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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 2 3 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) for review. The AAO reviewed the record of proceeding and finds that the petitioner has not established eligibility for the benefit sought. The director's decision will be affirmed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on December 10, 2012. In the Form I-129 visa petition, the petitioner describes itself as an enterprise with 60 employees that is engaged in software consulting, development and training that was established in 2004. In order to employ the beneficiary in what it designates as a computer system analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).[1]

The director found that the petitioner (1) failed to establish that it will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee; and (2) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director denied the petition and certified the petition for review by the AAO on May 28, 2013. Counsel submitted a brief on June 5, 2013, asserting that the director's bases for denial of the petition were erroneous and that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Notice of Certification; and (6) counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

I. Factual and Procedural Background

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a computer system analyst to work on a full-time basis at a rate of $60,000 per year.[2] In addition, the

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[1] It must be noted for the record that the petitioner provides inconsistent information as to the job title of the proffered position. For example, in the Form I-129 petition and LCA, the petitioner refers to the proffered position as "Computer System Analyst." However, throughout the petitioner's December 6, 2012 and January 2, 2013 letters of support, the petitioner refers to the proffered position as a "Programmer Analyst." No explanation for the variance was provided. The petitioner has not established that the duties of a computer system analyst and the duties of a programmer analyst are the same.

[2] The AAO notes that the H-1B submission includes several documents that do not appear to relate to the petitioner or the beneficiary. For instance, the H-1B submission includes a registration for the Hindu marriage of two individuals (neither of which is the beneficiary), a letter addressed to the California Service Center from a company (not the petitioner) regarding its total number of employees and the number of

petitioner indicates that the beneficiary will be employed off-site at the facility located at in Detroit, Michigan.

In a support letter dated December 6, 2012, the petitioner states that the beneficiary will be responsible for performing the following duties and responsibilities in the programmer analyst position:[3]

1. Performing system test requirement analysis, end to end data flow validation, data preparation and database change request validation for the Oracle Data Mart and BI reports. (approximately 25% of daily work time);

2. Creating automated smoke and regression test scripts to improve the testing process efficiency and effectiveness. (approximately 15% of daily work time);

3. Preparing test plans, test strategy, test requirement traceability and test result summary report for the datawarehouseing [sic] applications such as Informatica ETL, Cognos Reports and Oracle. (approximately 15% of daily work time);

4. Performing data analysis for various data warehouse tables, ETL jobs, AAA views and cubes using PL/SQL, Erwin, DataStage and Excel pivots. (approximately 15% of daily work time);

5. Creating QC Test Plan, Test Lab folders, and preparing test results. (approximately 15% of daily work time); [and]

6. Use various languages, tools and technologies including: SQL Server, VDI, JIRA, Marker, Cygwin, Visio, Erwin, Portico, HEDIS, NCQA, Waterfall, RUP, Agile, CMMI, Oracle Toad, Teradata, DB2, Sybase, QTP, Snowflake, and others as needed. (approximately 15% of daily work time).

In addition, the petitioner claims that "[t]he usual minimum requirement for performance of this job is a Bachelor's degree in Computer Applications, Electrical Engineering, Information Technology, Electronics, Engineering, Computer Science, Mathematics, Physics or the U.S. equivalent in any closely-related field." With the petition, the petitioner submitted a copy of the beneficiary's academic credentials, including a copy of his master's degree in information technology from the issued on November 21, 2003.

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employees in H-1B and L-1 classification, and pages of passports that do not correspond to the beneficiary's passport number. The images appear on the backside of pages submitted in support of the instant petition and, for some of the documents, someone has crossed out the images. It looks as though the petitioner or its counsel may be recycling paper from another case as the information appears to be irrelevant to the instant petition. No explanation was provided for the submission of this evidence.

[3] Again, the AAO observes that the petitioner refers to the proffered position as programmer analyst throughout its support letter rather than as a computer systems analyst as stated in the Form I-129 petition and LCA.

The petitioner also submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The occupational category is designated as "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1121 at a Level I (entry) wage level. The AAO notes that the place of employment is listed as , Detroit, Michigan . No other worksites are provided.

- A letter from General Counsel for dated December 3, 2012. In the letter, states that "[t]his is to confirm that [the beneficiary] has been contractually engaged by through supplier [the petitioner] to work on an ongoing project with client, , located in Detroit, MI." further states that "[the beneficiary] has been working with on an ongoing project since February 20, 2012." Notably, the letter does not provide the job title or any information regarding the duties and requirements of the position. Furthermore, the letter does not contain any information regarding the expected duration of the project.

- Copies of pay statements issued to the beneficiary by the petitioner.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 21, 2012. The director outlined the specific evidence to be submitted. On February 20, 2013, in response to the director's RFE, counsel provided additional supporting evidence. Specifically, counsel provided the following evidence in support of the H-1B petition:

- A photocopy of an employment authorization card issued to the beneficiary with validity dates of January 23, 2012 to October 15, 2012. There is no indication that the beneficiary was authorized to work in the United States after October 15, 2012.[4]

- An Offer of Employment letter and Employment Agreement between the petitioner and the beneficiary, dated January 23, 2012. The position is listed as "Computer Systems Analyst."

- A document entitled "[The petitioner's] Right of Control over EMPLOYEE." The validity period is from January 23, 2012 to January 23, 2015. Thus, the validity period of the document does not correspond to the validity period

[4] USCIS records indicate that the beneficiary applied for an extension of work authorization, which was denied on September 24, 2012. Notably, the record of proceeding contains documentation, which appears to indicate that the beneficiary continued to be employed on the project after October 15, 2012.

requested by the petitioner in the H-1B petition (i.e., December 5, 2012 to October 14, 2015).

Further, the document states that the petitioner's "supervisor, to whom [the beneficiary] will report, is " The document indicates that is the president of the petitioning company. Additionally, the document includes a statement that the beneficiary "will telephone or otherwise communicate directly with [the petitioner's] supervisor no less than once a week regarding his progress on the assigned work." The petitioner did not provide telephone records or other evidence of regular communication between and the beneficiary.

- An organizational chart. Although the petitioner claims to have 60 employees on the Form I-129, the chart only contains entries for eleven individuals.[5] The AAO observes that seven of the entries are for computer systems analysts (including the beneficiary). The hierarchy of the organizational chart is depicted as the beneficiary reporting to a computer systems analyst, rather than (as listed on the document entitled "[The petitioner's] Right of Control over EMPLOYEE").[6] No explanation was provided for the discrepancy.

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[5] In the brief dated June 4, 2013, counsel claims that the adjudication of the Form I-140 petition filed by the petitioner on behalf of the beneficiary is relevant to determining whether the proffered position qualifies as a specialty occupation. The AAO is not persuaded by counsel's assertion as the immigration classification requested in the Form I-140 petition is not that of a specialty occupation. Nevertheless, the AAO reviewed the Form I-140 petition and supporting documents previously submitted by the petitioner to USCIS on behalf of the beneficiary.

