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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 3 0 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 it does not establish eligibility for the benefit sought. The director's decision will be affirmed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on June 8, 2012. In the Form I-129, the petitioner describes itself as a "Staffing" business with 130 employees, established in 2005.[1] In order to employ the beneficiary in what it designates as a "Software Developer" 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).

The director denied the petition on February 7, 2013, finding that the petitioner failed to establish that there exists a credible offer of employment in a specialty occupation. Subsequently, on August 6, 2013, the director certified the petition to the AAO for review. On September 6, 2013, the petitioner, through counsel, submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's first Request for Evidence (RFE); (3) the petitioner's response to the first RFE; (4) the service center's second RFE; (5) the petitioner's response to the second RFE; (6) the director's notice denying the petition; (7) the Notice of Certification; and (8) counsel's brief and supporting documentation submitted to the AAO. The AAO reviewed the record in its entirety before issuing its decision.[2]

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[1] In contrast to its description as a "Staffing" business, in the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, on page 17, at Part A, section 6, the petitioner lists the North American Industry Classification System (NAICS) code as "541511," which relates to "Custom Computer Programming Services." The 2012 NAICS definition states that "[t]his U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." North American Industry Classification System, 2012 NAICS Definition, 541511 - "Custom Computer Programming Services," available on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited Sept. 30, 2013).

Also in contrast to the petitioner's description of itself on the Form I-129, the petitioner states in a letter to the AAO dated September 4, 2013 that it has "over 200 employees." No explanation was provided for the variance.

[2] The H-1B submission included several documents that did not appear to relate to the instant petition or the beneficiary and contained Sensitive Personally Identifiable Information (SPII). For instance, in response to the director's first RFE, the petitioner, through counsel, submitted copies of pages from four different passports that do not appear to relate to the beneficiary. One of the passport copies included a copy of a Canadian visa for an individual that is not the beneficiary. These copies originally appeared on the backside of a letter on counsel's letterhead, dated November 26, 2012, in which counsel responded to the director's first RFE, as well as on the backside of documents relating to the beneficiary's foreign education. No explanation was provided for the submission of this evidence and there is no documentation in the record of proceeding indicating that the individual named in the Canadian visa, who is not the beneficiary, consented to the submission, which includes his personal information, in this record of proceeding. The AAO will not further address this submission, except to note that to avoid potential

For the reasons that will be discussed below, the AAO agrees with the director that the record as currently constituted does not establish eligibility for the benefit sought. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

Based on its *de novo* review of the certification, however, the AAO will first address additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition.[3] As a preliminary matter and beyond the decision of the director, the AAO first finds that the petition cannot be approved because the petitioner failed to establish that the beneficiary is exempt from the numerical limitations contained in section 214(g) of the Act, i.e., the H-1B cap.

In addition to this H-1B cap issue, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not establish (1) that the petitioner will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee, (2) the petitioner's eligibility at the time of filing for the benefit sought, and (3) that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested. Furthermore, despite the director's specific request for original documentation pertaining to the beneficiary's qualifications, the petitioner failed to submit the requested material evidence. For these additional reasons, the petition may not be approved.

I. Preliminary Basis of Ineligibility Proscribing Approval of the H-1B Petition

As stated above, as a preliminary matter, and beyond the decision of the director, the AAO finds that the petition cannot be approved because the petitioner failed to establish that the beneficiary is exempt from the numerical limitations contained in section 214(g) of the Act. While the other grounds not identified by the director's decision will be addressed below, this ground will be addressed first as it precludes approval of the petition on an objective basis that can only be overcome by filing a new H-1B petition with fee.

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violations of the Privacy Act of 1974 and the Freedom of Information Act, the AAO has removed the documents containing SPII from the record of proceeding and returned these documents to the petitioner's counsel. The front-and-back copies of these documents have not been retained by USCIS and only the front side of each returned document which contains information related to the instant petition has been copied and placed in the record of proceeding.

Furthermore, in response to the director's second RFE, the petitioner, through counsel, again appears to have submitted documents unrelated to this petition. Specifically, four pages that state "SSA Soft" and various document numbers that do not appear to relate to this petition were printed on the backside of a letter dated January 15, 2013 as well as on the reverse side of a copy of an evaluation of the beneficiary's foreign education equivalency dated January 10, 2013. Again, no explanation was provided for the submission of these pages. These documents have not been removed from the record of proceeding, however, as they do not contain SPII.

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

Section 214(g) of the Act provides in pertinent part the following:

> (1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-
>
> (A) under section 101(a)(15)(H)(i)(b), may not exceed---
>
> * * *
>
> (vii) 65,000 in each succeeding fiscal year. . . .

In general, section 214(g)(5) of the Act provides that:

> The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who---
>
> (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;
>
> (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
>
> (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

The Code of Federal Regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads in pertinent part as follows:

> When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, [U.S. Citizenship and Immigration Services (USCIS)] will make numbers available to petitions in the order in which the petitions are filed. . . . Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. . . .

