are

undefined.

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

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

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

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

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or

² While the *Darden* court considered only the definition of “employee” under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(6), and did not address the definition of “employer,” courts have generally refused to extend the common law agency definition to ERISA’s use of employer because “the definition of ‘employer’ in ERISA, unlike the definition of ‘employee,’ clearly indicates legislative intent to extend the definition beyond the traditional common law definition.” See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff’d*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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“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 318-319.³

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

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. 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,

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

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

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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, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

On the Form I-129, the Petitioner stated that the Beneficiary would provide his services to its offsite client, [REDACTED] California. The Petitioner provided a single work location on the Form I-129: [REDACTED], California, which corresponds to [REDACTED] claimed business location.⁵ The Petitioner also submitted a letter dated March 12, 2014, signed by [REDACTED], the president of [REDACTED] in which [REDACTED] listed the duties of the proffered position, and stated that the Beneficiary's "duties will be performed *only* at [its] work site located at [REDACTED] CA – [REDACTED] (Emphasis added.).

In the RFE letter, the Director informed the Petitioner that the end-client's business address was a single-family residence⁶ and requested, among others, additional evidence demonstrating its relationship with the end-client, and how the Beneficiary would perform his duties at the end-client's residential address. The Petitioner replied by changing the work location. In contrast to the claims made on the Form I-129 and in [REDACTED] letter, the Petitioner claimed that the Beneficiary would now be performing his duties at the Petitioner's [REDACTED] California location, and submitted an unsigned letter on [REDACTED] letterhead, dated March 5, 2014, stating that the Beneficiary will be working "*only* at the work site of [the Petitioner], located at [REDACTED] CA [REDACTED] (Emphasis added.). The Petitioner did not explain the inconsistency, and did not explain why it did not submit this letter when it filed the petition. The Petitioner also submitted a letter written to the Beneficiary dated March 3, 2014 making a similar assertion. Again, the Petitioner did not explain this inconsistency or why it did not submit this letter when it filed the

⁵ As noted by the Director, the LCA was certified for work at two locations: (1) the [REDACTED] address in [REDACTED] California; and (2) the Petitioner's [REDACTED] location in [REDACTED] California. However, as noted, the Form I-129 listed only the [REDACTED] California location, and the supporting documentation contained the explicit claim that the Beneficiary's work would "only" be performed at the [REDACTED] California worksite.

⁶ Publicly-available mapping services on the Internet indicate clearly that the end-client's address is a single-family residence, and the Petitioner does not claim otherwise.

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petition. 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* at 591. Furthermore, as the March 5, 2014 letter from the end-client was not signed, it carries diminished evidentiary value.

However, even if these primary evidentiary deficiencies were not present, we would still find that the evidence of record does not demonstrate the existence of an employer-employee relationship between the Petitioner and the Beneficiary due to the additional inconsistencies we have identified.

We first note that on the Form I-129, the Petitioner stated that it is a single-employee company. However, in response to the Director's RFE letter, the Petitioner submitted an organizational chart indicating that the Petitioner employs at least four individuals (excluding the Beneficiary) as well as a team of recruiters. The chart does not indicate how many recruiters are on the recruiting team. Again, the Petitioner provides no explanation for the inconsistency. As stated above, 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. *Id* at 591-92. 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* at 591. Furthermore, on its 2014 Form 1040, Schedule C that it submitted on appeal, the Petitioner stated that it paid \$64,595 in wages in 2014. This wage amount does not support the Petitioner's new claim that it employs four individuals and a team of recruiters. In addition, the evidence of record does not contain any pay stubs or Forms W-2 it may have issued to its employees.

Moreover, if the information indicated on the Petitioner's organizational chart is correct, then the Petitioner has provided inaccurate information on the Form I-129, which could be grounds for denial. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial.⁷ See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1).

If we accept the Petitioner's initial claim to be a single-employee company, we find that it provides no insight into how, as such a single-employee company, it would control the Beneficiary's work at the end-client's location on a daily basis. Furthermore, as noted above, the end-client's business address is a single-family residence, and the Petitioner does not provide a meaningful and detailed explanation as to how it would control the Beneficiary's work as he performs his duties at this single-family residence located in a residential subdivision. 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'l Comm'r 1972)).

⁷ The Petitioner's new claim that the Beneficiary would "only" work at the Petitioner's [redacted] California location would also render the off-site employment location indicated on the petition inaccurate.

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The record also contains a February 10, 2014 master services agreement (MSA) executed between the Petitioner and [REDACTED]. On appeal, the Petitioner further submitted a purchase order and a subcontractor services agreement executed pursuant to the MSA between [REDACTED] and the Petitioner on February 10, 2014. Again, the Petitioner provides no explanation as to why it did not submit these documents at the time it filed the petition. Nonetheless, these agreements do not establish the requisite control. The agreements do not discuss the scope of the Petitioner's control over the Beneficiary's work, other than to note that the Petitioner will be responsible for fees, salaries, taxes and other compensations required by law.⁸ Without more, the language of the master service agreement provides no insight to specifics of the control the Petitioner would have over the Beneficiary.