The submission includes the petitioner's quarterly wage reports/tax reports for the State of Michigan. The report for the quarter ending on 09/30/2012 requests the employer provide the number of full-time and part-time employees who worked during or received pay for the pay period. The petitioner indicated the following:

1st Month	2nd Month	3rd Month
3	3	4

Again, the petitioner stated that it has sixty employees on the Form I-129.

The report also requests that the employer provide the names of its employees. The AAO also reviewed the petitioner's quarterly wage reports/tax reports for the State of Michigan for the first three quarters of 2012 and notes that is not listed as an employee. Thus, although the organizational chart depicts the beneficiary as reporting to the quarterly wage reports/tax reports for the first three quarters of 2012 do not indicate that is employed by the petitioner.

[6] The AAO notes that the director's RFE provided examples of evidence to submit, including a "[c]opy of your organizational chart, demonstrating the beneficiary's supervisory chain."

- An Employee Performance Review for the beneficiary, dated August 1, 2012. It is signed by the beneficiary and the petitioner's president. The appraisal contains eleven general categories (e.g., dependability, attendance, cooperation, communication) with "X" marks indicating excellent, good, fair or poor performance levels. For the entry "Employee Name," only the beneficiary's first name has been provided. Notably, the section for "Reviewer and Title" is blank. The AAO also observes that there is no information in the entry for "Client Site/Project." Further, the review does not contain any comments, and the sections for "Strengths" and "Opportunities for Development" are blank. The document does not provide any information regarding the basis of the marks selected.

- Email correspondence between and the beneficiary. The AAO observes that the subject line for one of the email chains is "H-1B Document Details" and the subject line for another email chain is "H-1B Client/Vendor Letters." The emails are dated from November 30, 2012 to January 17, 2013.[7] The beneficiary requests that provide letters in a particular format, as well as provide him with a purchase order (PO). The correspondence includes a job description for CPDM (which is not further defined) for lead test analysts and states that a "Bachelor's degree in related field preferred."[8]

  The AAO notes that the local-part of the beneficiary's email address is the username of the beneficiary (his first initial and last name), and the domain name is " ". Notably, a carbon copy or courtesy copy ("cc") of the emails were sent to an individual whose email address has the domain name of the petitioning company. Thus, the beneficiary's email address is distinct from this individual's email address in that the beneficiary's email address does *not* contain the domain name of the petitioning company; rather it contains the initials of the end-client. Moreover, the initial email from the beneficiary contains an automatic message (at the end of the

[7] Furthermore, the emails suggest that the beneficiary was working at from November 30, 2012 to January 17, 2013, which again was after his employment authorization expired. It is noted that, as the beneficiary was employed without authorization, he was not eligible for H-1B portability pursuant to section 214(n) of the Act, 8 U.S.C. § 1184(n) at the time the petition was filed.

[8] The job description is for a lead test analyst rather than the proffered position of a computer systems analyst or a programmer analyst (as stated by the petitioner). Thus, it has not been established that the job description is for the proffered position and, thereby relevant to this proceeding. Moreover, the AAO notes that a *preference* for a particular degree does not indicate a *requirement* for the same. *See Bob Huddleston State Farm Insurance Agency v. Holder*, No. 2:10-cv-02257-MMD-PAL, 2013 Dist. WL 1195519 (D. Nev. March 22, 2013) (upholding a denial of an H-1B petition, noting in part that an indication that a baccalaureate degree may be *preferred* does not indicate that it is *required*).

email) that includes a brief description of and a privacy statement.

- A document entitled "Work Order Details." Most of the entries have been redacted and the document is not signed or endorsed by the petitioner, vendor or end-client.

  The AAO notes that, based upon a review of this document, it cannot be established that it refers to the proffered position. More specifically, the AAO observes that the document states that the beneficiary's job title is technology specialist (rather than computer system analyst or programming analyst as stated by the petitioner on the Form I-129 and supporting documents).[9] Notably, the document states that the project will last just six months, from "01/01/2013" until "06/30/2013."[10] Further, the scope of work is described as follows:

  > Participates in development of business cases and obtaining approvals for capital expenditures. Familiar with standard concepts, practices, and procedures within a particular field. Significant creativity is required. Minimum 3-5 years of experience[.]

  Thus, this description of the position differs significantly from the petitioner's description of the proffered position. Moreover, the document indicates that the education level is a bachelor's degree but it does not indicate that such a degree is required, nor does not indicate that any specific discipline is necessary.

- A letter from the petitioner, dated January 2, 2013, which includes a description of the duties of the proffered position. Notably, the petitioner elected to provide the exact same duties as those provided in the original support letter, along with five new duties.

  The petitioner, however, altered the percentage of time to be spent performing the duties as stated in its initial submission. For example, the petitioner initially claimed that the beneficiary would spend 25% of his time "[p]erforming system test requirement analysis, end to end data flow validation, data preparation and database change request validation for the Oracle Data Mart and BI reports." In the revised description, the petitioner stated that the beneficiary will spend

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[9] The AAO notes that that petitioner has also not established that the duties of a technology specialist are the same as the proffered position of computer system analyst (as stated by the petitioner in the Form I-129 and LCA) or the same as a programmer analyst (as stated by the petitioner in the letters of support). The petitioner did not acknowledge or provide any explanation regarding the variance in the job title.

[10] Again, the petitioner requested that the petition be granted with validity dates of December 15, 2012 to October 14, 2015. However, the "Work Order Details" indicate that the project would last six months, with an end date of June 30, 2013.

approximately 9-11% of his time performing this duty. No explanation for the variance was provided.

In addition, the petitioner refers to the proffered position in the letter of support as a programmer analyst (rather than as a computer system analyst as stated in the Form I-129 petition and LCA) and claims that the position "require[s] at least a bachelor's degree, and it is therefore a specialty occupation."[11] The petitioner does not state that a degree *in a specific specialty* is required. Thus, the petitioner indicates that a general-purpose bachelor's degree is sufficient for the proffered position.

- A Supplier Services Agreement between and the petitioner, effective February 8, 2012. The agreement includes two work orders.

The AAO observes that the work order dated February 16, 2012 indicates, in pertinent part, the following:

Description of Services:	Technology Specialist (QA/Data Analysis)
Supplier Personnel:	[The beneficiary]
Professional Fees: [Insert Hourly Rate]→	$61.00/hour
Dates:	Supplier Personnel Start Date: 02/20/2012 Supplier Personnel End Date: TBD
Location of Services:	
Bill to Address:	Detroit, MI

The work order indicates that the beneficiary will provide services as a "Technology Specialist (QA/Data Analysis)" rather than as a "Computer System Analyst" or a "Programmer Analyst" as stated by the petitioner. No explanation was provided for the variance. Furthermore, the AAO observes that the work order does not contain a job description and the requirements (if any) for the position.

The second work order is dated January 1, 2013. It provides, in part, the following information:

[11] Contrary to the petitioner's claim, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii); *see also 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").