As noted above, the petitioner filed the Form I-129 on June 8, 2012. The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter, "H-1B Supplement"), at Part C, Numerical Limitation, reads as follows:

> 1. Specify how this petition should be counted against the H-1B numerical limitation (a.k.a. the H-1B "Cap"). *(Check one):*
>
> ☐ a. CAP H-1B Bachelor's Degree
> ☐ b. CAP H-1B U.S. Master's Degree or Higher
> ☐ c. CAP H-1B1 Chile/Singapore
> ☐ d. CAP Exempt

In this matter, by requesting an employment start date of October 1, 2012, the instant petition is subject to the Fiscal Year 2013 (FY 2013) limitation on H-1B beneficiaries. While a regular H-1B cap number was still available at the time the instant petition was filed, the petitioner checked box b at Part C, section 1, indicating that the beneficiary has a U.S. master's degree or higher, and thereby claimed an exemption from the numerical limitation contained in section 214(g)(1)(A)(vii) of the Act pursuant to section 214(g)(5)(C) of the Act. The numerical limitation for the "advanced degree" cap exemption was reached on June 7, 2012. *See* "USCIS Reaches Fiscal Year 2013 H-1B Cap," available on the USCIS Internet site at http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ee9f3f93131e7310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Oct. 10, 2013).

For fiscal year 2013, Congress provided that 65,000 H-1B numbers will be available for visas issued or status provided. *See* section 214(g)(1)(A) of the Act. As indicated above, the regular statutory cap of 65,000 was reached on June 11, 2012, three days after the instant petition was filed. *Id.*

Here, the record does not support a finding that the beneficiary possesses a U.S. master's or higher degree. In the May 8, 2012 letter of support, the petitioner's Vice President stated that the beneficiary received a master's and a bachelor's degree "from respected Indian Universities . . . ." In addition, the petitioner submitted copies of documentation only pertaining to the beneficiary's *foreign* degrees. Accordingly, absent evidence to the contrary, it appears the petitioner should have checked box "a" at Part C, section 1 of the H-1B Supplement, indicating that the beneficiary is subject to the numerical limitation contained in section 214(g)(1)(A) of the Act.

As noted above, however, 8 C.F.R. § 214.2(h)(8)(ii)(B) provides that "[p]etitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied. . . ." The actual determination date for the beneficiary's ineligibility for this claimed U.S. master's or higher degree exemption is the date of this decision.[4] Consequently, as the AAO is hereby determining that the petition is

[4] For the sake of argument, even if the determination should have been made by the director, as the director issued the service center decision on February 7, 2013, any determination relative to the H-1B cap exemption would still have been made after the final receipt date of regular cap-subject H-1B

not exempt from the standard 65,000 numerical limitation and as a regular FY 2013 cap number is no longer available to be assigned to the beneficiary, the petition must be denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B).[5]

II. Factual and Procedural History

The petitioner indicated on the Form I-129 that it wishes to employ the beneficiary as a "Software Developer" on a full-time basis at a salary of $120,000 per year for the period October 1, 2012 to September 30, 2015. On the Form I-129 at Part 1, section 3, the petitioner indicated that its address is The petitioner did not fill out Part 5, section 3, of the Form I-129, which requests the "[a]ddress where the beneficiary[] will work if different from the address in Part 1," indicating that the beneficiary will be employed only at the petitioner's location listed at Part 1, section 3.

In addition, on the Form I-129, the petitioner checked the boxes at (1) Part 5, section 4, indicating that an itinerary is included in the petition, and (2) Part 5, section 5, indicating that the beneficiary will not work offsite.

In the Labor Condition Application (LCA), the petitioner also indicated that the beneficiary will be employed at The petitioner further attests on the LCA that the proffered position's occupational category is "Software Developers, Applications," and that the petitioner will pay the beneficiary $120,000 per year for work performed at

In a support letter dated May 8, 2012, the petitioner's Vice President states that the petitioner "provides flexible and cost-effective services" and that its "services include Contract Staffing[,] Project Services and Managed Staffing[,] [and] Permanent Placement assistance." The petitioner's Vice President also states in his letter that the petitioner is "always expanding [its] impressive database of talent" which "gives [the petitioner] a much larger pool of candidates to find that perfect fit for [the petitioner's] clients."

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petitions. In other words, the February 7, 2013 decision is the earliest date that USCIS would have determined that the petition was not exempt from the numerical limitation contained in section 214(g)(1)(A) of the Act.

[5] It is recognized that the petitioner filed the instant petition claiming the U.S. master's or higher H-1B cap exemption one day after that exemption's final receipt date of June 7, 2012. There is no evidence in the record, however, to support a finding that the instant petition was receipted by USCIS as a regular H-1B filing and assigned one of the 65,000 visa numbers then still available for FY 2013 filings. Based on the date the final receipt dates were announced, i.e., June 12, 2012, it appears instead that the instant petition was receipted as a U.S. master's or higher H-1B cap exempt filing as requested by the petitioner and assigned one of the 20,000 visa numbers permitted for FY 2013. Accordingly, as it was more likely than not receipted as a FY 2013 U.S. master's or higher cap filing and as a determination that the beneficiary was ineligible for the exemption claimed was made after June 11, 2012, the petition must be denied as there are no remaining FY 2013 H-1B visa numbers available to be assigned to the beneficiary.

Also, the petitioner's Vice President states that the position offered to the beneficiary is a full-time "Software Developer" position and that the proffered position's duties include the following:

1. Interaction with customer to receive and understand software requirements, and provide a walk through [sic] of the solution design. (approximately 15% of daily work time);

2. Analyzing use cases in overall solution perspectives and communicating with peer teams to resolve design interfaces and implement details and issues. (approximately 25% of daily work time);

3. Implementing Sequence Diagrams using Enterprise Architect; Implement Curam Classic rules. (approximately 15% of daily work time);

4. Conduct code reviews and design reviews for use in other cases; Conduct unit testing for the designed and implemented modules. (approximately 15% of daily work time);

5. Preparing the design documents for work testing use cases[.] (approximately 15% of daily work time); [and]

6. Use various languages, tools and technologies including: Java, J2EE, JSP, AJAX, Java script, Curam, Oracle 10g, Clear Case, Apache, Rational Rose, JBuilder, JBoss, Struts, Guice, UML, Servlet, WAS 6, Tomcat, Maven and others as needed. (Approximately 15% of daily work time).

