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: JUN 2 6 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 9, 2012. In the Form I-129 visa petition, the petitioner describes itself as a technology IT resources company established in 2004. In order to employ the beneficiary in what it designates as a business analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 21, 2012, finding that the petitioner 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. The director further found that the petitioner failed to establish that the duties of the proffered position are at a specialty occupation level and that it has sufficient work for the requested period of intended employment. On appeal, the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that it satisfied all evidentiary requirements. In support of this assertion, the petitioner submitted a brief and supporting evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (4) the response to the RFE; (5) the director's denial letter; and (6) the Form I-290B and supporting documentation. 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 director's decision will not be disturbed. The appeal will be dismissed. The petition will remain denied.

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record of proceeding, the AAO notes that in the instant case, there are additional issues, not addressed by the director, which preclude the approval of the H-1B petition.[1] As will be discussed later in the decision, for these additional reasons the petition also may not be approved. They are considered independent and alternative bases for denial of the petition.

In this matter, the petitioner stated in the Form I-129 petition that it is a technology IT resources company and that it seeks the beneficiary's services as a business analyst to work on a full-time basis for $60,200 per year. The petitioner further indicated that the beneficiary will work at [redacted] The petitioner also provided several documents describing the proffered position and its requirements:

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

- Letter dated March 28, 2012 describing the petitioner, professional nature of the position offered, and the beneficiary. In the letter, the petitioner interchangeably referred to the proffered position as "programmer analyst" and "business analyst." No explanation was provided. Further, the petitioner stated the following regarding its job responsibilities:

> This person will be responsible for applying [her] knowledge of [her] Programming analytical skills and Administration principles and practices to collect, review and analyze business and industry information in order to make recommendations to the management regarding effective business resources allocation, marketing, sales, consultancy, payroll, personnel, budget, small projects/programs, benefit analysis, legislative compliance analysis, research, and other departmental functions. She would initially identify the different current work methods and resources and make suggestions, develop plans and work process methodologies for the management for the effective implementation of business resources management. She would research policies and procedures and provide explanations to the management regarding compliance and review the processes for compliance and report back to the management. She will supervise the training department for effective allocation of training resources for the employees.
>
> She will work independently to accomplish and develop solutions to problems identified by her analysis and will make recommendations, taking into account the nature of the organization relationships with other industry players and internal organizational culture. She may also help to implement solutions she has identified, through training and education on new procedures and functions. Interfacing with top management of the company as well as the clients to report progress [on] projects. Prov[id]ing status reports and new project initiation reports to management and clients.

The petitioner further added the following:

> It has been our experience and understanding that a highly skilled professional with a minimum qualification of a Bachelor's of Science/Engineering/Business Administration/Management, can only fulfill these job responsibilities. The position requires a keen and detailed understanding of human resources management analysis.

The AAO notes that in the section that describes the beneficiary's qualification for the position, the petitioner identified another individual, [redacted] as the beneficiary. No explanation was provided.

- Letter dated March 28, 2012 entitled "job description and letter of support." The petitioner stated that it wishes to employ the beneficiary as a business analyst and that the beneficiary's major duties include all of the following:

- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced.
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct.
- Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data or controlling other equipment.
- Write, analyze, review, and rewrite programs, using workflow chart and diagram, and applying knowledge of computer capabilities, subject matter, and symbolic logic.
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements.
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes.
- Perform systems analysis and programming tasks to maintain and control the use of computer systems software as a systems programmer.
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program.
- Technical writing, editing, project management, and full-suite documentation development.
- Rational Unified Process (RUP_ for software developments.
- Requirements analysis discovery and development by interacting with clients and stakeholders.
- Use case development using RUP methodology and tools; write requirements; use case tools (Rational Rose)
- Software testing and script development, both manually and with automated tools.
- Read 4th generation code; comfortable with scripting languages, HTML, XML.
- Prepare detailed workflow charts and diagrams that describe input, output, and logical operation, and convert them into a series of instruction coded in a computer language.
- Consult with and assist computer operators or system analysts to define and resolve problems in running computer programs.

The petitioner further stated that "most people require a minimum degree for this position." The petitioner also noted that the beneficiary will be paid an annual salary of $60,200.