Description of Services:	Information Technology
Supplier Personnel:	[The beneficiary]
Professional Fees: [Insert Hourly Rate]→	$61.00/hour (less $1.00 for Supplemental Insurance) $60.00
Dates:	Supplier Personnel Start Date: 1/1/13 Supplier Personnel End Date: 1/1/14
Location of Services:	[redacted]
Bill to Address:	[redacted] Detroit, MI [redacted]

The work order was executed after the director's RFE and does not pre-date the filing of the petition. The AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Therefore, the January 1, 2013 work order is not probative evidence as it did not exist prior to the filing of the instant petition on December 10, 2012.

The AAO, however, notes that this work order indicates that the beneficiary will provide "Information Technology" services. Thus, the description of the services varies from the prior work order dated February 16, 2012. No explanation was provided. It appears that the beneficiary's role may have changed, since the description of the services has been altered. The work order does not contain any further information regarding the duties and requirements (if any) of the position.

Furthermore, the AAO notes that both the work order and the beneficiary's start date are listed as January 1, 2013 (which was after the expiration of the beneficiary's work authorization). The end date is January 1, 2014. Thus, according to the work order, the end date is approximately 20 months prior to the end date requested by the petitioner in the H-1B petition. The petitioner did not acknowledge or explain the discrepancy.

- A photo identification badge stating '[redacted]" the beneficiary's name, and the word "contractor." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company. It states that it must be worn at all times while on [redacted] property.

  The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced.

- A chart entitled "View my tasks" that lists the beneficiary as the "User" and provides information regarding tasks performed for one week in January/February 2013 and another week in March 2013. The charts indicate his "Acct. Work" was eight hours per day (40 hours per week). The documentation

suggests that the beneficiary was employed during this period, which was after his employment authorization expired on October 15, 2012.

- Email correspondence between the beneficiary and various individuals who appear to be employed by . Based upon the email correspondence it appears that an employee of assigns work to the beneficiary. For example, a message to the beneficiary from (who appears to work for) states, "I will assign the deployment to you on once I receive the email from Mou and validate the smoke tests, and I will send you a separate email with the go ahead."

  Additionally, (another individual who appears to be employed by) states that he is "passing on Kudos to [the beneficiary]" and requests that "[c]heck out the efforts of [the beneficiary] to please business." responds by thanking the beneficiary for his "extra work and attention to detail." The emails do not appear to have included anyone from the petitioning company.

- Email correspondence regarding between the beneficiary and [12] According to counsel the documentation was submitted in support of demonstrating the beneficiary's "Maintenance of F-1 Status (student)." The correspondence includes emails (dated October 14, 2010) from the beneficiary to the Chief Executive Officer (CEO) of in which the subject is "Salary Agreement." For instance, an email from the beneficiary to the CEO states the following:

  [13],

  As per our previous discussion I am agree to do a split of 75-25 percent of the total invoice amount once the GC [Green Card] labor process is approved based upon the conditions as below:

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[12] It is noted for the record that, as of August 9, 2012, is no longer certified by the Student and Exchange Visitor Program (SEVP) to enroll nonimmigrant students, and all active nonimmigrant students have since had their Student and Exchange Visitor Information System (SEVIS) records terminated.

The AAO notes that , the Chief Executive Officer (and Principle Designated School Official - DSO), along with several other individuals, was arrested on charges of conspiracy to commit visa fraud and harboring aliens for criminal gain. All defendants in the U.S. criminal justice system, however, are presumed innocent until proven guilty.

[13] The email exchange indicates that " " refers to the Chief Executive Officer of .

1. will make the salary payment on the 1st day of the following month (75% of the total invoice amount).
2. I will take care of the employee taxes and will take care of all the the [sic] other taxes.

Please reply with your confirmation.
Thanks,
[the beneficiary]

The email correspondence also includes an email from the beneficiary to the CEO of stating the following:

I do not want to file the GC unless I get the confirmation on the salary agreement and contact details of the attorney. This is very important for me and do not want any confusion in the future.

Thanks,
[the beneficiary]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on March 1, 2013. Thereafter, the director certified the petition to the AAO on May 28, 2013. In response to the director's Notice of Certification, counsel submitted a brief.[14] In the brief, counsel references the preponderance of the evidence standard.

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

[14] In the brief, counsel claims that "[t]he record reflects a significant volume of evidence establishing the employment relationship between [the petitioner] and the beneficiary." The AAO reviewed the record in its entirety. As discussed in this decision, the evidence submitted fails to establish eligibility for the benefit sought. The AAO notes that it is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 375-376.

* * *

> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

II. Issues Not Addressed By the Director's Decision

A. Limitation on the Authorized Period of Stay in H-1B Classification

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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).

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought as there are additional issues that preclude the approval of the H-1B petition.

More specifically, an alien who will perform services in a specialty occupation may be admitted to the United States as an H-1B nonimmigrant. *See* section 101(a)(15)(H)(i)(B) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(B). A specialty occupation is defined as an occupation that requires (1)

theoretical and practical application of a body of highly specialized knowledge, and (2) the 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. *See* section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). The Act provides the numerical limitation for the total number of aliens who may be issued H-1B visas or otherwise accorded H-1B status in a fiscal year. *See* section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A).

An approved H–1B petition may be valid for a period of up to three years. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Subsequently, the original employer or a different employer may petition USCIS for another H-1B approval on behalf of the beneficiary, which may, if the beneficiary is in the United States in H-1B status at the time the petition is filed, include a request to extend the beneficiary's stay in H-1B status.

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A).[15] Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. Moreover, the AAO again notes that the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1).

In the instant case, the AAO observes that on the Form I-129 (page 4, Part 4.8.a) the petitioner indicated that the beneficiary had previously been granted H-1B classification. The petition was signed by the petitioner's president on December 5, 2012 and filed with USCIS on December 10, 2012. The Form I-129 (page 4, Part 4.8.a) requests that the petitioner provide an explanation on page 7, part 9 regarding all periods of the beneficiary's stay in H classification for the prior seven years (thus, beginning from approximately December 5, 2005). Here, the petitioner failed to provide the requested information on page 7, part 9.

In addition, the AAO notes that on the H Classification Supplement to Form I-129 (page 11), the petitioner was asked to provide the beneficiary's prior period of stay in H classification in the United States for the last six years. The petitioner was notified that it should list only those periods in which the beneficiary was actually in the United States in an H classification. The petitioner provided the following information:

From: **1/29/2009** To: **10/21/2010**

[15] The petitioner provided a copy of the Form I-94, Departure Record, for the beneficiary that indicates that he last entered the United States on January 29, 2009. There is no indication that the beneficiary resided and was physically present outside the United States for a year immediately prior to the filing of the H-1B petition.

