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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 05 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, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AA) on appeal. The appeal will be dismissed.

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

The Director denied the petition, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; and (2) the proffered position qualifies for classification as a specialty occupation. After granting the petitioner's motion to reopen and reconsider, the Director again denied the petition on the same grounds. The petitioner now files this appeal, asserting that the Director's bases for denial were erroneous and that the submitted evidence was sufficient.

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

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner described itself on the Form I-129 as a two-employee "Advance software development and consulting" business established in . The petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a full-time QA Lead at a salary of $60,000. The petitioner listed its address on the Form I-129 as Illinois. The petitioner indicated that the beneficiary will work at an off-site address located at Missouri.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a QA Lead, and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1199, Computer Occupations, All Other" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level position. The petitioner indicated on the LCA that the beneficiary will be working at two locations: (1) Illinois; and (2)

Missouri.

In support of the petition, the petitioner submitted, *inter alia,* a letter, dated March 25, 2014 affirming its intent to employ the beneficiary in the position of QA Lead. The petitioner listed the duties of the proffered position as follows:

- Responsible for allocating tasks on daily basis, tracking progression of work and reporting while at Offshore as well as Onsite.
- Responsible in preparing Test Execution Plan, Check lists for Design and Execution, Test Summary reports per Iteration wise.
- Responsible in facilitating testing sessions for associates
- Experience in handling team with team size of 4-6.
- Provide assistance to team to ensure they are following testing and defect reporting processes.
- Participate in Walkthrough sessions for understanding Use Cases.

(Verbatim.)

In the same letter, the petitioner stated that the proffered position "qualifies as a specialty occupation because it requires theoretical and practical application of a body of highly specialized knowledge and 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 petitioner also stated that, despite the beneficiary's placement off-site, the petitioner "will maintain right to control over when, where, and how the Beneficiary performs the job through inbuilt mechanisms such as periodic status reports, timesheets, performance evaluation, off-site supervision using phone calls, reporting back to main office, or site visit by the Petitioner."

The Director issued an RFE instructing the petitioner to submit additional documentation. In response to the RFE, the petitioner submitted, *inter alia,* a letter, dated July 30, 2014, explaining that "[t]he beneficiary will be assigned to work on a project with located at MO. This assignment is conditional upon H1B approval." The petitioner further stated that "End client . . . has declined to provide any verification letter because the beneficiary is currently not assigned to work on this project, and this assignment is conditional upon H1B approval."

The petitioner submitted a letter from , dated March 1, 2014, stating that the petitioner "is a strategic partner of and supplies their I.T. consultants to for project assignment needs." The letter further states that "currently [is] in the process of locating 15+ additional I.T. consultants to work on I.T. projects by the end of 2014." The letter explains that "do[es] not issue specific verification letters for consultants who are not currently working on project assignments with ," and requests that this letter serve as "confirmation that contract for IT services with [the petitioner] is ongoing and long-term and will be using the services of [the petitioner's] employees as consultants for various projects." It

further states: "The projects that will be assigned to these consultants are highly complicated and needs [*sic*] a minimum education of a Bachelor's degree or equivalent to perform the duties."

The petitioner submitted a Master Services Agreement (MSA) between and the petitioner ("Subcontractor") made on June 22, 2007. Under "Scope of Services," it states: "The Subcontractor shall use its best endeavors to provide to the computer consulting services . . . as described in the Statement of Work in the form attached as Appendix A."

The petitioner submitted its federal Employer's Quarterly Federal Tax Returns (Forms 941) and Quarterly Contribution and Wage Reports for the State of Missouri. These forms show that the petitioner has had between zero to one paid employee or worker during the last quarter of 2013, and the first and second quarters of 2014.

The petitioner submitted its Employment Agreement, dated March 11, 2014, with the beneficiary. Under "Employee's Duties," it states: "As a QA Lead, [the beneficiary] will render all duties as are communicated to [him] by [the petitioner]. [The beneficiary's] role and responsibilities will be as discussed during [his] interview."

The petitioner submitted information pertaining to the company's claimed performance review process.

The petitioner submitted its organizational chart which identifies twelve individuals in various positions, in addition to several vacant positions.

The Director denied the petition, concluding that the evidence of record does not demonstrate that the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary. The Director also concluded that the evidence of record was insufficient to establish that the proffered position qualifies as a specialty occupation. The Director specifically observed the lack of a Statement of Work (SOW) from the end-client.

