

**U.S. Department of Homeland Security**

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

(b)(6)



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

DATE: **AUG 08 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:  
Beneficiary: [REDACTED]

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)

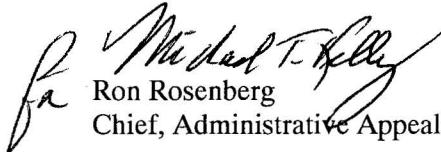
ON BEHALF OF PETITIONER:

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

On the Form I-129 petition, the petitioner describes itself as a 90 employee consulting and technology solutions for government and commercial organizations firm<sup>1</sup> established in 2005. According to the petitioner, it filed this petition in order to employ the beneficiary in what it designates as a full-time "computer system analyst" at a salary of \$65,000 per year the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

For the reasons that will be discussed in this decision, we conclude that the director's decision to deny the petition for its failure to establish the existence of an employer-employee relationship between the petitioner and the beneficiary was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. GENERAL OVERVIEW

According to the petitioner, it seeks approval of this H-1B specialty occupation petition so that it can assign the beneficiary to work at a particular end-client pursuant to two sets of contract relationships, namely: (1) the contractual relationship between the petitioner [REDACTED] and a firm named [REDACTED] and (2) a contractual relationship between [REDACTED] and its client to [REDACTED] – which is the ultimate end-client for whom the beneficiary would provide his services. For brevity's sake, we will hereafter refer to [REDACTED] simply as the petitioner, to [REDACTED] and to [REDACTED]

The petitioner is located in in [REDACTED] Texas. According to the petition, the beneficiary would provide his services to [REDACTED] Pennsylvania.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 3, 2014).

In the body of the decision below we will first survey the evidence of record, providing relevant comments and findings about the evidentiary record that the petitioner has presented with regard to the issue upon which the service center denied the petition, namely, whether the evidence of record established that the petitioner has the requisite employer-employee relationship with the beneficiary that is required to qualify the petitioner as a "United States employer" as defined at C.F.R. § 214.2(h)(4)(ii). (Of course, that status is necessary for the petitioner to have standing to file the H-1B specialty occupation petition that is now before us on appeal.)

The purpose of our reviewing and entering relevant findings on the evidentiary record will be to address what the record of proceeding provides in terms of factors, or indicia of control, that we have identified and weighed in applying the common-law test for determining whether a genuine employer-employee relationship exists between the petitioner and the beneficiary in this case.

Following our review of the evidence of record, we shall present a discussion of the common-law principles that we applied in reaching our conclusion that the petitioner did not establish the necessary employer-employee relationship between it and the beneficiary.

We shall then address two additional aspects of the record of proceeding that would preclude approval of the petition at this time, even if the petitioner had established the requisite employer-employee relationship.

## II. THE REQUISTE EMPLOYER-EMPLOYEE RELATIONSHIP IS NOT ESTABLISHED

### A. Insufficient Indicia that Such Relationship Resides with the Petitioner

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Computer System Analyst" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay him a salary of \$65,000 per year. The petitioner specified its gross annual income as \$6.8 million and its net annual income as approximately \$115,000. The LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level II prevailing wage rate.

### Documents filed with the Form I-129

In its letter of support filed with the Form I-129, the petitioning company's Director described the proffered position as follows:

In the position of Computer System Analyst, [the beneficiary] will be responsible for only qualifying duties, those duties that require a bachelor's degree. In particular, he will be responsible for:

- Involve in analysis, design and development of the application[.]
- Involve in loading data from XML files to Database[.]

- Expert in handling Dataset and data tables[.]
- Use data grid to review and modify manipulated data[.]
- Use ADO.NET objects such as Data Reader, Dataset and Data Adapter, Data View for consistent access to SQL Server data sources[.]
- Develop ASP.NET MVC 3 web services and classic WebForms Administrative web sites.
- Integrate with flash with the help of handlers in .net[.]
- Design and Developed User Interfaces using ASP.NET.
- Add functionality in business layer and Data access layer.
- Generate the required reports with the help of data grid.

The petitioning company's Director continues his letter with the following assertion about the petitioner's "right of control-supervision" over the beneficiary:

While working at the location of [REDACTED]

[the petitioner] has the right to control and maintains control over the terms and conditions of beneficiary's employment, meeting the requisite criteria for the existence of an employer-employee relationship under the common law and Service guidance. [The petitioner] not only retains control over all the salient employees attributes, including but not limited to the right to hire, fire, remunerate, supervise and otherwise control the employee, but the beneficiary will be on the employer's payroll and under the supervision and control of the petitioner.