Thus, the petitioner indicated that the beneficiary's only prior period of stay in H classification "in the United States" was from January 29, 2009 until October 21, 2010 (without interruption). The AAO notes that this information is inconsistent with USCIS records, which indicate that the beneficiary was granted a change of status from F-1 classification to H-1B classification on October 22, 2004 and was thereafter granted three extension of stay requests, with the final request valid until October 21, 2010. Thus, the beneficiary was granted H-1B classification for a *total period of six years* rather than a period of approximately 20 months as claimed by the petitioner. No explanation was provided for this inaccurate statement on the Form I-129.[16]

The regulation at 8 C.F.R. § 103.2(a)(1) states that every benefit request or other document submitted to USCIS "must be executed and filed in accordance with the form . . . and such instructions are incorporated into the regulations requiring its submission." Here, the petitioner has failed to follow the instructions of the Form I-129 and failed to fully disclose material information that is relevant to the eligibility determination. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1). For this reason also, the petition must be denied.

Moreover, the AAO notes that, as discussed above, section 214(g)(4) of the Act provides that the period of authorized admission of an H-1B nonimmigrant may not exceed six years. Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by USCIS that adopts *Mutter of I-*, USCIS Adopted Decision 06-0001 (AAO, Oct. 18, 2005), as formal policy. *See* Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (Oct. 21, 2005). The term "recapture" is used in this context to refer to the period of time spent outside the United States that an alien beneficiary seeks to have subtracted from the maximum period of stay in H-1B status, as governed by § 214(g)(4) of the Act, in order to have that period of time added back (i.e., "recaptured") when seeking an extension of H-1B status.

The regulation indicates that "the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception" to the limitation on admission. 8 C.F.R. § 214.2(h)(13)(v). The petitioner must submit supporting documentary evidence to meet its burden

[16] The petitioner disclosed that the beneficiary had previously held H-1B nonimmigrant status (for 20 months) in order to assert that the petition was "CAP Exempt." The AAO notes that the failure to accurately disclose the duration of the beneficiary's prior periods in the United States in H-1B nonimmigrant status (in accordance with the form instructions) may have been in an effort to mislead USCIS into believing that the beneficiary was not subject to section 214(g)(4) of the Act. Moreover, it appears that the reason that the director did not identify this issue in the denial and certification notice is because the petitioner failed to provide this material information (which is relevant to the eligibility determination) in the petition.

of proof. The petitioner and beneficiary are in the best position to organize and submit evidence of the beneficiary's departures from and reentry into the United States. The AAO notes that the standard of proof, as stated by this regulation, is the *clear and convincing* standard and not the *preponderance of the evidence* standard applicable to the remaining evidence in this record of proceeding. *See id.*; *Matter of Chawathe*, 25 I&N Dec. 375 (noting that the standard of proof to be applied in administrative immigration proceedings is the preponderance of the evidence standard, "except where a different standard is specified by law").

In the Form I-129 and supporting documents, the petitioner did not claim that the beneficiary was exempt from the six-year limit based upon periods of being physically outside the United States. The AAO will not attempt to "guess" whether or not the beneficiary has made any trips of at least one 24-hour day outside the United States. Accordingly, as the petitioner does not assert that the beneficiary is eligible to "recapture" any time spent outside the United States and there is insufficient evidence in the record of proceeding to support such a claim, the AAO will not further address the "recapture" exemption. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

The AAO notes that section 106(a) and 104(c) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions. More specifically, an exemption is available under section 106(a) of AC21 for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b))*, if 365 days or more have elapsed since *the filing of any of the following:*
>
> > *(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*
> >
> > *(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

> (b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—
>
> *(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;*
>
> *(2) to deny the petition described in subsection (a)(2); or*
>
> *(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.*

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based immigrant petition under section 203(b) of the Act is considered "a lengthy adjudication delay" for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

Upon review of the record of proceeding, there is no evidence to support an assertion that a qualifying labor certification application or Form I-140 petition had been or would have been pending for *at least 365 days* on or prior to the last day of the beneficiary's authorized period of H-1B admission. More specifically, in the instant case, the petitioner submitted an Application for Permanent Employment Certification (Form ETA 9089) to the U.S. Department of Labor (DOL) on July 5, 2012, and it was certified on August 31, 2012. Subsequently, the petitioner submitted an Immigrant Petition for Alien Worker (Form I-140) to USCIS, which was approved on November 26, 2012. Accordingly, there was not a "lengthy adjudication delay" in connection with either the labor certification application or the immigrant petition submitted on behalf of the beneficiary. Therefore, the beneficiary does not qualify for an extension of stay under section 106(a) of AC21.

The AAO now turns to section 104(c) of AC21 regarding the exemption to the period of authorized admission under 214(g)(4) of the Act. More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
>
> > (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> >
> > (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

> may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

As noted above, an extension of H-1B nonimmigrant status may be granted when a petitioner demonstrated eligibility under section 104(c) of AC21. Notably, by its very terms, section 104(c) of AC21 applies only in cases where a petitioner is seeking to extend the H-1B nonimmigrant status of the beneficiary. Here, however, the beneficiary has not maintained H-1B status. Rather, on the Form I-129 petition, the petitioner stated that the beneficiary's current nonimmigrant status is F-1 (student). The beneficiary does not qualify for "an extension of such nonimmigrant status" because he does not have H-1B nonimmigrant status to extend. Therefore, the beneficiary does not qualify for an extension of such status under section 104(c) of AC21.

More specifically, the Form I-129 consists of the following requests: (1) a petitioner's request to classify the employment offer as appropriate for the H-1B category (the basis for classification); and (2) requests for the procedural benefits relevant to the beneficiary's change of status and authorized stay in the United States (requested actions).[17] In the instant case, the petitioner has not submitted a request for a petition extension requesting an extension of H-1B nonimmigrant status.

That is, 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

> (14) *Extension of visa petition* validity. The petitioner shall file a request for a petition extension on Form I–129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

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[17] These functions previously required two to three separate filings depending upon on whether a change of status was being requested: one by the petitioner (Form I-129H) and the others by the beneficiary (Forms I-506 and I-539). For example, the regulations on January 1, 1991 state that a petitioner "shall file a petition in duplicate on Form I-129H with the service center which has jurisdiction over I-129H petitions in the area where the alien will perform services or receive training or as further prescribed in this section." 8 C.F.R. § 214.2(h)(2)(i)(A) (1991). Further, the 1991 regulations require applications for a change of status or visa classification to be submitted by the nonimmigrant alien on Form I-506, Applicant for Change of Nonimmigrant Status, filed with the district director having jurisdiction over the place of employment if changing to H or L status. 8 C.F.R. § 248.3(a) and (b) (1991). In addition, the 1991 regulations state that "[a]n alien . . . shall apply for an extension of stay on Form I-539. . . . [E]ach alien seeking an extension of stay generally must execute and submit a separate application for extension of stay to the district office having jurisdiction over the alien's place of temporary residence in the United States." 8 C.F.R. § 214.1(c)(1) (1991). In implementing the Immigration Act of 1990 (IMMACT90) Pub. L. No. 101-649, 104 Stat. 4978, these functions were combined into one form (Form I-129) to more efficiently process the separate requests. *See* 56 Fed. Reg. 61111 (Dec. 2, 1991); 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991).