The petitioner subsequently filed a motion to reopen and reconsider. On motion, the petitioner expressed that "a SOW does not yet exist as Beneficiary is not yet working for [the petitioner]. An SOW will be available upon H1B approval."

On motion, the petitioner submitted, *inter alia,* a new Employment Agreement with the beneficiary, also effective March 11, 2014, that lists the following job duties:

- Design test plans, scenarios, scripts, or procedures. Test system modifications to prepare for implementation.
- Develop testing programs that addresses areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retreats, or usability.
- Document software defects, using a bug tracking system, and report defects to software developers.

- Identify, analyze, and document problems with program function, output, online screen, or content.
- Monitor bug resolution efforts and track successes. Create or maintain databases of known test defects.
- Plan test schedules or strategies in accordance with project scope of delivery dates.
- Participate in product design reviews to provide input on functional requirements, product designs, schedules, or potential problems.
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.

The petitioner submitted a letter from the claimed end-client, dated August 20, 2014, certifying that "is one of the primary vendors and implementation partners for IT projects" and that has been providing such services "since several years."

The petitioner submitted a letter, dated September 2, 2014, ostensibly from advising that has "contracted with [the petitioner] to provide the services of [the beneficiary], an employee of [the petitioner], as a Test Lead for our customer " The letter lists the same job duties for the beneficiary as those listed in the newly submitted Employment Agreement between him and the petitioner. The letter elaborates that the beneficiary's services will be performed at customer's facility," and that "[t]he project has the potential duration of three years, and the project can be extended indefinitely." In addition, the letter states that "minimum requirement for this [proffered] position is a comprehensive understanding of computer systems and programming by virtue of a Bachelor's Degree in Engineering or related field."

The petitioner submitted a new Master Services Agreement (MSA) made with on September 4, 2014.[1] Identical to the other MSA, the new MSA states under "Scope of Services" that "[t]he Subcontractor shall use its best endeavors to provide to the computer consulting services . . . as described in the Statement of Work in the form attached as Appendix A."

The petitioner submitted a "sample SOW as well as the SOWs for two other employees." All three documents identically explain that "[t]his Statement of Work forms part of the Master Services Agreement dated July 5th, 2006 ('MSA') made between and the Subcontractor," and that "[t]his Statement of Work is an authorization for providing information technology services." The SOW for was signed by both the petitioner and on March 18, 2014, authorizing Mr. to provide services for the client from March 3, 2014 through June 20, 2014. The SOW for was signed by both the petitioner and on March 18, 2014, authorizing Mr. to provide services for the client from March 3, 2014 through July 3, 2014.

[1] This new MSA bears an original signature by the petitioner's president, and a photocopied signature by president. Both signatures are dated September 4, 2014.

Finally, the petitioner submitted a new organizational chart, which identifies the beneficiary in the position of "Test Lead."

The Director granted the combined motion, and denied the petition on the same grounds, i.e., that the evidence does not demonstrate that the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary, and that the proffered position qualifies as a specialty occupation.

The petitioner now files the instant appeal. On appeal, the petitioner avers that the previously submitted evidence was sufficient. With respect to the lack of documentation between the end-client and the petitioner asserts that "the contracts between the vendor, , and the vendor, are confidential and therefore cannot be obtained."

II. EMPLOYER-EMPLOYEE RELATIONSHIP

The first issue to be discussed is whether the petitioner will have an employer-employee relationship with the beneficiary.

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. Analysis

In this matter, the Director determined that the evidence of record is insufficient to establish that the petitioner is a "United States employer" who will have "an employer-employee relationship" with the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

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.[2]

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

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

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

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

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

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 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, we agree with the Director 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."

In the instant matter, the petitioner asserts that the beneficiary will work off-site for the end-client, [redacted] located at [redacted] Missouri. However, the record of proceeding does not contain sufficient, credible documentation confirming and describing the circumstances of the beneficiary's claimed assignment there. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

The record does not contain documentation issued by the end-client specifically regarding the beneficiary. The only document from the end-client is a letter dated August 20, 2014 certifying that [redacted] has been one of [redacted] primary vendors for IT services; this letter does not mention the beneficiary, the petitioner, or the proffered position. Notably, the petitioner states that the end-client "has declined to provide any verification letter because the beneficiary is currently not assigned to work on this project." The petitioner also asserts that "the contracts between the vendor, [redacted] and the vendor, [redacted] are confidential and therefore cannot be obtained."[5] The lack of documentation from the end-client about the beneficiary,

[5] The claim that documentation is "confidential" does not provide a blanket excuse for the lack of documentation that is material to the requested benefit. Although a petitioner may always refuse to submit information it deems to be confidential, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

however, raises doubts as to whether the beneficiary would actually work at as claimed.