[The beneficiary] will be directly supervised by Mr. [REDACTED] Director of [the petitioning company], and his associates. The supervision of [the beneficiary's] work will take the form of weekly conference calls and/or status reports, time-sheets, and other communications as needed on a frequent and ongoing basis.

As will be reflected in our review that follows below, the evidence of record does not fully support the petitioner's claims.

The petitioner also states that "[t]he minimum requirements that we at [the petitioning company] establish for the position of a Computer System Analyst include bachelor's degree in computer science, IT, engineering, business administration or a related degree."

The documents filed with the initial petition, also included, among others:

- The required Labor Condition Application (LCA). It was certified for work at [REDACTED] which the petition identifies as [REDACTED] business address and the location where the beneficiary would perform his duties. The LCA also specified Computer System Analysts as the related occupational group for the position for which the LCA would be used.
- A copy of the petitioner's offer letter, dated March 8, 2013, offering employment to the beneficiary, signed by the petitioner and accepted by the beneficiary.
- A copy of the Employment Agreement, dated March 13, 2013, signed by the petitioner and the beneficiary.
- Business documents pertaining to the Petitioner, including a copy of an Organization Chart.
- A copy of the beneficiary's "Contractor" badge referencing [REDACTED]
- A March 8, 2013 copy of a letter from [REDACTED] confirming that the beneficiary has been contracted through the petitioner to work at [REDACTED] direct client.
- A copy of the Vendor Services Agreement between the petitioner and [REDACTED]
- A document entitled "Benefit Summary" from [REDACTED] Neither the petitioner nor the beneficiary are named in the document.
- Select invoices between the petitioner and [REDACTED] for unidentified services performed by the beneficiary between December 2012 and March 2013
- A timesheet from [REDACTED] referencing the beneficiary for hours worked between March 11, 2013 and March 17, 2013.
- Copies of emails between the beneficiary and [REDACTED] We note that the local-part of the beneficiary's email address is the username of the beneficiary (first two letters of his first name and last name) and the domain name is "deloitte."
- Payroll documentation establishing payments made by the petitioner to the beneficiary.

- Copies of previous job vacancy announcement that the petitioner has run for its employees.
- Select promotional materials from the petitioner.

We will now comment directly on some of that documentation.

Evidence that the petitioner will administer the beneficiary's pay, work-related benefits, and work-related taxes.

With the initial petition, the petitioner submitted copies of pay statements issued to the beneficiary on January 30, 2013 and March 15, 2013. In addition, in response to the RFE, the petitioner submitted a copy of the beneficiary's Form W-2 for 2012 and a Benefit Summary. We recognize that the control over the method of wage payments to the beneficiary, provision of health benefits to the beneficiary, and shouldering the work-related tax responsibilities are pertinent factors in determining whether the requisite employer-employee relationship would exist between the petitioner and the beneficiary – and we have accordingly weighed these indicia in the petitioner's favor.

However, such factors are not in themselves determinative of the employer-employee question. Further, in this particular case the significance of these factors is tempered by the fact that, in a practical sense, in this particular H-1B petition scenario an entity other than the petitioner, i.e., [REDACTED] will ultimately provide the remuneration that will be channeled through the petitioner (and perhaps [REDACTED] to the beneficiary as pay, throughout the H-1B period for which the petition was filed.

The industry in which the beneficiary would be assigned to work

The petitioner correctly notes that we should take account of the fact that the beneficiary is being assigned to work in the petitioner's industry. However, we find that this factor merits little weight, in light of the facts that, one, [REDACTED] the end-client for whom the beneficiary would directly work, appears to be engaged in the same industry itself and, two, that the evidence of record does not indicate that [REDACTED] would need the beneficiary in any leadership role that it cannot itself provide from its own personnel resources and institutional experience.

March 8, 2013 Job Offer/Job-Offer-Acceptance letter signed by the beneficiary and by [REDACTED] on the behalf of the petitioner.

We note that, consistent with the Form I-129 and the petitioner's letter of support, this document also refers to the job as that of a "Computer System Analyst" position; and its "Job Description" section specifies exactly the same duties as the petitioner stated in its letter of support.