The support letter's section titled, "**Terms of Employment**," includes the following language:

3. **Itinerary:** The venue, establishment and location of the beneficiary's services shall be performed in house at our business location located at

In addition to the aforementioned letter and LCA, the documents submitted with the Form I-129 included, among other things, a copy of the petitioner's unsigned 2011 Form 1120S, U.S. Income Tax Return for an S Corporation. Schedule B of that tax return indicates that the petitioner's "[b]usiness activity" is "CONSULTING" and that its "[p]roduct or service" is "IT STAFFING."

As indicated above, the petitioner's Vice President also stated that the beneficiary "received a Master[']s [degree] in Computer [A]pplications and a Bachelor of Computer Science from respected Indian Universities . . . ."

No documentary evidence pertaining to the proffered position or the beneficiary's qualifications to perform the claimed duties of the proffered position was submitted with the petition when it was filed with USCIS.

The director found the initial evidence insufficient to establish eligibility for the benefit sought,

and issued an RFE on September 3, 2012. The petitioner was asked to submit "evidence to establish that the beneficiary is qualified to perform [services] in the claimed specialty occupation." Specifically, the director requested originals of the beneficiary's college/university transcripts and degrees to be submitted by November 26, 2012.

In response, the petitioner, through counsel, submitted the following:

- A copy of the beneficiary's Bachelor of Science degree from in India.
- A copy of the beneficiary's transcript for the Bachelor of Science degree examinations from (an autonomous college in the jurisdiction of , for the "Elective Combination" of mathematics, physics, and computer science, for the period of study from 1997 to 2000.
- A copy of the beneficiary's degree of master of computer applications from the dated "09-10-2003."
- A copy of the beneficiary's statements of marks from the

The petitioner did not submit the original documents requested by the director.

A letter on counsel's letterhead, dated November 26, 2012, was also submitted. In the letter, counsel stated the following:

> The beneficiary is currently working abroad in Australia until this visa is granted, while both of his graduating schools are located in India. The initial petition was filed without copies of his degrees so that this petition would make the quota for this year. There was some difficulty in getting the degree copies to our office in time, and had we waited, we would have missed the quota.
>
> Had we submitted the evidence copies that we are forced to submit here, it would have been sufficient to establish the beneficiary's educational qualifications for eligibility for this visa. Instead, we did not and were requested to provide original degrees and the signed and sealed transcripts.
>
> We and the [petitioner] requested that the beneficiary obtain the transcripts and provide us with the originals as required, but they were unexplainably delayed by both the beneficiary, his education institutions and the distance that the documents must traverse. With the result that we now find ourselves out of time, forced into a "last ditch" attempt to save our client the loss of his filing fees. In such a frustrating situation, we must submit this response such as it is in all its deficiency. We will forward the original documents as soon as possible to fully satisfy the inquiry.
>
> Please find the following evidence enclosed in response to your inquiry:

1. Copies of the beneficiary['s] bachelor's degree and transcript[; and]
2. Copies of the beneficiary's Master's degree and transcripts[.]

We realize that this information most likely will not suffice, and that we are not entitled to a favorable determination because of our failure to fully comply, but none the less, we hopefully request that you use your discretion and extend favor to this case.

On December 6, 2012, the service center issued a second RFE requesting (1) evidence to establish that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree, and (2) documentation to demonstrate that the petitioner has sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. The director provided a list of the types of evidence that could be submitted.

In response to the director's second RFE, the petitioner provided additional supporting evidence, including, among other things, the following:

- An evaluation of the beneficiary's foreign degrees rendered by Inc., dated January 10, 2013, which states that the beneficiary's foreign degrees are equivalent to a U.S. master's degree in computer science.

- A copy of a letter, dated June 5, 2012, addressed to the beneficiary, regarding an "Offer of Employment." The letter is on the petitioner's letterhead and is signed by the petitioner's Vice President. The letter states that the petitioner "would like to offer [the beneficiary] a position on [its] team as a **effective 1/1/13**." (Emphasis added). This letter further states that "[w]hile [the beneficiary] will be based out of, and work out of, [the petitioner's] corporate office in IN, some travel to client sites may be required from time to time as necessary."

- A copy of a document titled "Internal Employment Agreement," made and entered into on June 6, 2012, between the petitioner and the beneficiary (hereinafter "the Employment Agreement"). The Employment Agreement was signed by both the petitioner's Vice President and the beneficiary; however, it is noted that the lower right-hand side sections on each page requiring initials (to presumably indicate the beneficiary's acceptance of the terms thereof) were left blank. The Employment Agreement states, in pertinent part, the following:

  2. Term of Agreement – Subject to the provisions for termination hereinafter provided, the Term of this Agreement shall commence on **January 1, 2013**, and shall continue until written notification of intent to terminate is provided in writing by either party.

  3. Duties and Responsibilities – During the Term of this Agreement, Employee shall hold the position of Employee shall perform all duties related and necessary to this position as

determined by [the petitioner]. Employee agrees to abide by all by-laws, policies, practices, procedures, and rules of [the petitioner].