- Offer letter from the petitioner to the beneficiary dated November 26, 2011. The letter stated that the beneficiary is being offered the position as a business analyst. The letter further indicated that the salary will be $50,000 starting from November 28, 2011, and "there will be an increment of 10% in 6 months and subsequent increment when you complete one year with us."

- Letter dated April 5, 2012 describing the employer-employee relationship between the petitioner and the beneficiary. In the letter, the petitioner stated that the skills required for the specialty occupation are as follows:

    - Programming-Writing computer programs for various purposes.
    - Reading comprehension-Understanding written sentences and paragraphs in work related documents
    - Complex problem solving-Identifying complex problems and reviewing related information to develop and evaluate options and implement solutions.
    - Critical Thinking-Using logic and reasoning to identify the strengths and weaknesses of alternative solutions, conclusions or approaches to problems.
    - Active Listening-Giving full attention to what other people are saying, taking time to understand the points being made, asking questions as appropriate, and not interrupting at inappropriate times.
    - Quality Control Analysis-Conducting tests and inspections of products, services, or processes to evaluate quality or performance.
    - Judgment and decision Making-Considering the relative costs and benefits of potential actions to choose the most appropriate one.
    - Operations Analysis-Analyzing needs and product requirements to create a design.
    - Systems Evaluation-Identifying measures or indicators of system performance and the actions needed to improve or correct performance, relative to the goals of the system.
    - Time management-Managing one's own time and the time of others.

    The petitioner indicated that the location of work is at [redacted] The petitioner also stated that the petitioner provides employee benefits such as medical, sick, paid vacations and expenses, and that the beneficiary reports to an offsite coordinator and accounts team on a weekly basis. The petitioner also addressed, in relevant part: instrumentality and tools required to perform the job; the method of payment of the beneficiary's salary; information about the petitioner; the itinerary of services; the petitioner's organizational chart; and the performance review process.

- Letter from [redacted] dated March 23, 2012. [redacted] states that the beneficiary has been working as a business systems analyst at [redacted] since December 7, 2011. The letter stated that the beneficiary has been contracted to [redacted]. No further information regarding [redacted] is provided and how it relates to the petitioner. The letter further stated that "we anticipate the project to go until 2013 to 2014." The letter stated that the beneficiary duties consist of "providing analysis for the activities related to the Risk and Compliance in the company" and claimed that some of the beneficiary's additional responsibilities include:

    - Working under the direction of the Business System Analyst Manager to produce documentation related to business, operational, and technical tasks.

- Interacting with internal customers to solve complex issues by understanding and participating in project planning.
- Documenting business, functional, and data requirements, and communicating the requirements to the development team for design and implementation of business solutions.
- Writing and executing SQL statements for data analysis and research.

- Itinerary dated April 4, 2012, stating that the beneficiary would be assigned at at The project start date is indicated as December 7, 2011 and end date is "open contract." It further identified the petitioner as the employer, the vendor as , and the end client as

- Agency agreement between and the petitioner dated July 28, 2010.

- Purchase order between and the petitioner dated November 30, 2011, which named the beneficiary as the business system analyst consultant. It stated that the name of the client is and indicated the project location as It further indicated the project duration as 3 months with a possible extension.

Further, the petitioner submitted the following documents as evidence of the beneficiary's employment:

- A copy of a work badge with the beneficiary's picture and name that does not indicate the name of the employer.

- A copy of work badge identifying the beneficiary as an employee for the petitioner.

- Copies of invoices from the petitioner sent to for the beneficiary's work from December 2011 to February 2012.

- Copies of pay stubs for the beneficiary from January to March 2012. The AAO notes that the pay stubs indicate that the beneficiary's rate is $25 per hour, which is below the proffered wage indicated in the Form I-129, which is $60,200 per year or $29 per hour.

- Copies of timesheet for the beneficiary from December to February 2012.

- A copy of the beneficiary's performance review dated January 30, 2012, from November 28, 2011 to January 27, 2012. The beneficiary's job title is indicated as "business analyst."