As noted above, a request for a petition extension may be filed only if the *validity of the original petition has not expired.*[18] The regulations do not permit the late filing of a petition extension. The record of proceeding does not indicate that the instant H-1B petition is as an extension petition. Furthermore, the validity of the most recent H-1B petition expired *more than two years* prior to the filing of the instant petition. Accordingly, the beneficiary does not qualify for an extension of H-1B nonimmigrant status under section 104(c) of AC21.

The petitioner has not established that the beneficiary is eligible for an exemption from the six-year limitation on the authorized period of stay in H-1B classification. In addition, and as previously discussed, the inaccurate statements on the Form I-129 regarding the beneficiary's prior periods in the United States in H-1B nonimmigrant status require the denial of this petition. Thus, the petition could not be approved even if the petitioner overcame the director's grounds for denial of the petition (which it has not). These are separate and independent grounds for denial of the petition. These bases for denial render the remaining issues in this proceeding moot.

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[18] The petitioner has provided inconsistent information regarding the basis for classification. For example,

- With regard to the "Basis for Classification" (on the Form I-129, page 2, part 2), the petitioner marked, "Change in previously approved employment." The AAO notes that this option is to notify USCIS of non-material changes in previously approved employment. *See* Instructions for Form I-129, Petition for Nonimmigrant Worker, available at http://www.uscis.gov/files/form/i-129instr.pdf. Based upon a complete review of the record of proceeding, the petitioner has not established that this is the appropriate selection for the instant H-1B petition.

- Notably, within the Form I-129, the petitioner selected entries that correspond to the option "New Employment" (i.e., page 2, part 2, 4.b., "This is available only where you check 'New Employment' in Item 2 . . ." and page 4, part 4, 8., "If you indicated that you were filing a new petition in Part 2 . . . "). On the Form I-129 petition (page 4, part 4, 9), the petitioner indicated that it had not previously filed a petition for the beneficiary.

- On the Form ETA 9035/9035E, Labor Condition Application (LCA), the petitioner selected, "Continuation of previously approved employment without change with the same employer." This selection is appropriate when the petitioner is "applying to continue employment of the beneficiary in the same nonimmigrant classification the beneficiary currently holds and there has been no change in employment." *Id.* The AAO reviewed the record of proceeding and notes that the petitioner has not demonstrated that this is the correct selection for the instant H-1B petition. Moreover, it does not correspond to the option chosen by the petitioner on the Form I-129 petition.

No explanation for the inconsistencies was provided by the petitioner or counsel.

The AAO again notes that the regulation at 8 C.F.R. § 103.2(a)(1) states that every benefit request or other document submitted to USCIS "must be executed and filed in accordance with the form . . . and such instructions are incorporated into the regulations requiring its submission." Here, the petitioner has failed to follow the instructions of the Form I-129 and LCA.

B. The LCA Filed in the Instant Matter Does Not Correspond to the Petition and Fails to Establish that the Petitioner will Pay the Required Salary

The next issue the AAO will address is whether the petitioner submitted an LCA that corresponds to the instant petition. The AAO reviewed the record in its entirety and finds that, for the reasons discussed below, the LCA provided by the petitioner does not correspond to the instant petition. Moreover, the petitioner has not established that, if the petition were to be approved, that it would pay the beneficiary the required wage.

In the brief dated June 4, 2013, counsel references an Immigrant Petition for Alien Worker filed by the petitioner on behalf of the beneficiary and claims that it is relevant to this proceeding. Specifically, counsel states the following:

> The evidence submitted indicates that the beneficiary had been working for the petitioner in this position for about a year, performing these specific, specialized duties. Further, USCIS has also granted his I-140 filed by the same petitioner for *the same position* (see [redacted], approved on December 3, 2012) under EB-2, requiring at least a Master degree or BS with minimum 5-year progressive IT experience. It is hard to imagine why CSC would deny this H-1B petition only a few months later on the basis that *the same position* is not a specialty occupation and does not require a Bachelor's degree, when NSC concluded that *the same position* requires a Master degree.

(Emphasis added.)

The AAO notes that the issue in the instant case is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act and not whether the beneficiary is a member of the professions holding an advanced degree as described at 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). That is, the AAO finds no merit in counsel's assertion that the adjudication of the immigrant petition is relevant for determining eligibility for H-1B classification. In addition, counsel cites no statutory or regulatory authority, case law, or precedent decision to support this assertion. Furthermore, neither the statutory nor regulatory provisions governing the adjudication of Form I-129 specialty occupation petitions provide for the approval of a nonimmigrant H-1B petition on the grounds argued by the petitioner's counsel, or even indicate that decisions on immigrant petitions are relevant to USCIS adjudications of Form I-129 nonimmigrant petitions. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions, *infra*. It may not rely on the approval of an immigrant petition to establish eligibility for H-1B classification.

Here, the AAO acknowledges that counsel repeatedly states that the permanent position described in the Form I-140 petition and the temporary proffered position for H-1B employment are "the same position." The AAO notes that it reviewed the Form I-140, Form ETA 9089 and supporting documents and compared (1) the petitioner's description of the permanent position; and (2) the description of the job that the beneficiary has been performing for the petitioner since January 23,

2012. The job duties are virtually identical. Moreover, the duties of the jobs (as described by the petitioner in the Form ETA 9089) are encompassed by the description of the proffered position as stated by the petitioner in the letter of support submitted with the H-1B petition.

The AAO notes, however, that when reviewing other aspects of the permanent position to the H-1B position, there are significant discrepancies. For instance, the requirements of the position as stated in the Form ETA 9089 vary considerably from the requirements as stated in the H-1B petition. More specifically, in the Form ETA 9089, the petitioner claims that the position requires a master's in computer science or information technology and one year of experience as a programmer analyst or as a "Programmer/Analyst or QA or IT Consultant." The petitioner further claims that in the alternative, it will accept a bachelor's degree and five years of experience.

In its letter (dated December 6, 2012) submitted in support of the H-1B petition, however, the petitioner stated that "[t]he usual minimum requirement for performance of this job is a Bachelor's degree in Computer Applications, Electrical Engineering, Information Technology, Electronics, Engineering, Computer Science, Mathematics, Physics or the U.S. equivalent in any closely-related field." In its January 2, 2013 letter of support, the petitioner stated that the position "require[s] at least a bachelor's degree" (without further specification). The petitioner did not provide an explanation for the significant differences in its claimed academic and experience requirements as stated in the documents for the immigrant petition and the H-1B petition for what its counsel alleges is "the same position."

The AAO also observes that there are inconsistencies in the occupational category and wage level chosen for the position. As previously noted, the petitioner submitted an LCA in support of the H-1B petition that designated the proffered position under the occupational category "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1121. The petitioner claimed in the LCA that the wage level for the proffered position was Level I (entry level) and reported that the prevailing wage in [redacted] (Detroit, Michigan) for the proffered position was $59,530 per year.[19] The

[19] The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

prevailing wage source is listed in the LCA as FLC Data Center (Office of Foreign Labor Certification Online Data Center).[20] The LCA was certified on October 3, 2012, and signed by the petitioner on October 16, 2012.