March 8, 2013 Employment Agreement

This two-page document is signed by the beneficiary and by the aforementioned [REDACTED] as the petitioner's Director. While we note that this document states, in part, that the petitioner "will

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provide you [i.e. the beneficiary] with task-specific instructions for each task assigned to you," we find no corroborative documentation that such would be the case in the particular assignment - at [REDACTED] that the petitioner states as the basis of the petition.

We also note that the tenor and content of this document indicates that it would apply to the beneficiary whether he were to work at the petitioner's own location or at a client's external location. As reflecting this fact and the fact that the Employment Agreement does not contemplate task-by-task direction or on-the-job supervision from the petitioner if the beneficiary is assigned to [REDACTED] or any other "external client," we quote the following section which is emphasized by underlining in the agreement document itself:

If you are assigned to one of our external clients, you still have the responsibility of reporting to your supervisor in [the petitioner] on a weekly basis and you are required to submit your weekly activity report along with your timesheets to your supervisor who controls your work assignments. Your performance will be reviewed periodically and your salary review will be based on your performance review. You are required to report back to your supervisor in [the petitioner] as soon as your work assignment at the client place is completed.

Not only does the above quoted-language indicate that, in fact, the petitioner would not receive task-by-task directions or on-the-job supervision from the petitioner while assigned to [REDACTED] but it also indicates, by virtue of the fact that the petitioner would only evaluate the beneficiary's performance "periodically," it appears that the day-by-day evaluation of the acceptability of the beneficiary's performance at [REDACTED] will not reside with the petitioner. We assess these facts as indicia that the requisite employer-employee relationship may not reside with the petitioner.

Undated letter submitted by the petitioner's Director in support of the petition.

This letter, which was filed with the petition, also identifies the proffered position by the job title "Computer Systems Analyst" and it repeats the duty descriptions provided in the job offer/acceptance letter. Also, it identifies [REDACTED] - who also signed the job offer/acceptance letter – as the petitioner's director.

IBS/Petitioner Vendor Services Agreement

Based upon its submission by the petitioner in support of this petition, it appears that this agreement is operative with regard to the assignment of the beneficiary to [REDACTED] which is the basis of the petitioner's specialty occupation claim.

The document characterizes the petitioner as a Vendor whom [REDACTED] may retain, from time-to-time, to "carry out and perform such software developing, engineering, or programming (Services) for a period as [REDACTED] shall set forth in a Work Order."

There are two major aspects that we find significant about this document. First, the petitioner has not provided any Work Order(s) related to the agreement, and this leaves to speculation whatever

terms and/or conditions that they may contain that might bear on the employer/employee issue. Second, and having even greater negative impact against the petitioner establishing the requisite employer-employee relationship, the record of proceeding does not provide the specific content of all of the contractual documents that relate to the beneficiary's assignment to [REDACTED]<sup>2</sup>

### Documents submitted in response to the RFE

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 26, 2013. The petitioner was asked to submit probative evidence to establish, in part, that a valid employer-employee relationship will exist between the petitioner and the beneficiary. The director outlined some of the types of specific evidence that could be submitted.

The petitioner's letter replying to the RFE stated that the beneficiary would work at the [REDACTED] facility as indicated in the LCA; that he would "be directly supervised by Mr. [REDACTED] Director of [the petitioning company], and his associates"; "works under the supervision of the Petitioner, demonstrated by his submission of weekly progress reports and/or time sheets to the Petitioner and Petitioner's control over performance reviews that result in salary increases, promotions, or termination notices and/or discipline; and will be claimed "as an employee for tax purposes."

Among other documents submitted in response to the RFE are (1) a June 12, 2013 copy of a letter from [REDACTED] confirming that the beneficiary has been contracted through the petitioner to work at [REDACTED] as a Computer System Analyst; (2) a May 29, 2013 letter from [REDACTED] a Deloitte senior associate, (a) stating that the beneficiary is working at [REDACTED] in contractor status as a Computer System Analyst, and (b) outlining the job duties<sup>3</sup>; (3) a copy of a May 13, 2013 email from [REDACTED] PMP, [REDACTED] to the beneficiary, stating that [REDACTED] does not provide a client letter<sup>4</sup>; (4) a copy of the Form W-2 issued to the beneficiary by the petitioner for tax year 2012; (5) a document entitled "RIGHT OF CONTROL OVER [THE BENEFICIARY]

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<sup>2</sup> As will be indicated in discussions later in this decision, we are not overlooking the [REDACTED] Subcontractor Agreement # DC-0431 that the petitioner has submitted into the record. However, that is an umbrella agreement containing terms to be deemed automatically including in a follow-on contract. The petitioner has not provided that contract.