- A one-page printout of the current job listings from the petitioner's Internet site (printed on January 3, 2013), listing one "*Direct Hire*" and four "*Contract*" positions. Specifically, the print-out lists the following five positions (emphasis added):

  Systems Administrator
  | *Direct Hire*

  ETL Developer
  | *Contract*

  Sr. Project Manager
  Contract

  Curam Developer
  | ***Contract***

  Ruby on Rails Architect
  | *Contract*

- A copy of a four-page document titled "**MASTER AGREEMENT TO PROVIDE CONSULTING SERVICES TO** ' made effective March 19, 2010, by and between the petitioner (referred to as "Consultant" therein) and [6] This Master Agreement calls for the petitioner to provide with "computer consulting services . . . (collectively, the 'Services')" and that "[t]he Services will be ordered using [a] Statement of Work [(SOW)] . . . ." Furthermore, "[t]he Services . . . shall be executed to satisfaction." A copy of the SOW referenced in the Master Agreement was not submitted by the petitioner.

- A copy of an invoice, dated October 31, 2012, from the petitioner, billed to for "[r]emote Java/Curam work for October for IEMP project."

- A copy of a four-page document titled, "***SUBCONTRACTOR AGREEMENT***," made and entered into on November 24, 2010, by and between and the petitioner.[7] This agreement calls for the petitioner to provide services to client The AAO notes that the agreement was *not* signed by Also, the petitioner did not submit a copy of the Work Order referenced in the agreement.

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[6] The AAO will hereinafter refer to this document as the Master Agreement.

[7] The AAO will hereinafter refer to this document as the Subcontractor Agreement.

- A copy of a three-page document titled, "Confidentiality and Nondisclosure Agreement," made on November 24, 2010, by and between and the petitioner.

- A copy of an invoice, dated October 31, 2012, from the petitioner, billed to for work performed by six individuals.

- A copy of the petitioner's business checking account statement for the period from November 1, 2012 through November 30, 2012, with a highlighted line indicating a deposit by on November 28, 2012.

- A copy of pages 1-5 and page 7 of a 12-page document titled, "**SUBCONTRACT AGREEMENT**," entered into and effective on June 15, 2010, between and the petitioner.[8] This agreement states that is in the business of filling temporary assignments and providing consulting services in accordance with the needs of its customers (the 'Client(s)')" and that "the Client has requested to locate temporary staffing services to staff its project . . . ." The agreement also states that have engaged [the petitioner] to provide those services . . . [as more particularly set forth in the Statement of Work, attached hereto as Exhibit A (the 'SOW')]" and that "[the petitioner] shall provide the Services through the personnel listed in Section 9 of the SOW." Section 6(a)(ii) of the agreement states that "[the petitioner] is not and will assure that [its] Employees assigned to provide services hereunder are not subject to any contractual limitations on its/his/her ability to perform Services under this Agreement." The AAO notes that the petitioner did not submit a copy of the SOW. Also, it is noted that the lower left-hand side sections on each page requiring the initials of both parties were left blank.

- A copy of an invoice, dated October 31, 2012, from the petitioner, billed to for work performed by three individuals.

- A copy of a letter dated May 8, 2012, from Property Manager, addressed to the petitioner, regarding the "Second Amendment to Lease Dated 03/12/12." The letter states that the "Occupancy" and "Commencement" date shall be March 27, 2012, and that the "Lease Expiration Date" shall be February 9, 2016. The letter was signed by the petitioner's representative indicating that the petitioner concurred with the dates listed in the letter.

- A copy of a document titled, "**SECOND AMENDMENT TO LEASE**," made and entered into as of March 12, 2012, by and between as the landlord, and the petitioner as the tenant. This amendment indicates that the parties desire to expand the leased premises by adding 386 contiguous rentable square feet to the current leased premises, resulting in 4,736 rentable square feet.

- A copy of a letter dated September 13, 2007, from Property Manager, addressed to the petitioner, regarding the "Lease Dated

[8] The AAO will hereinafter refer to this document as Subcontract Agreement I.

June 22, 2007." The letter states that the "Commencement" and "Occupancy" date shall be September 10, 2007, and that the "Lease Expiration Date" shall be September 30, 2014. The letter was signed by the petitioner's representative indicating that the petitioner concurred with the dates listed in the letter.

- A copy of a document titled, "**LEASE**," dated June 22, 2007, by and between [redacted] as the landlord, and the petitioner as the tenant.

Counsel also submitted a letter to the director on counsel's letterhead, dated January 15, 2013, which states:

> Thank you for you[r] gracious approach to this case that has allowed us to save a petition. We are extremely grateful for the deference that you have shown in this case.

As noted above, the director denied the petition on February 7, 2013. The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. Specifically, the director found that none of the documents submitted by the petitioner, a "for-profit enterprise engaged in information technology staffing," "suggest that an ultimate end-client company is contractually bound to, or in need of, the beneficiary's services in accordance with the petitioner's period of requested employment at the indicated work location." The director further found that the documents submitted by the petitioner do not establish the "work to be completed; that the duties to be performed are those of a software developer position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period." The director also concluded that "although the petitioner has provided a description of the duties to be performed by the beneficiary, without further information to substantiate the nature of the vendors' agreements with their respective end-clients, the end-clients' need for the beneficiary's services, the work location, and the specific duties to be performed, a credible proffer for the indicated specialty occupation cannot be established for the requested period of employment."[9]

On August 6, 2013, the director certified the petition for review by the AAO. On September 6, 2013, the petitioner, through counsel, submitted a brief and additional evidence. In his brief, counsel contends that even though "some service agreements may not have 3 years[,] [t]his does not mean that [the petitioner] would not have enough work for the beneficiary because in the real business world, rarely any service agreements would be valid that long." Counsel also contends that "most of the agreements are routinely renewable as indicated by some sample agreements we submitted . . . ." Counsel also asserts that the petitioner has contracts that are in effect with companies such as [redacted] Counsel also states his belief that the service center "was confused by the petitioner's name" and "assumed that since their name