In addition, the record does not contain sufficient, credible documentation from the vendor, confirming and describing the beneficiary's claimed assignment at client, While the petitioner submitted the MSA between its company and entered into on June 22, 2007, and a new MSA entered into on September 4, 2014, these agreements are inadequate to establish what work, if any, will be assigned to the beneficiary. These agreements contain no references to the beneficiary individually, nor do they contain detailed descriptions of the work to be performed. They identically state that the petitioner "shall use its best endeavors to provide to the computer consulting services . . . as described in the Statement of Work in the form attached as Appendix A." However, the petitioner has not submitted a SOW for the beneficiary. Without the actual Statement of Work, which, according to the MSA, describes the services to be performed, the evidence is insufficient to establish the beneficiary's assignment to and the circumstances of his assignment, if any.

The petitioner claims that "a SOW does not yet exist [for the] Beneficiary as [the] Beneficiary is not yet working for [the petitioner]." The petitioner relies upon the SOWs for two of its other "employees," to establish the likelihood that "[a] SOW will be available [for the beneficiary] upon H1B approval." However, we must question the credibility of the SOWs for and hence, the credibility of the petitioner's claims. First, we note that neither individual appears on the petitioner's recent federal and state quarterly tax returns. As such, it is not evident that they are actually employed by the petitioner pursuant to these SOWs. Moreover, the petitioner has not explained how it could have entered into these contracts for work to start on March 3, 2014, when the petitioner and did not sign the SOW until March 18, 2014.[6] Additionally, the SOWs both reference a MSA dated July 5, 2006, whereas the petitioner has not submitted an MSA dated July 5, 2006. The lack of a SOW for the beneficiary, as well as the concerns surrounding the SOWs for the petitioner's other claimed employees, further raises questions regarding the beneficiary's claimed assignment to

Furthermore, the petitioner submitted a letter, dated September 2, 2014, ostensibly from stating that has "contracted with [the petitioner] to provide the services of [the beneficiary], an employee of [the petitioner], as a Test Lead for our customer " However, the authenticity and credibility of this letter is also in question. This letter was not written on company letterhead. Moreover, while this letter specifically states that and the petitioner have contracted for the beneficiary's services, the previously submitted letter from (which was prepared on company letterhead) states, to the contrary, that "do[es] not issue specific verification letters for consultants who are not currently working on project assignments with ." The petitioner has not submitted an explanation, corroborated by competent objective

[6] Even if these documents were credible, we observe that the contracted services are to be completed within a few months, whereas the petitioner is now requesting a validity period of approximately three years.

evidence, resolving this inconsistency. 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.*

Nor has the petitioner adequately described and documented the circumstances of beneficiary's claimed assignment at That is, the petitioner has not explained and documented *in detail* how the company would supervise and otherwise control the beneficiary's day-to-day work performed at the client's worksite, which is located in a different state.[7] Making conclusory statements such as the petitioner "will maintain right to control over when, where, and how the Beneficiary performs the job," without more, is insufficient. 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)). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the beneficiary is an employee. *Clackamas*, 538 U.S. at 450.

Here, it is important to note significant discrepancies regarding the petitioner's overall staffing and structure. According to the Form I-129, the petitioner has two employees. However, according to the petitioner's federal and state quarterly tax returns, the petitioner has had, at most, one paid employee or worker as of the date of filing.[8] The petitioner has not submitted an explanation, corroborated by competent objective evidence, resolving this inconsistency and establishing how the petitioner would exercise control over the beneficiary with such minimal staffing. 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 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.*

To confuse matters further, the petitioner's organizational charts identify at least twelve individuals (not including the beneficiary). The petitioner has not clarified the employment status of these

[7] While the petitioner indicated on the LCA that the beneficiary would also be working at the petitioner's business premises at Illinois, the petitioner has not explained what work the beneficiary would be performing at its own premises. The petitioner has only stated that the beneficiary "will be assigned to work on a project with "

[8] The petitioner's federal return reported zero employees in April 2014. However, the petitioner's state return reported one employee in April 2014.