The petitioner also submitted a copy of 2011 U.S. Income Tax Return for an S Corporation. It is noted that the gross income was $9.8 million and net income was $180,405. The petitioner paid $6.6 million in salaries and wages. However, the cost of goods sold is left blank.

Moreover, the petitioner submitted a copy of the beneficiary's diploma and academic transcript

showing that she received a Master's in Business Administration from in The beneficiary also submitted a copy of resume which indicates that she has a bachelor's degree from with a Bachelor's in Electronics and Communication Engineering.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analyst" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position. In the LCA, the petitioner indicated that the wage rate is $60,200. The petitioner also indicated that the place of employment 1 is the petitioner's old address at 1 with prevailing wage of $60,174, and the place of employment 2 is with prevailing wage of $50,939.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 21, 2012. The director acknowledged that the petitioner had submitted various documents in support of the petition, but found that the evidence was insufficient to establish that a valid employer-employee relationship will exist for the duration of the period requested. The director specifically noted that a letter dated March 23, 2012 from ndicated that the beneficiary will be engaged to work at through but the work arrangement was not documented. The director outlined the types of evidence to be submitted. Furthermore, the petitioner was notified that it may submit any and all additional evidence that it believed would establish eligibility for the benefit sought.

The petitioner responded to the RFE by submitting a brief and additional evidence. However, the AAO notes that the letter dated April 27, 2012 submitted in response to RFE is largely a copy of the letter submitted on April 5, 2012 describing the employer-employee relationship between the petitioner and the beneficiary. In addition, the petitioner stated that "we do have the ability to assign work for In-house projects, RFP's, [the petitioner]'s database work and any other client work that we feel [she] will be a good fit for also we control the ability to assign the beneficiary to various other clients that we do business with." The petitioner also added that they "have a huge demand of IT services to be provided from over 100 companies" and that the beneficiary's "profile and skills match many of them and will be a good asset to [their] team." Moreover, the petitioner indicated that "project completion dates are flexible with various extensions from and that "it is Open Ended Contract with with extensions." The petitioner also indicated that the position is "programmer analyst." The petitioner provided copies of its contracts with various clients as evidence of "ability to place the beneficiary as and when required all over USA and continuity of IT business domain service since 2004."

The petitioner submitted the following documents as evidence of "ability to place the beneficiary as and when required all over USA":

- Subcontractor agreement with
- Professional services agreement with I

- Consulting agreement with
- Contractor agreement with
- Subcontractor Addendum located in
- Associate Supplier Master Services Agreement with in
- Master Contracting Agreement from
- Subconsulting agreement with
- Independent Contractor Agreement with
- Subcontractor Agreement with
- Contractor Master Services Agreement with
- Agreement to provide services with
- Subcontractor Agreement with
- Business to business consulting agreement with

The petitioner also stated "please find attached letter from End Client, who is the ultimate end client between [the petitioner] and However, the AAO notes that this letter is not in the record. The AAO further notes that the petitioner did not address the director's concerns regarding

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on May 21, 2012. The petitioner submitted an appeal of the denial of the H-1B petition.

The matter is now on appeal before the AAO. Notably, there are significant discrepancies in the record of proceeding with regard to the proffered position. These material conflicts, when viewed in the context of the record of proceeding, undermine the claim that the petitioner has established eligibility for the benefit sought under the pertinent statutory and regulatory provisions.

The petitioner has provided inconsistent information as to the nature and requirements for the proffered position. Specifically, the petitioner provided conflicting and varied description of job duties throughout the record. For example, in the letter dated March 28, 2012, the petitioner states that the beneficiary will "collect, review and analyze business and industry information in order to make recommendations to the management regarding effective business resources allocation, marketing, sales, consultancy, payroll, budget, small projects/programs, benefit analysis, legislative compliance analysis, research, and other departmental functions." The petitioner also stated that the beneficiary would "initially identify the different current work methods and resources and make suggestions, develop plans and work process methodologies for the management for the effective implementation of business resource management." The petitioner further stated that the beneficiary "will supervise the training department for effective allocation of training resources for the employees." However, in another letter dated March 28, 2012 entitled "job description and letter of support," the petitioner stated that some of the major duties for the position include: "correct errors by making appropriate changes and rechecking the program to ensure that the

desired results are produced"; "conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct"; and "write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment." In another letter provided by dated March 23, 2011, it states that the beneficiary's "profile involves providing analysis for the activities related to the Risk and Compliance in the company" and her additional responsibilities include "working under the direction of the Business Systems Analyst Manager" to produce documentation related to business, operational, and technical tasks," "documenting business, functional, and data requirements, and communicating the requirements to the development team for design and implementation of business solutions" and more.