We acknowledge the Petitioner's repeated claims that it will have control over the Beneficiary. However, the evidence of record does not establish that the Petitioner would exercise control over the Beneficiary's employment. The generalized assertions regarding control contained in the record of proceeding lack any degree of specificity, and they do not specifically discuss, in probative detail, the degree of supervision, direction, or control that he would receive from a single-employee entity. They are not sufficient to establish that the Petitioner would supervise or otherwise control the work of the Beneficiary. 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. Similarly, without documentary evidence to support the claim, the assertions of counsel will not satisfy the Petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For all of these reasons, the evidence of record does not demonstrate the requisite employer-employee relationship between the Petitioner and the Beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control a foreign national 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 foreign national Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

The evidence of record, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim,

⁸ The Petitioner's claims that it would pay the beneficiary's salary are noted, and the method of payment is a factor to be considered. However, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. *See Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Based on the tests outlined above, the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the Beneficiary as an H-1B temporary “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Thus, we agree with the director’s decision that the Petitioner has not demonstrated that it will have an employer-employee relationship with the Beneficiary.

II. SPECIALTY OCCUPATION

The second issue is whether the evidence of record has demonstrated by a preponderance of the evidence that the Petitioner will employ the Beneficiary in a specialty occupation position.

A. Legal Framework

For an H-1B petition to be granted, the Petitioner must provide sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the Beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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;

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- (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 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 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified foreign nationals 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 foreign national, 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.

B. The Proffered Position

In the Form I-129, the Petitioner indicated that it wishes to employ the Beneficiary as a senior software developer on a full-time basis. In the support letter, the Petitioner provided the following information regarding the duties of the proffered position:

[The Beneficiary] will develop and program software systems using various hardware and operating systems. This will include converting symbolic statements of scientific, engineering other technical problem formulations and administrative data to detailed logical flow charts for coding into computer language. He will develop and write computer programs to store, locate, and retrieve specific documents, data, and information, in addition to developing or modifying restart procedures and writing macros and sub-routines to be used by other programming personnel.

Using his knowledge of software development, program construction, distributed processing and familiarity of debugging tools, [the Beneficiary] will assist in analyzing business procedures and problems to redefine data and convert them into programmable forms of EDP, along with planning and preparing technical reports, memoranda, and instructional manuals to document program development.

The Petitioner further stated that the Beneficiary "may also be called upon" to perform the following duties:⁹

- Developing and programming computer software applications using various software and interface with the technical staff in the complex programming needs and document modification concerning the systems software; - 30%
- Responsible for improvements in software computer utilization and determine necessity for modifications; -10%
- Reviewing software programs for compliance with company standards and requirements and assisting in identifying deficiencies of computer runs and perform specialized programming assignments; -5%
- Developing and enhancing the software systems for wider applications and customize it for specific requirements; -5%
- Using RDBMS to log system change orders and analyze, develop and implement new applications with GUI and analyze software requirements to determine feasibility of design within time and cost constraints; -15%

⁹ The Petitioner did not indicate the likelihood with which the Beneficiary "could" be "called upon" to perform these duties. The Petitioner therefore has not established the probative value of this list of possible duties and tasks, and we consequently decline to assign it any significant evidentiary weight.

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- Identifying deficiencies,, troubleshooting problems and supporting user needs with professional knowledge for test planning, defect tracing and provide assistance in sue of RDBMS; -10%
- Analysis and design of system which includes Preparation of Process Flow Diagrams, Entity Relationship Diagrams, File design, Program Specification and Design Document; -10%
- Database and application analysis/ design logical and physical database; -5%
- Interacting with other technical staff in researching and interpreting technical data; -5%
- Assisting as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions. -5%

In support of the petition, the Petitioner also submitted a letter from its end-client [REDACTED] in which the claimed end-client stated the Beneficiary will be responsible for the following duties:

- Providing Enterprise Application Integration Architecture and detailed design of the systems.
- Install and Configure TIBCO product suite including TRA, Business Works, Administrator, ADB Adapter, File Adapter and build Frameworks to seamlessly integrate applications in the Enterprise Service Bus.
- Mentor the team by providing required knowledge and skills to build integration applications.
- Install and configure adapters to build communication mechanism between legacy applications.
- Use TIBCO Business Events to build complex event processing applications based on business critical rules.
- Design and development of middleware applications using SOA and Rendezvous in TIBCO Business Works.
- Generate XML, XSD, and WSDL and SOAP messages for use in the SOA based applications for interfacing between trading partner applications.
- Work with various applications like SAP R/3 Interfaces, data base applications, webservices [sic], integration using various transport protocols, etc.
- Utilizing various protocols like SSL, AS2, PGP, Rosettanet, EDI, etc[.] in transmitting data to partner applications.
- Deploying [TIBCO] applications to UAT and QA Environments using [TIBCO] Administrator and Appmanage tools.
- Writing [TIBCO] Hawk rule bases to manage for event processing, alerting and monitoring purposes.
- Build RCV and EMS Scripts for use with development and troubleshooting. To use TIL Harness, SOAP UI, [incomplete in original].
- Performance tuning and Bench Marking for all the RV and SOA and Enterprise message Service based Applications.
- Server scaling and sizing recommendations and managing the Configurations across environments.