twelve individuals, nor explained why none of them appear on the petitioner's federal and state quarterly tax returns.[9] More importantly, the petitioner's organizational charts both depict the beneficiary as being directly supervised by a senior manager ' Assuming *arguendo* that is the same individual as " ' as identified in the petitioner's SOW, we again observe that Mr. is not listed on the petitioner's recent federal and state quarterly tax returns. As such, it is not evident that Mr. is in fact employed by the petitioner and will supervise the beneficiary as depicted in the organizational charts. Furthermore, the SOW describes Mr. position and services to be provided as "programming and analysis." There is no indication that Mr. is authorized to perform any supervisory or managerial duties consistent with his title and role as depicted in the petitioner's organizational charts.[10] Additionally, the SOW lists Mr. anticipated end date at as June 20, 2014, and there is no evidence in the record establishing that this SOW has been extended or renewed. Overall, the evidence of record is unclear as to the petitioner's actual staffing, structure, and the manner in which the petitioner will purportedly exercise control over the beneficiary's work.

The evidence, 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). Based on the tests outlined above, the petitioner has not established that it qualifies as an "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). For this reason, the petition must be denied.

III. SPECIALTY OCCUPATION

We will now address whether the position proffered here qualifies for classification as a specialty occupation. 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. We find here that the evidence of record fails to establish that the proffered position qualifies for classification as a specialty occupation.

A. The Law

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

[9] The single paid employee or worker reported on the petitioner's recent quarterly tax returns is ' who does not appear on either organizational chart.

[10] According to the petitioner's organizational charts, Mr. is also the direct supervisor for However, their SOWs are identical with respect to their positions, services to be provided, and hourly rates.

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 meet one of the following criteria:

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

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

necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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. Analysis

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 at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the claimed end-client, [redacted] regarding the specific job duties to be performed by the

beneficiary for that company. The sole letter from does not address the beneficiary, the petitioner, or the proffered position. Without sufficient information from the end-client regarding the proposed duties, we cannot find that the petitioner has satisfied its burden of proof in establishing the substantive nature of the proffered position.

While petitioner-provided job duties and requirements are often outside the scope of consideration for establishing whether the position qualifies as a specialty occupation in cases such as this, we are considering the petitioner's descriptions of the duties here for the purpose of highlighting the inconsistencies in the evidence of record. More specifically, the petitioner initially listed the beneficiary's job duties as "QA Lead" to include leadership-type duties such as "allocating tasks," "handling team with team size of 4-6," and "[providing] assistance to team to ensure they are following testing and defect reporting processes." However, the petitioner also designated the proffered position as a Level I (entry level) position on the LCA.[11] In designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation that requires the beneficiary to only have a basic understanding of the occupation and perform routine tasks that require limited, if any, exercise of judgment. The designation of the proffered position as a Level I (entry) position is inconsistent with the petitioner's initial description of the proffered job duties. In addition, the job duties as initially listed by the petitioner are not included in the petitioner's subsequent list of job duties for the proffered position. These unresolved inconsistencies raise additional questions regarding the substantive nature of the proffered position. 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. at 591-92.

[11] DOL's "Prevailing Wage Determination Policy Guidance" defines a Level I wage rate is described as follows:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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.

As such, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the beneficiary, which 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 petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

Finally, 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 the proffered position qualifies for classification as a specialty occupation. As stated above, the sole letter from the end-client does not address the proffered position, and thus, does not establish what the end-client's minimum educational requirement is for the proffered position.

Moreover, the petitioner states, as does the letter from dated March 1, 2014, that the proffered position requires "a minimum education of a Bachelor's degree or equivalent to perform the duties," without further specifying whether the degree must be in any particular field(s). The other letter ostensibly from states that the "minimum requirement for this [proffered] position is a comprehensive understanding of computer systems and programming by virtue of a Bachelor's Degree in Engineering or related field." It is not clear which of these statements, if any, is representative of the end-client's minimum educational requirement for the proffered position.

If the proffered position can be satisfied by a general-purpose Bachelor's degree, then this further supports the conclusion that the proffered position does not qualify as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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 (Comm'r 1988) ("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."). While a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).

For all of the above reasons, the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation. The petition must be denied on this additional ground.

IV. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also find insufficient evidence to establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the petition will be denied.

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.[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. The petition is denied.

[12] As these issues are dispositive of the petitioner's appeal, we will not address any of the additional deficiencies we have identified on appeal.