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[9] It is noted that the director states in his decision that "USCIS does not dispute that a bona fide position of software developer requires a beneficiary to have a baccalaureate degree." To the extent that the director's statement may be construed as a finding that all bona fide software developer positions require a bachelor's or higher degree in a specific specialty, thus rendering all such positions specialty occupations, the director's statement is withdrawn.

includes the word 'staffing' that they are just a staffing company and all work available for the beneficiary is the result of personnel contract[s] with third parties at client locations." According to counsel, the beneficiary can be assigned to any of the petitioner's in-house projects involving and that the "contracts specifically provide [the petitioner] with complete discretion over the manner and means of providing the services mandated by contract." Counsel further contends that based on this "discretion, [the petitioner] is the only relevant employer." In conclusion, counsel states the following:

> As [the petitioner] is the "more relevant" employer, it will determine what work is assigned to the beneficiary. [The petitioner] has clearly established the duties of the position and all other aspects to show that it is a specialty occupation. Since the position is in-house and there is clearly ample work available for [the beneficiary], the position is not at all speculative.
>
> Using a preponderance standard, the evidence submitted shows that [the petitioner] has [made a] credible job offer to the beneficiary. Further, the evidence also establishes that the position for the beneficiary is a specialty occupation.

The petitioner also submitted through counsel, among other things, the following:

- A letter, dated September 4, 2013, from the petitioner's Vice President stating the following:

  > [The petitioner] designs, develops, modifies, and supports and all of its six modules from our IN corporate office.
  >
  > * * *
  >
  > [The beneficiary] will become part of this team and help us support all of our Health and Human Service clients from our Indiana location. Since all work is software development and support, all work can be done remotely in our office.

- A copy of a three-page document titled, "[The petitioner] Health and Human Services Operations," listing "Sample Clients" and the following "Services":

  > Program Management and Operations
  > Data Warehousing and Business Intelligence
  > Project Life Cycle Management
  > Remote Application Management and Support
  > Consulting Services

- A copy of a three-page document titled "IT Professional Services Change Order," entered into by and between and the petitioner, pursuant to the "IT Professional Services Agreement between the parties effective **10/28/2010** . . . to

amend and revise Work Order NO. 002 . . . and [] subject to the terms and conditions of the Agreement."[10] The AAO notes that a copy of the Agreement was not provided. The Change Order calls for the petitioner to "[p]rovide two development resources on a time a [sic] material basis with the following skill sets: -Senior level Java developer (3+ year experience developing enterprise applications in Java). Proven track record of delivering data driven web applications using . . . Java . . . ." The duration of the Change Order is from a start date of January 1, 2012, to a projected end date of December 31, 2013. The Change Order further states that the "[r]esources with [the] skill set listed above will provide time and material development to under the direction and supervision of staff for 2013." The Change Order also states that the "[p]erson primarily responsible for furnishing Services and Deliverables (may be changed only with [the] approval of the contact person responsible for accepting Services and Deliverables)."

- A copy of a three-page document titled ' ' entered into by and between and the petitioner, pursuant to the "IT Professional Services Agreement between the parties effective October 28, 2010."[11] This Work Order calls for the petitioner to "[p]rovide two (2) development resources on a time a [sic] material basis with the following skills sets: -Java standard edition knowledge . . . ." The duration of the Work Order is from an estimated start date of August 15, 2012, to an estimated end date of December 21, 2012. The Work Order further states that the "*[r]esource with [the] skill set listed above will provide time and material development to Eli Lilly under the direction and supervision of staff.*" The Work Order also states that the "[p]erson primarily responsible for furnishing Services and Deliverables (may be changed only with [the] approval of the contact person responsible for accepting Services and Deliverables)."

- A copy of the first nine pages of a 12-page document titled "**SUBCONTRACT AGREEMENT**" entered into on June 15, 2010, between The Experts and the petitioner.[12] This agreement states that is in the business of filling temporary assignments and providing consulting services in accordance with the needs of its customers (the 'Client(s)')" and that "the Client has requested to locate temporary staffing services to staff its project . . . ." Subcontract Agreement II calls for the petitioner "to provide certain of the services that Client requires as a subcontractor . . . ." In Section 6(a)(ii), this agreement states that "[the petitioner] is not and will assure that [its] Employees assigned to provide services hereunder are not subject to any contractual limitations on its/his/her ability to perform Services under this Agreement."

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[10] The AAO will hereinafter refer to this document as the Agreement.

[11] The AAO will hereinafter refer to this document as the Work Order.

[12] The AAO will hereinafter refer to this document as Subcontract Agreement II.

Pages 8-9 of Subcontract Agreement II consist of "Exhibit A – Statement of Work ('SOW')." The AAO notes that this SOW pertains to services provided by a and that those services are to be provided by a "contractor" that is not the beneficiary. Second, the named "contractor," "agrees to perform work at ('Client')," thus this SOW pertains to services that will be provided offsite. Finally, the estimated start date is June 15, 2010, and the estimated end date is June 17, 2013, and the SOW may "be extended on a month-to-month basis."

- Copies of two invoices billed to by the petitioner in June 2013, for "Remote Work" performed by four individuals.

- A copy of a four-page document titled, "Subcontractor Agreement," made and entered into on November 24, 2010, by and between and the petitioner. The AAO notes that a partially executed copy of this agreement was previously submitted by the petitioner in response to the second RFE and that the AAO herein refers to this document as the Subcontractor Agreement. The Subcontractor Agreement calls for the petitioner to provide services to In contrast to the first copy of the Subcontractor Agreement that was submitted in response to the second RFE, this copy is signed by both parties.