(b)(6)

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The end-client also stated that it requires a “[b]achelors in engineering in any major” for the position.

In the RFE response letter, the Petitioner provided duties similar to the ones provided by the end-client.

C. Analysis

Considering the totality of all of the Petitioner’s duty descriptions, we find that the evidence of record does not establish the depth, complexity, or level of specialization, or substantive aspects of the matters upon which the Petitioner claims that the Beneficiary will engage. Rather, the duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. For example, in its support letter, the Petitioner states that the Beneficiary will be “responsible for improvements,” or that he will “[assist] in identifying deficiencies.” However, these statements provide no insight into the Beneficiary’s actual tasks. The abstract nature of the proposed duties is further illustrated by the Petitioner’s statement that the Beneficiary will be “interacting with other technical staff in researching and interpreting technical data” and “assisting as part of the team to resolve technical problems.” The Petitioner does not explain the Beneficiary’s actual tasks in “interacting” and “assisting.” Similarly, the end-client also describes the duties in generalized and abstract terms. For example [REDACTED] the claimed end-client, states that the Beneficiary will “[m]entor the team by providing required knowledge and skills.” The end-client does not provide details regarding what mentoring activities involve, how often these mentoring activities would take place, and how the Beneficiary would implement the mentoring activities. Furthermore, as we will discuss later, these mentoring duties contradict the Petitioner’s Level I, entry-level, designation of the proffered position. Again, the generalized nature of the duties is exemplified by the end-client’s statement that the Beneficiary’s duties include “[w]ork[ing] with various applications,” “[u]tilizing various protocols,” “[p]erformance tuning,” “[s]erver scaling and sizing recommendations,” and “managing the Configuration across environments.” These generalized statements fail to provide any insight into the nature of proffered position and the actual tasks the Beneficiary would perform on a day-to-day basis. Notably, the Petitioner does not explain how the performance of the proffered duties, as described in the record, would require the attainment of a bachelor’s or higher degree in a specific specialty, or its equivalent.

In the instant case, neither the Petitioner nor the end-client has described the proffered position with sufficient detail to determine that the minimum requirements are a bachelor’s degree in a specialized field of study. It is incumbent on the Petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor’s degree in a specific specialty, or its equivalent. When “any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible” for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972).

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Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The Petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a Petitioner may be considered as a component of the nature of the Petitioner's business, as the size impacts upon the duties of a particular position. In matters where a Petitioner's business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the Beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the Beneficiary will be relieved from performing non-qualifying duties. Here, the Petitioner claims to have a single employee, and the record of proceeding does not contain credible documentation as to how the Beneficiary will be relieved from performing non-qualifying duties.

Furthermore, any claims about the high-level duties of the proffered position are inherently contradictory to the level of responsibility conveyed by the Level I wage level specified in the LCA submitted in support of the petition. The LCA designated the wage level for the proffered position as a Level I (entry-level) position, which corresponds to "job offers for beginning level employees who have only a basic understanding of the occupation . . . [and who] perform routine tasks that require limited, if any, exercise of judgment."¹⁰ Considering that the LCA is certified for a Level I entry-level position, we must further question the veracity of the Petitioner's assertion that the proffered position is a "senior" software developer.¹¹

¹⁰ See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹¹ As stated above, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position, which requires employees to perform routine tasks that require limited, if any, exercise of judgment. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Therefore, it does not appear that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level III or Level IV position, requiring a significantly higher prevailing wage. The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines any claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV

Finally, the nature and scope of the end-client's business operations are unclear. As noted above, the end-client's business address is a single-family home located in a residential subdivision. The end-client's website provides limited information regarding its operations and customers. Although the Petitioner stated on the Form I-129 that the Beneficiary would work off-site at the end-client's location, when asked by the Director to explain how the Beneficiary would provide services at such a residential address, the Petitioner changed the work location instead of providing the requested explanation. These discrepancies undermine the Petitioner's credibility. Again, 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. at 592. We find the Petitioner's response insufficient to demonstrate that it has a specialty occupation employment for the Beneficiary.

Overall, the above deficiencies and discrepancies in the record preclude a finding that the proffered position qualifies as a specialty occupation.

III. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons.¹² 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.

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wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

¹² As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.