Similarly, the petitioner makes conflicting statements regarding requirements for the position. For example, in the letter dated March 28, 2012, the petitioner states that it "has been our experience and understanding that a highly skilled professional with a minimum qualification of a Bachelor of Science/Engineering/Business Administration/Management, can only fulfill these job responsibilities." The petitioner further added that the "position requires a keen and detailed understanding of human resources management analysis." However, in the letter dated April 5, 2012 and in response to the RFE, the petitioner lists generic skills such as programming, reading comprehension, complex problem solving and others, but does not state that a bachelor's degree in a specific specialty is required for the position. Likewise in another letter dated March 28, 2012, the petitioner states "most people require a minimum degree for this position," but did specify the type of degree or the specific specialty, and did not provide documentary evidence to corroborate this statement. Further, no explanation for the variance was provided. Moreover, the letter from did not state that the position requires any particular education level. In addition, the petitioner did not provide any documentation from the end-client to establish the requirements for the proffered position.

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. 582, 591 (BIA 1988). Although the petitioner made assertions regarding the qualifications required for the proffered position, it failed to submit probative and credible evidence to substantiate its claims. 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).

Further, the AAO notes that the claimed requirement of a degree in such majors as "engineering" or "business administration" for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position

requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.

The AAO will now address whether the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter and that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee" in accordance with the applicable statutory and regulatory provisions.

To establish eligibility for H-1B classification, a petitioner demonstrate that it is qualified to file a petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F). (In the instant case, the petitioner does not claim to be a U.S. agent.) Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not 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." *Id.*

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

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

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

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the

> extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

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

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

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

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

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.[3]

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

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

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"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).

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

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

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

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

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

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

Applying the *Darden* and *Clackamas* tests to this matter, 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."

The AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. As previously mentioned, 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.

In the instant case, the AAO notes that in addition to discrepancies of job duties and requirements for the position as previously discussed, the record contains inconsistent statements regarding the location of the beneficiary's employment. In the Form I-129 and the LCA, the petitioner claimed that the beneficiary will be working for the end-client located at The petitioner also confirms the location in the letter dated April 5, 2012, in the itinerary, and in response to the RFE. Further, the petitioner submitted photos of the beneficiary standing front of a building that shows the address as However, in the purchase order for it indicated that the project location is No explanation was provided regarding the variance in the work location.

Further, the record of proceeding lacks probative evidence from the end-client to establish the duties of the proffered position, requirements for the position, nature of the project and place of employment. The AAO notes that on appeal, the petitioner through counsel submitted a document that describes current projects that the beneficiary is working on and two affidavits from individuals who work for However, the AAO finds that these documents are not probative evidence. The AAO notes that the document that describes the current project is not dated and not signed, and other than counsel's claim that this document was written by the beneficiary, there is no documentary evidence to corroborate his claim. Further, while two individuals claim in their affidavits that they are the beneficiary's co-workers, there is no independent documentary evidence to substantiate their claim. Moreover, the petitioner failed to submit any documents from to establish the nature of the beneficiary's employment. The AAO finds that without independent, documentary evidence from JP Morgan, claims regarding the beneficiary's employment cannot be verified. 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).

Moreover, the petitioner did not provide any documentation from establishing the length of the project. Instead, the petitioner submitted letters from that provide inconsistent information as to the length of the project. More specifically, a letter from dated March 23, 2012 states "we anticipate the project to go until 2013 or 2014." However, in the purchase order dated November 30, 2011, it states that estimated project duration is "3 months with possible extension." Here, while the petitioner makes various assertions regarding the beneficiary's employment, the record lacks sufficient documentary evidence to support the claims.