  In connection with the Subcontractor Agreement, the petitioner submitted two work orders. The first work order titled, "Work Order – Revised," and dated January 19, 2011, states that ' would like to request the services of [an individual with the initials , as a Programmer." This work order also lists the duties of the Programmer. The second work order titled, "Work Order," and dated January 10, 2012, states that ' would like to request the services of [an individual with the initials , as a Developer." The duties to be performed by the Curam Developer were not listed on this work order.

- A copy of a two-page invoice billed to by the petitioner on July 31, 2013, for "Remote Work" performed by six individuals.

- A copy of a 17-page document titled "**SUBCONTRACT SUPPLIER LINK AGREEMENT**," made and entered into on October 24, 2005, between and the petitioner.[13] This agreement states that '. . . has entered into a contract with . . . to supply temporary personnel to ' and calls for the petitioner to provide with "Temporary Personnel . . . to provide services to Chimes' Customer . . . on the terms and conditions of this Agreement and the Assignment Order . . . ." The AAO notes that the petitioner did not provide a copy of the Assignment Order. Furthermore, Subcontract Supplier Link Agreement states in section 4, "**SUBCONTRACT SUPPLIER RESPONSIBILITIES**," that the petitioner agrees to, in pertinent part, the following (emphasis added):

[13] The AAO will hereinafter refer to this document as the Subcontract Supplier Link Agreement.

> (b) Direct [the petitioner's] Employee[s] to perform their duties under the *supervision and control of Customer*, in accordance with *Customer directions and instructions*, and to comply with Customer rules, policies, regulations, procedures and/or directives which may be relayed by
>
> * * *
>
> (d) Schedule [the petitioner's] employees to *work as directed by* in accordance with the Customer's request . . . .

- A copy of an invoice billed to by the petitioner on June 30, 2013, for "Remote Work" by one individual.

III. Law and Analysis

A. Inaccurate Statements in the Petition; Failure to Provide Material, Requested Evidence; Lack of Standing to File the Petition as a United States Employer; and Speculative Employment and Failure to Establish Eligibility at the Time of Filing

1. Inaccurate Statements in the Petition

Upon review of the entire record of proceeding and the totality of the evidence presented, the AAO notes, as a preliminary matter, that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Accordingly, the AAO will discuss these issues first before addressing the ground of ineligibility identified by the director.

Specifically, the petitioner in this matter provides conflicting information as to the nature of its business. On the Form I-129, at Part 5, section 11, the petitioner attested that it is a "Staffing" business. In addition, in its May 8, 2012 support letter, the petitioner states the following (emphasis added):

> [The petitioner] provides flexible and cost-effective services dedicated to helping our clients fulfill their short and long-term business needs and goals. Our services include **Contract Staffing; Project Services and Managed Staffing; [and] Permanent Placement** assistance. [The petitioner] was founded because we realize organizations are looking for more than just staffing, or placements. Companies today need their human capital partners to be more than "body shops" – they need to be part of an overall strategy to optimize the workforce.
>
> * * *

> Our recruiting and testing process is objective, thorough, and comprehensive. Anyone can pull a resume from an online job board. We are continually seeking out the best and brightest in the industry – always expanding our impressive database of talent.
>
> * * *
>
> This gives us a much larger pool of candidates to find that perfect fit for our clients.
>
> * * *
>
> **Our ability to staff projects nationwide** allows us to provide seamless support to our clients.

Moreover, as noted above, the petitioner stated on its 2011 Form 1120S, U.S. Income Tax Return for an S Corporation, that its business activity is "consulting" and that its product or service is "IT staffing."

In contrast, counsel states in his brief that the petitioner "specializes in software development and providing customized IT[-]related services." Counsel further asserts that, "The majority of [the petitioner's] employees work at its location performing development, programming, design and other IT[-]related duties in house for its clients and customers."

In a letter dated September 4, 2013, the petitioner's Vice President omits all references to IT staffing and permanent placement and states that "[the petitioner] designs, develops, modifies, and supports Curam and all of its six modules from our [redacted] IN corporate office." The petitioner's Vice President further states that, "Since all work is software development and support, all work can be done remotely in our office."

Based upon the petitioner's statements and a review of the evidence of record, including the agreements, works orders, and invoices submitted, the AAO finds that it is more likely than not that the petitioner provides staffing services to its customers or its customer's clients. While counsel contends in the brief that the service center's "assumption" that the petitioner is a "staffing company . . . is wrong," the aforementioned evidence indicates that prior to the director's decision, the petitioner described itself as an IT staffing business, and that after the director's decision, the petitioner appears to have distanced itself from its original characterization of its business. No explanation for the inconsistencies was provided. Thus, the AAO must question the credibility and the accuracy of the later assertions made by the petitioner and its counsel in support of the petition.[14]

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[14] 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).

Furthermore, the AAO finds that there are various inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. For instance, in the LCA, the petitioner indicates that the dates of intended employment for the proffered position are October 1, 2012 to October 1, 2015. The Form I-129 indicates that the dates of intended employment are October 1, 2012 to September 30, 2015. As previously noted, however, the June 5, 2012 "Offer of Employment" letter states that the petitioner "would like to offer [the beneficiary] a position on [its] team as a Developer, effective 1/1/13."[15] In addition, the Employment Agreement states that the Term of the Employment Agreement "shall commence on **January 1, 2013**, and shall continue until written notification of intent to terminate is provided in writing by either party." No explanation for the inconsistencies was provided.