On the Form I-140 petition and Form ETA 9089, however, the petitioner claims that the position falls under the occupational category "Software Developers, Applications" - SOC (ONET/OES Code) 15-1132 at a Level III (experienced).[21] The AAO notes that although the occupational categories "Computer Systems Analysts" and "Software Developers, Applications" both entail duties involving information technology, they are separate occupational categories with different duties and requirements.

The petitioner and counsel failed to acknowledge or explain the reason that "the same position" has been classified by the petitioner under two distinct occupational categories with differing wage levels. The petitioner and counsel do not claim that the position is a combination of occupations. Nevertheless, the AAO notes that when the duties of the proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

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[20] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at http://www.bls.gov/oes/. The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at http://www.flcdatacenter.com/.

[21] The "Prevailing Wage Determination Policy Guidance" issued by DOL states the following about a Level III wage rate:

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III 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.

> In determining the nature of the job offer, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NETSOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

Thus, if the proffered position is a combination of occupations, according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. Notably, the prevailing wage for "Computer Systems Analysts" (the occupational category selected by the petitioner for the LCA in support of the H-1B petition) is significantly lower than the prevailing wage for "Software Developers, Applications."

Specifically, the Online Wage Library lists the prevailing wage for "Computer Systems Analysts" for a Level I position as $59,530 per year in the area of intended employment.[22] The prevailing wage for "Software Developers, Applications" for a Level I position was $62,982 per year – and the prevailing wage for a Level III position was $88,504 per year at the time the application was submitted in this matter.[23] The difference is over $3,450 per year for a Level I position and over $28,970 per year for a Level III position.

The prevailing wage for "Computer Systems Analysts" is less than the prevailing wage for "Software Developers, Applications." Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations "Computer Systems Analysts" and "Software Developers, Applications," it should have chosen the relevant occupational code for the highest paying occupation – in this case "Software Developers, Applications." However, the petitioner

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[22] For additional information regarding the prevailing wage for computer systems analysts in the area of intended employment, *see* the All Industries Database for 7/2012 - 6/2013 for "Computer Systems Analysts" at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?area=19804&code=15-1121&year=13&source=1 (last visited August 23, 2013).

[23] For additional information regarding the prevailing wage for software developers, applications in the area of intended employment, *see* the All Industries Database for 7/2012 - 6/2013 for "Software Developers, Applications" at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?area=19804&code=15-1132&year=13&source=1 (last visited August 23, 2013).

selected the occupational category for the lowest paying occupation when classifying the proffered position on the LCA.

Moreover, the AAO observes that the LCA was certified at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.[24]

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.[25] DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description. Here, the petitioner claims on the LCA that the proffered position falls under the occupational "Computer Systems Analysts" at a Level I (entry), however, for "the same position" (as repeatedly claimed by counsel), the petitioner indicated on the Form ETA 9089 that the position falls under the occupational category "Software Developers, Applications" at a Level IIII (experienced).

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to

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[24] For additional information on wage levels, *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.

[25] A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1"or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers").

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the *correct occupational category and wage level* in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category and wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. 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).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to fall under the occupational category and wage level as stated in the Form I-140 and supporting documents (for "the same position"), the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, the LCA submitted in support of the petition would then fail to correspond to the level

of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the proffered position are materially inconsistent. This conflict undermines the overall credibility of the petition. As discussed in greater detail, *infra*, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

In any event, it cannot be found that the information provided in the LCA corresponds to the level of work and requirements that the petitioner ascribed to the proffered position and to the occupational category and wage level corresponding to such work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position is "the same position" as the position described in the immigrant petition (as repeatedly claimed by counsel), the H-1B petition could still not be approved for these two additional reasons.[26]

III. Review of the Director's Decision

A. The Petitioner Failed to Establish that It will have an Employer-Employee Relationship with the Beneficiary

The first ground of ineligibility identified by the director is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now discuss the record of proceeding and whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

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[26] Fundamentally, it appears that (1) the petitioner previously claimed in the Form I-140 and supporting documents that the proffered position falls under the occupational category "Software Developers, Applications" at a Level III (experienced); and (2) the petitioner is now claiming to USCIS that the position falls under the occupational category "Computer Systems Analysts" at a Level I. Counsel claims that it is "the same position" and the approval of the Form I-140 is relevant to the adjudication of the Form I-129 petition. The petitioner cannot have it both ways. Either the position is a more senior and/or complex software developer, applications position (based on a comparison of the employer's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage or it is an entry-level computer systems analyst position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

> 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 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).

In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2011). 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) (2011). 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 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.

In the June 4, 2013 brief, counsel states that "[redacted] [sic] might have daily control over [the

beneficiary]. But such element alone should NOT supersede all other elements according to a precedent decision, *Matter of Smith*, 12 I & N Dec. 772 (D.D.1968)." The AAO notes that subsequent to the decision in *Matter of Smith*, the United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

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.[27]

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[27] 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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[28]

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"

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of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

[28] 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)).

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).[29]

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

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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is

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[29] 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).

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).

In the instant case, the petitioner claims that it has an employer-employee relationship with the beneficiary. The AAO has considered the assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. 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)). Applying the *Darden* and *Clackamas* tests to this matter, 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 support of the H-1B petition, the petitioner submitted pay statements that it issued to the beneficiary. The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an offer of employment letter and an employment agreement between the petitioner and the beneficiary, dated January 23, 2012. Notably, the offer of employment letter and the employment agreement were signed prior to the submission of the Form I-129 petition. The petitioner, however, did not provide the documents with its initial H-1B submission. Furthermore, the AAO observes that the offer of employment letter reports that the beneficiary will be eligible for benefits. However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plans, including eligibility requirements, was provided to USCIS.

Notably, the offer of employment letter and the employment agreement do not provide any level of specificity as to the beneficiary's duties and the requirements for the position. In addition, the documents do not indicate that the beneficiary will be assigned to the

project. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In the document entitled "[The petitioner's] Right of Control over EMPLOYEE," submitted in response to the RFE, the petitioner states that "[the petitioner] will provide [the beneficiary] with all instrumentalities and tools required for this position, including [a] computer, if not already available at the work site." The petitioner did not provide any further information on this matter. Here, although the petitioner and counsel claim that "the beneficiary had been working for the petitioner in this position for about a year," the petitioner failed to clarify the source of instrumentalities and tools used by the beneficiary. The petitioner did not fully address or submit probative evidence on the issue.

Further, upon review of the record, the AAO notes that on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from December 5, 2012 to October 14, 2015. As previously mentioned, the petitioner stated on the Form I-129 and supporting documents that the beneficiary will work at the facility at in Detroit, Michigan. No other work locations were provided.