The petitioner is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

> (A) General documentary requirements for H–1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:
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> * * *

> (B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

In the instant case, the petitioner repeatedly states that an employment agreement is submitted, but the document that the petitioner refers to as an employment agreement is entitled "confidential agreement" and is limited to discussing treatment of confidential information. The record also contains the offer letter dated November 26, 2011, but it is devoid of several critical aspects of the beneficiary's employment. While the offer letter identifies the proffered position as a business analyst, it does not contain information regarding job duties, place and period of employment, and requirements for the position. 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.

Furthermore, the offer letter indicates that the beneficiary will be paid a salary of "$50,000 starting from November 28, 2011" "with increment of 10% in 6 months and subsequent increment when you complete one year with us." The AAO notes that in the Form I-129 petition, LCA and letter of support filed approximately six months after commencement of the beneficiary's employment, the petitioner stated that the beneficiary would be paid $60,200 per year. However, the pay stubs submitted by the beneficiary from January to May 2012 indicate that the pay rate is $25 per hour, which is $52,000 per year. No explanation was provided for the variance.

The AAO notes that the pay stubs are issued by the petitioner to the beneficiary and 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.

The petitioner also submitted printouts of the beneficiary's timesheets. The document resembles a monthly calendar with the petitioner's logo in the top corner. The document indicates number "8" during the week and "0" on weekends. The document further shows the employee's name as the beneficiary and the client as , and location as ' In the letter dated April 5, 2012, the petitioner indicated that "the beneficiary submits time tracker showing hours implemented and duties performed." However, the timesheets submitted on record do not contain the probative details regarding duties performed. The timesheet has a column on the corner "project details," but the column is left blank.

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 record of proceeding provides insufficient probative evidence on this issue. For example, it must be noted that the petitioner claims that the beneficiary will be physically located in The petitioner is located approximately 683 miles away in raising serious questions as to who will supervise, control and oversee the beneficiary's work. In the letter dated April 5, 2012, the petitioner indicated that the "beneficiary reports [to] offsite coordinator and accounts team on weekly basis." The petitioner further added that "the beneficiary reports to offsite coordinator as well as Director of Operations/President in timely manner." The petitioner included a copy of the organizational chart which indicates that the beneficiary reports to an unnamed offsite coordinator as well as accounts manager, and the president, 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 demonstrating the supervisory chain of command.

In response to the RFE, the petitioner indicated that the president "functions as the beneficiary's primary Manager and provides evaluations of the Beneficiary's performance and other supervision." The petitioner indicated that when the beneficiary is off-site, she "will be subject to additional supervision procedures and protocols." In support, the petitioner submitted a document entitled "[the petitioner's] Performance Review Procedures and Process." The document states the following:

> All employees send a weekly timesheet along with a segregation of their work (duties and % of time spend on a particular action item during the execution of the project). This is automated and sends to our HR/Accounting system in QuickBooks, their career development over the years. They also report to the offsite work co-coordinator on a weekly basis for status reporting. This allows [the petitioner] to monitor their work on a regular basis on a case by case scenario. [The petitioner] also control workflow execution and task assignment on a weekly basis.

Further, the document further stated that "a quarterly review is done by the Offsite Coordinator and the President." On appeal, counsel claimed that the beneficiary "has not yet been subject to a quarterly review," but the AAO notes that the record contains a copy of the performance review dated January 30, 2012. The performance review is from November 28, 2011 to January 27, 2012. The document shows the beneficiary's name and the position. Further, while the document provides performance rating and comment that "the beneficiary has shown great Oracle, DB2, load and data analysis work at the client site," the record does not contain documentary evidence that corroborates the petitioner's review procedures and does not indicate how the beneficiary's progress is being reported. As mentioned above, the AAO notes that the timesheets submitted on record do not contain information regarding duties and percentage of time spent on a particular action, but merely records hours worked in a month. Therefore, the performance review does not provide information on how the petitioner supervises, controls, and oversees the petitioner's work.

The petitioner also submitted another organization chart in response to the RFE, but it does not list the beneficiary, and therefore, does not establish a chain of supervisory control and oversight.