Moreover and as previously discussed, on the H-1B Data Collection and Filing Fee Exemption Supplement to the Form I-129, the petitioner checked box b at Part C, section 1, indicating that the beneficiary has a U.S. master's degree or higher and that the petition should be counted against the H-1B numerical limitation for "CAP H-1B U.S. Master's Degree or Higher." In contrast, in its May 8, 2012 letter of support, the petitioner's Vice President stated that the beneficiary received a master's and a bachelor's degree "from respected Indian Universities . . . ." In addition, as noted above, the petitioner submitted copies of documentation only pertaining to the beneficiary's *foreign* degrees. No explanation was provided for the inconsistency.[16]

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In this case, the discrepancies and errors catalogued above undermine the credibility of the petition.

Furthermore, 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) (stating in pertinent part that an H "petition will be denied if it is determined that the statements on the petition were inaccurate"); *see also* 8 C.F.R. § 103.2(b)(1) (clarifying that "[a]ny evidence submitted in connection with a [petition] is incorporated into and considered part of the [petition]"). Accordingly, based on the inaccurate statements identified in the petition, *supra*, the AAO here finds that for this reason alone, and independent of the other issues herein, this petition may not be approved.

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[15] The AAO observes that the petitioner also provides conflicting information as to the job title of the proffered position. On the Form I-129, the petitioner states that it wishes to employ the beneficiary as a "Software Developer." In contrast, in, *inter alia*, the June 5, 2012 "Offer of Employment" letter, and in the Employment Agreement, the petitioner refers to the proffered position as Developer." While the petitioner may be asserting that a Developer" is a type of software developer, no explanation was provided for why the same job title was not used consistently throughout the petition.

[16] The AAO notes that the petitioner's incorrect statement on the Form I-129 may have resulted in another qualifying H-1B petition (filed on behalf of a person exempt from the cap under the "advanced degree" exemption), not being accepted and counted towards the Fiscal Year 2013 H-1B Cap.

2. Failure to Provide Material, Requested Evidence

As counsel recognized in his November 26, 2012 letter, the petitioner knowingly submitted an incomplete petition. *See* 8 C.F.R. § 214.2(h)(4)(iii)(B)(3) (indicating that "[e]vidence that the alien qualifies to perform services in the specialty occupation" is initial required evidence). The petition could have been denied by the director for this reason alone. *See* 8 C.F.R. § 103.2(b)(8)(ii) (providing USCIS with the authority to deny a petition "for lack of initial evidence"). The director, however, chose to provide the petitioner an additional opportunity to submit this initial required evidence "that the beneficiary is qualified to perform [services] in the claimed specialty occupation."

Despite the specific request in the director's first RFE for original transcripts and degrees and counsel's assurance that the original documents would be submitted "as soon as possible to fully satisfy the inquiry," to date the petitioner has failed to submit such evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, the failure to submit requested original documents may result in the denial or revocation of the petition. 8 C.F.R. § 103.2(b)(5). The petition should have been denied by the director for this reason and, pursuant to the AAO's *de novo* review, will now be denied on this additional basis.

3. Lack of Standing to File the Petition as a United States Employer

The AAO will next determine 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 review the record of proceeding to determine 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." *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) . . . .

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

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

(1) Engages a person to work within the United States;

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

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

8 C.F.R. § 214.2(h)(4)(ii) (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). 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). 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.

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[17]

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[17] 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-

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.[18]

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).[19]

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

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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).

[18] 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)).

[19] 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).

added)).

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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, 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 record does not establish that the petitioner will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

In his brief, counsel contends that the beneficiary is employed by the petitioner and that "the contracts specifically provide [the petitioner] with complete discretion over the manner and means of providing the services mandated by contract." Counsel also asserts that the petitioner

has several in-house projects;[20] however, the record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the petitioner (or any end-user).

While the record contains several contracts, statements of work, and work orders for the services of *other individuals*, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, three-year validity period at the petitioner's location. Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment.[21] Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, while counsel asserts in the brief that "[the petitioner] specializes in software development and providing customized IT[-]related services," the petitioner failed to submit documentary evidence demonstrating that it develops any software or customized IT products on its own. In his brief, counsel also states that "the beneficiary could be assigned to any of [the petitioner's] in[-]house projects that involve Curam software."

In its letter dated September 4, 2013, the petitioner directs USCIS to visit a website for more

is used by health and human services, workforce services, and social security organizations around the world to deliver welfare, social insurance and both individual and employer based social programs. The allows government and providers to focus on lowering overall program costs by ensuring that the benefits and services provided address core issues and that people become more self-sufficient."

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[20] For instance, in the brief, counsel states that "[the petitioner] has ongoing in-house project[s] for 3 states and the federal government that use as the core for providing public health and human service operations . . . ."

[21] It is recognized that the petitioner's contractual documents relevant to other individuals is acceptable to show that there will likely be some kind of work made available for the beneficiary. The issue here, however, is that the lack of such evidence relevant to the beneficiary in the context of the beneficiary's normal staffing operations leaves unanswered a number of material questions, such as whether the work would be continuous, the type and level of work to be performed, the actual duties of the position, and who would control that work.