With the petition, the petitioner submitted a letter from General Counsel for , dated December 3, 2012. does not provide the job title or any specific details regarding the responsibilities and requirements (if any) of the position. also does not indicate that the beneficiary is serving in the proffered position of computer systems analyst and performing the duties of a computer systems analyst. Moreover, she failed to provide any information regarding the expected duration of the project, when the project began, whether or not the project has been extended in the past, et cetera.

In response to the RFE, the petitioner provided a Supplier Services Agreement, which states that "[s]upplier [the petitioner] agrees to provide, as and when requested by , Services for the Customers of specified in Personnel Requests and Work Orders issued by to Supplier from time to time." The agreement does not provide any specific information establishing the duration of the beneficiary's work on the project.

The petitioner also submitted a document entitled "Work Order Details." Notably, many of the entries have been redacted and the document has not been signed or endorsed by the petitioner, vendor or client. The document does not indicate the beneficiary will serve in the proffered position of computer systems analyst but rather as a "Technology Specialist." Again, there is no indication

that the duties of a computer systems analyst are the same as a technology specialist. The work order indicates that the beneficiary will serve in the position for just six months, beginning on "01/01/2013" and ending on "06/30/2013."

With the RFE response, the petitioner included two work orders from [redacted] While the work order dated February 16, 2012 references the beneficiary, the description of services is listed as "Technology Specialist (QA/Data Analysis)." The second work order is dated January 1, 2013 (after the petition was filed), and describes the services as "Information Technology." The change in the description of services suggests that the beneficiary's role may have changed. Furthermore, neither document indicates that the beneficiary will provide services as a computer systems analyst or programmer analyst (as stated in the H-1B petition and letters of support). Moreover, the work orders do not contain any further information regarding the duties and requirements of the position. Upon review of the work orders, the AAO cannot determine that they correspond to the proffered position.

Additionally, the AAO notes that the January 1, 2013 work order indicates an end date of January 1, 2014. The petitioner has not provided any further information or probative evidence of H-1B work for the beneficiary from January 1, 2014 through October 14, 2015 (the requested end date on the H-1B petition). The record does not contain a written agreement between the petitioner and [redacted] or any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from December 5, 2012 to October 14, 2015. However, the documentation does not establish that a [redacted] project for the beneficiary to serve as a computer systems analyst will commence/continue for the requested period. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In the RFE, the director requested the petitioner provide information regarding the beneficiary's role in hiring and paying assistants. In the response, the petitioner elected not to address this issue or provide any information on this matter. Here, the petitioner was given an opportunity to clarify the beneficiary's role on this issue, but it failed to submit any probative evidence on the issue.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit an organizational chart, a description of the performance review process and/or

other similarly probative documents.

The petitioner's response included an organizational chart depicting its staffing hierarchy. The chart shows the beneficiary reporting to , a computer systems analyst, who serves under , another computer systems analyst. The organizational chart further indicates that serves under , Manager (Technical) and President. In addition, the petitioner submitted a document entitled "[The petitioner's] Right of Control over EMPLOYEE." Notably, the document indicates that the petitioner's "supervisor, to whom [the beneficiary] will report, is " The document indicates that is the president of the petitioning company. No explanation for the discrepancy was provided.

Further, the document states that the beneficiary "will telephone or otherwise communicate directly with [the petitioner's] supervisor no less than once a week regarding his progress on the assigned work." Although the petitioner claims to supervise the beneficiary through telephone calls, the AAO notes that the record does not contain any telephone records or other documentation of regular communication between the petitioner and the beneficiary. That is, the record of proceeding is devoid of probative evidence that the petitioner has supervised, directed or guided the beneficiary via telephone or by other means of communication.

The AAO notes that the petitioner provided email correspondence between the beneficiary and various individuals who appear to be employed by Based upon the email correspondence it appears that an employee of assigns work to the beneficiary. For example, a message to the beneficiary from (who appears to work for states, "I will assign the deployment to you on once I receive the email from Mou and validate the smoke tests, and I will send you a separate email with the go ahead." Additionally, the email chain contains praise for the beneficiary's work; however, the evidence does not indicate that the emails were sent to the petitioner. Notably, in the brief dated June 4, 2013, counsel states, "We may concede that might have daily control over [the beneficiary]."

In addition, the petitioner submitted email correspondence between and the beneficiary. Notably, the local-part of the beneficiary's email address is the username of the beneficiary (his first initial and last name), and the domain name is ' [ ]. A carbon copy or courtesy copy ("cc") of the emails was sent to an individual whose email address has the domain name of the petitioning company. Thus, the beneficiary's email address is distinct from this individual's email address in that the beneficiary's email address does *not* contain the domain name of the petitioning company; rather it contains the initials of the end-client. Moreover, the initial email from the beneficiary contains an automatic message (at the end of the email) that includes a brief description of and a privacy statement. The beneficiary's assigned email address suggests that he is an employee of

The petitioner also submitted a copy of its Employee Performance Review for the beneficiary. The AAO observes that the only the beneficiary's first name is provided in the "Employee Name" entry.

Furthermore, many of the entries are blank, including the client site/project, reviewer and title, strengths, and opportunities for development. Notably, the record does not contain any information from the petitioner regarding the purpose of the performance report; the methods used for accessing and evaluating the beneficiary's performance; how work and performance standards are established; and the criteria for determining bonuses and salary adjustments. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the document to the matter here.

Further, the AAO observes that the Supplier Services Agreement between and the petitioner, submitted in response to the RFE, indicates the following:

> Supplier [the petitioner] shall ensure that Candidates have the requisite skills, experience, qualifications and capabilities specified in the applicable Work Order. shall review the Candidates submitted by Supplier and, in sole discretion, determine if a Candidate will be submitted to the Customer for its review.

Based on this statement, it appears that also has at least some control over the assignment of projects to the beneficiary.

Moreover, the petitioner provided a copy of a photo identification badge stating " ," the beneficiary's name, and the word "contractor." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company. It states that it must be worn at all times while on property. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced. Upon review of the photocopy of the badge, it suggests, at best, that the beneficiary is working for Strategic Staffing Solutions; there is no indication that the beneficiary is employed by the petitioner.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter 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). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence does not indicate that the petitioner will the beneficiary's work. The day-to-day work of the beneficiary appears to be supervised and overseen by with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator,

the beneficiary is even paid, in the end, by the client or end client. *See Defensor v. Meissner*, 201 F.3d at 388.

It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

B. The Petitioner Failed to Establish that the Proffered Position Qualifies as a Specialty Occupation in Accordance with the Applicable Statutory and Regulatory Provisions

The AAO will now address the issue of whether the petitioner's proffered position qualifies as a specialty occupation. 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 also meet one of the following criteria:

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty

occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Here, the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. No explanation for the variances was provided. The AAO will not attempt to "guess" the actual requirements (if any) for the proffered position. As previously mentioned, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

Nevertheless, the AAO notes that in the letter of support (dated December 6, 2012), the petitioner claims that its minimum educational requirement for the proffered position is a bachelor's degree in computer applications, electronic engineering, information technology, electronics, engineering, computer science, mathematics, physics, or a related field. Even if the petitioner's statement accurately reflects the requirements of the proffered position, it has not established the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions. That is, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

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

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in computer applications, electronic engineering, information technology, electronics, engineering, computer science, mathematics, physics, or a related field. The petitioner's claim does not establish that the proffered position requires a baccalaureate (or higher degree) in a specific specialty, or its equivalent. For instance, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering.

Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

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

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although 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.[30] *See Royal Siam Corp. v. Chertoff*, 484 F.3d 147.

Furthermore, the AAO notes that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the legacy INS had reasonably interpreted the statute and

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

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, the record of proceeding is devoid of substantive information from regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain sufficient corroborating documentation on this issue from, or endorsed by, the company that will actually be utilizing the beneficiary's services (according to the petitioner).[31]

The AAO finds that the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the proffered duties as described in the record would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

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[31] Moreover, the petitioner submitted an email exchange in support of the H-1B petition between and the beneficiary. An email from includes a job description for (which as previously mentioned, was not further defined) that indicates that for the lead test analyst position, a bachelor's degree in a related field is *preferred*. Obviously, a *preference* for a particular degree is not an indication that such a degree is *required*. *See Bob Huddleston State Farm Insurance Agency v. Holder*, No. 2:10-cv-02257-MMD-PAL, 2013 Dist. WL 1195519 (D. Nev. March 22, 2013) (upholding a denial of an H-1B petition, noting in part that an indication that a baccalaureate degree may be *preferred* does not indicate that it is *required*). Moreover, the petitioner has not established that the job description is for the proffered position of computer system analyst or programmer analyst.

The AAO will now look at DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[32] As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.[33] However, contrary to the assertions of counsel, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupation:

> A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.
>
> **Education**
> Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).
>
> Some employers prefer applicants who have a Master of Business Administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.
>
> Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.
>
> Some analysts have an associate's degree and experience in a related occupation.
>
> Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive.

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[32] All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

[33] For additional information regarding computer systems analyst positions, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1 (last visited August 23, 2013).

> Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.
>
> Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, available on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4 (last visited August 23, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.[34] This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance reports that classification of the job as a Level I position should be considered for a research fellow, a worker in training, or an internship.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including an associate's degree and degrees not in a specific specialty.

The narrative of the *Handbook* states that some analysts have an associate's degree and experience in a related occupation. The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree in normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees. Notably, the AAO observes that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement.

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[34] For additional information, *see* DOL's guidance entitled "Prevailing Wage Determination Policy Guidance" regarding a Level I wage rate. *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.

The text of the *Handbook* suggests that a baccalaureate degree or higher may be a preference among employers of computer systems analyst in some environments, but that some employers hire employees with less than a bachelor's degree, including candidates that possess an associate's degree or a bachelor's degree in an unrelated specialty. Thus, the *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

The AAO observes that in the brief dated June 4, 2013, counsel references the Dictionary of Occupational Titles (hereinafter the DOT). It is important to note, however, that DOT was last updated in 1991 (approximately 20 years prior to the submission of the H-1B petition) and has been superseded by O*NET.[35] Although counsel references DOT, he fails to establish its relevancy to establish the current educational requirements for entry into the occupation.

Nevertheless, the AAO reviewed the DOT entry regarding system analysts in its entirety. However, it does not support a finding that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. More specifically, the occupational title of "Systems Analyst" has a Specialized Vocational Preparation (SVP) rating of 7. It must be noted that an SVP rating of 7 is not indicative of a specialty occupation. This is obvious upon reading Section II of the DOT's Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.[36] The section reads:

> II. SPECIFIC VOCATIONAL PREPARATION (SVP)
>
> Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.
>
> This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

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[35] *See*, for instance, this note at the opening page of the U.S. Department of Labor Internet site at http://www.oalj.dol.gov/libdot.htm (last visited August 23, 2013):

> The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O*NET.**

(Emphasis in the original).

[36] Section II of the DOT's Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

Specific vocational training includes training given in any of the following circumstances:

a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);

b. Apprenticeship training (for apprenticeable jobs only);

c. In-plant training (organized classroom study provided by an employer);

d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation. Rather, an SVP rating of 7 indicates that over *two years* (but not more than four years) of preparation is required for average performance of the duties of the occupation. Moreover, DOT indicates that preparation for the occupation may be the result of vocational training, including vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Accordingly, DOT does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally required to perform the duties of the occupation. Therefore, the DOT information regarding the SVP rating is also not probative of the proffered position being a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." As previously mentioned, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. On the contrary, and as discussed in greater detail *supra*, the petitioner's attestations regarding the requirements for the position indicate that at most that a general bachelor's degree may be required but not one in a specific specialty or its equivalent. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the industry in positions that are both: (1) parallel to the proffered position; and (2) located in similar organizations.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the industry in positions that are both: (1) parallel to the proffered position; and (2) located in

similar organizations. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of its computer system analyst position. Specifically, the petitioner failed to demonstrate how the computer system analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a computer system analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Systems Analysts" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.[37]

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Therefore, the evidence of record does not establish that this position is significantly different from other computer systems analyst positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not normally required for entry into such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer systems analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

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[37] For additional information on wage levels, *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.

The AAO observes that the petitioner has indicated that the beneficiary's academic background and experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or, in this case, by the client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but

whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 60 employees and was established in 2004 (approximately eight years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. The petitioner did not provide probative evidence signed by or endorsed by the client to establish that it normally requires a baccalaureate (or higher degree) in a specific specialty, or its equivalent. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

Upon review of the record, the petitioner has not provided probative evidence to establish that it (or, in this case, the client) normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." It is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV

(fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the petition cannot be approved.

IV. Inconsistencies and Discrepancies in the Record of Proceeding

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies in the evidence submitted by the petitioner. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 591.

It is noted for the record that, in light of the numerous and unresolved discrepancies in the record of proceeding, including the non-disclosure of material information relevant to the beneficiary's past stays in H-1B nonimmigrant status as well as the material discrepancies regarding the job requirements as claimed on the approved immigrant petition versus the instant H-1B nonimmigrant petition for what is allegedly the "same position," USCIS reserves the right to make a formal finding of material misrepresentation or a finding of fraud in the future under separate proceeding.

A USCIS finding of willful, material misrepresentation may lead to criminal penalties. *See* 18 U.S.C. §§ 1001, 1546; *see also U.S. v. O'Connor*, 158 F.Supp.2d 697 (E.D. Va. 2001). Knowingly and willfully making materially false or fraudulent statements or using false writings or documents may result in a fine and imprisonment of not more than 5 years. 18 U.S.C. § 1001. Furthermore, "[w]hoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact . . . [s]hall be fined under this title or imprisoned not more than . . . 10 years . . . ."

V. Conclusion and Order

As previously noted, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.