However, it names the HR/Offsite Coordinator as ' On appeal, counsel provided a printout entitled "my manager hierarchy" from which lists nine people, with the beneficiary listed on the bottom. The AAO notes that is not on the list. Further, the petitioner fails to provide any specific information regarding the beneficiary's offsite coordinator (e.g., role, location, employer). Moreover the petitioner did not submit any email correspondence or other probative evidence to establish that the beneficiary has been supervised or even had any contact with the referenced offsite coordinator or other officials from the petitioning company. That is, the record is devoid of any evidence establishing that the petitioner has supervised, directed, guided or even contacted the beneficiary electronically or in person ("physically meets").

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 petitioner stated that the petitioner "reimburses the beneficiary for computer hardware & software required by the employee to perform a job since "depending on each client the hardware and software requirement/needs change, so in certain cases, the software and hardware are bought by [the petitioner] and provided in some others the beneficiary is reimbursed for the same." In the instant case, the record does not contain evidence of reimbursement and it does not indicate whether the petitioner provided the instrumentalities and tools required to perform the duties of the proffered position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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). While counsel claims that it has on-going projects with , counsel failed to provide evidence to substantiate the beneficiary's actual work on any particular project.

As mentioned, the documents show inconsistent dates for the duration of the project. Specifically, the letter from states "we anticipate the project to go until 2013 or 2014," but in the purchase order, it is indicated project duration is "3 months with possible extensions." Further, in response to the RFE, the petitioner submitted various contracts and claimed that it has "the ability to place the beneficiary as and when required all over USA." However, the AAO finds that the petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary a business analyst that, at the time of the petition's filing, was definite and nonspeculative for any of the requested period of employment specified in the Form I-129.[5] The record of proceeding lacks (1)

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

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must

evidence corroborating that the petitioner has work that exists as an ongoing endeavor generating definite employment for the beneficiary's services (e.g., documentary evidence regarding the scope, staging, time and resource requirements, supporting contract negotiations, documentation regarding the business analysis and planning to support the work); and (2) evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

Accordingly, the petitioner has not demonstrated that it will maintain an employer-employee relationship with the beneficiary for the duration of the period requested. The AAO finds that the petitioner has failed to establish that the petition was filed for work that was reserved for the beneficiary as of the time the petition was submitted.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has 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). That is, 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).

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The AAO will now address the issue of whether the petitioner established that it would employ the beneficiary in a specialty occupation position. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

> first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

(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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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.

In the instant case, as previously discussed, the petitioner has provided inconsistent information regarding its academic requirements. For example, in the letter dated March 28, 2012, the petitioner states that it "has been our experience and understanding that a highly skilled professional with a minimum qualification of a Bachelor of Science/Engineering/Business Administration/Management, can only fulfill these job responsibilities." The petitioner further added that the "position requires a keen and detailed understanding of human resources management analysis." However, in the letter dated April 5, 2012 and in response to the RFE, the petitioner listed generic skills such as programming, reading comprehension, complex problem solving and others, but does not state that a bachelor's degree in specific specialty is required for the position. Likewise in another letter dated March 28, 2012, the petitioner stated "most people require a minimum degree for this position," but did specify the type of degree or that specific specialty, and did not provide documentary evidence to corroborate his statement. No explanation for the variance was provided.

In addition to providing inconsistent requirements for the position, the AAO observes that the documents do not establish that a bachelor's degree in a specific specialty is required for the position. 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 two disparate fields, such as physics and business, 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) of the Act (emphasis added).

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in Engineering or Business Administration. These two disciplines are not closely related fields of study. Consequently, 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, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

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

In the instant case, the record of proceeding is devoid of substantive information from the end-client 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 any documentation on this issue from, or endorsed by the end-client that will actually be utilizing the beneficiary's services (according to the petitioner).

Further, the record of proceeding contains numerous inconsistencies and discrepancies regarding the proffered position, as described in detail earlier in the decision. 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.[6] For this additional reason, the appeal will be dismissed and the petition denied.

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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.[7] 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. Here, that burden has not been met.

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

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[6] A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications in this matter.

[7] As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the petition cannot be approved for the above stated reasons, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.