After reviewing this information on that the petitioner requested be reviewed, the AAO finds that the petitioner did not develop software and (as also noted by counsel in a footnote in the brief) that is owned by another company. Contrary to the claims of counsel and absent evidence showing otherwise, it appears that the petitioner may only be using and/or installing software developed by instead of developing this software itself. The record, therefore, does not contain sufficient documentary evidence relating to the petitioner's claimed "software development" and "customized IT[-]related services." As noted above, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Upon review of the totality of the evidence, the AAO finds that there is insufficient documentary evidence to demonstrate that the beneficiary will more likely than not work in-house for the petitioner developing software under the petitioner's control. While the petitioner submitted contracts, work orders, and statements of work to support its claim that the petitioner has sufficient work for the beneficiary to perform and that the petitioner will control the beneficiary, the submitted documentation indicates the opposite with regard to the petitioner's control of its workers. It is the end-users who control the petitioner's workers under such contracts, work orders, and statements of work. For example, as noted above, the Work Order states that the "*[r]esource with [the] skill set listed above will provide time and material development to under the direction and supervision of staff.*" Furthermore, Subcontract Agreements I and II state that "[the petitioner] is not and will assure that [its] Employees assigned to provide services hereunder are not subject to any contractual limitations on its/his/her ability to perform Services under this Agreement."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the 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. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Even though certain factors appear to weigh in favor of a finding that the petitioner would be the beneficiary's employer and that it would maintain the requisite employer-employee relationship with the beneficiary, some factors have not been shown and among those that have been asserted, there remains insufficient evidence to support the claims made or contrary evidence exists in the record which draws into doubt their veracity, such as the direction and supervision assertion.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the beneficiary is the petitioner's employee and that the beneficiary will work at the petitioner's office on in-house projects does not establish that the petitioner exercises or will exercise the

requisite control over the beneficiary and the substantive work that he would perform. Without documentary evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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)).

4. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Moreover, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2012 to September 30, 2015, there is a lack of documentation regarding any specific work for the beneficiary for the duration of the requested employment period. As previously noted, the "Offer of Employment" letter and the Employment Agreement state that the beneficiary's employment would commence on January 1, 2013, three months after the requested start date of employment listed on the Form I-129. Also, in the brief, counsel states that "[w]e fully understand that some service agreements may not have 3 years . . . [h]owever, most of the agreements are routinely renewable as indicated by some sample agreements we submitted . . . ."

The AAO finds that, while the petitioner may have some contracts that are renewable,[22] the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. 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). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested including, notably, during the first three months of the employment period requested in the petition.[23]

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[22] The petitioner did not provide evidence that any of the "renewable" contracts pertained to the beneficiary's employment with the petitioner.

[23] The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

While the regulations at 8 C.F.R. § 214.2(h)(9) indicate that USCIS may have the authority to limit the validity period of an approved petition for certain reasons, e.g., to limit the approval to the validity dates in the supporting LCA, there is no indication that USCIS has the authority to delay an employment start date beyond that requested in a petition. It is especially apparent that no such authority would exist in a case such as this one where the actual January 1, 2013 start date is more than six months after the June 8, 2012 filing date of the petition. Title 8 C.F.R. § 214.2(h)(9)(i)(B) specifically provides that an H-1B petition "may not be filed . . . earlier than 6 months before the date of actual need for the beneficiary's services." Accordingly, the petition may not be approved for these additional reasons.

In conclusion and for the reasons discussed 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). Furthermore, the petition may not be approved based on the petitioner's inaccurate statements in the petition. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1). The petition will also be denied due to the petitioner's failure to provide material, requested evidence and the original documents requested by the director. *See* 8 C.F.R. § 103.2(b)(5) and (14). Moreover, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for these reasons, the petition must be denied.

B. Lack of a Credible Offer of Employment in a Specialty Occupation

The AAO will now address the director's basis for denying the petition, namely that the petitioner has not established that there exists a credible offer of employment in a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that there exists a credible offer of employment in a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (*citing Matter of Treasure*

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

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

Craft of California, 14 I&N Dec. at 190). 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).

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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner stated on the Form I-129 that the beneficiary would be employed in a software developer position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all

of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a software developer). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. Accordingly, the AAO affirms the director's conclusion that the petitioner failed to establish that it made a credible offer of employment in a specialty occupation.

Moreover, the AAO finds that, as reflected in the description of the position as quoted earlier in this decision, the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided regarding the proffered position and its constituent duties is exemplified by the petitioner's assertion in its support letter that the beneficiary will "[a]nalyz[e] use cases in overall solution perspectives and communicat[e] with peer teams to resolve design interfaces and implement details and issues." The petitioner claims that the beneficiary will spend approximately 25% of his daily work time performing these functions.

Based upon the allocation of 25% of the beneficiary's time on this duty, this is a primary duty for the beneficiary. Notably, however, the statements provide insufficient insight into the specific tasks that the beneficiary will perform. This is again illustrated by the petitioner's statement in the support letter that the beneficiary will "[c]onduct code reviews and design reviews for use in other cases; [and] [c]onduct unit testing for the designed and implemented modules." The petitioner does not explain the beneficiary's specific role and how these duties will be conducted and/or applied within the scope of the petitioner's (or end-users') business operations. Thus, as so generally described, the description does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

Accordingly, without further information, the petitioner has failed to credibly convey how it would be able to sustain an employee performing this duty at the level required for the H-1B petition to be granted for the entire period requested. That is, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business

operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the proffered position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position. Unfortunately, the petitioner's attestation that it will pay the beneficiary a high salary relative to others in the same occupation, while relevant, is not a determinative factor in finding whether a proffered position qualifies as a specialty occupation.

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

For the reasons related in the preceding discussion, the AAO finds that 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. Accordingly, for this additional reason, the petition cannot be approved.

IV. Conclusion

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); *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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. This decision to dismiss the petitioner's appeal, however, does not prejudice or otherwise prevent the petitioner from filing a new H-1B petition on behalf of the beneficiary. With a new petition, the petitioner is free to submit any new and/or additional evidence it believes may establish its eligibility for the benefit sought.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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