<sup>3</sup> The job duties listed were: (i) Involve in analysis, design and development of the application; (ii) Involve in loading data from XML files to Database; (iii) Expert in handling Dataset and data tables; (iv) Use data grid to review and modify manipulated data; (v) Use ADO.NET objects such as Data Reader, Dataset and Data Adapter, Data View for consistent access to SQL Server data sources; and (vi) Develop ASP.Net MVC 3 web services and classic WebForms administrative web sites.

<sup>4</sup> This email is in response to a May 13, 2013 email from the beneficiary stating "I got an RFE (Request for Evidence) on my H-1B request which required a client letter. So Can you please provide me the client letter which indicates that currently I am working in [REDACTED]

(EMPLOYEE)<sup>5</sup>; (6) a copy of a document entitled Subcontractor Agreement #DC-0431, signed by [REDACTED] and (7) documents previously submitted.

The June 6, 2013 IBS letter

This letter, signed by [REDACTED] as Vice President of [REDACTED] was written "to confirm the assignment of [the beneficiary] who works at [the] [REDACTED] Pennsylvania]."

In stating that the beneficiary is a "valuable member of our team," the letter raises such issues, not resolved in this record of proceeding, as (1) who else belongs to "the team"; (2) who directs, evaluates, and supervises "the team" in its day-to-day work – and, by extension, the beneficiary as a "team" member; (3) why the [REDACTED] Vice President's letter would identify the beneficiary as part of the [REDACTED] did not have at least some material control over what work the beneficiary would do, how he would do it, and how he would have to perform to remain a member of the [REDACTED] team.

We also find that the letter's information about the petitioner's role is questionable, in that the letter does not explain why this "valuable member of [REDACTED] team" - which the letter indicates is working together on a multi-year project at [REDACTED] - would have "the performance of [his] duties directed by the team at [the petitioner]" (that is, if the author is referring to the beneficiary's performance of the day-to-day work as it develops at [REDACTED]).

As reflected above, because of its vagueness on that issue, the letter has little evidentiary value toward revealing how the relevant contracts in play here divide aspects and degrees of control, and rights to control, over the many dimensions of the beneficiary's day-to-day performance on assignment to [REDACTED]. In this regard, we note that this [REDACTED] Vice President's letter does not explain the particular meanings, in the practical context of the beneficiary's assignment, of the author's statements (1) that the petitioner's team would direct the performance of the beneficiary's duties, (2) that the beneficiary's performance would be subject "to a lesser extent under [REDACTED] supervision, since he will be working at our client site," and (3) that "the beneficiary's work will be overseen by [REDACTED] who is Project Manager."

The letter also begs the question as to the nature and extent of [REDACTED] involvement because while the letter states that the beneficiary is a member of the [REDACTED] team and also that the beneficiary meet "our minimum requirements for the position," the letter avoids any particulars about [REDACTED] active roles – whatever they may be - though not hesitating to state what [REDACTED] does not do.

The notarized letter of Nishit Vadnerar

We find it significant that while this person, who identifies himself as a coworker of the beneficiary and a Senior Associate [REDACTED] attests to the beneficiary's duties, he also does not mention any project by name or even state that the beneficiary is working on a project.

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<sup>5</sup> We observe that the document indicates "[the beneficiary] will also report to [REDACTED] (Project Manager), who also works at the client location." The record indicates that Mr. [REDACTED] is employed at Deloitte, as evidenced in his signature block in his email to the beneficiary on May 13, 2013.

The "Right of Control" document, signed by the petitioner's director and the beneficiary on June 5, 2013

We will here list each of the document's paragraphs, followed by such comments as we think should be made regarding the value of that paragraph. The document lists the following as indicia of the petitioner's "right of control" over the beneficiary:

1. [The beneficiary] has acknowledged that he will work under the supervision and control of [the petitioner] throughout the time he is employed.
  - While this statement is appropriate for consideration on the employer-employee issue, of greater weight is evidence of the actual nature of the supervision and control that the petitioner can exercise under the relevant terms and conditions of the contractual documents that bind the petitioner, [REDACTED] with regard to the beneficiary while on assignment to [REDACTED]. As will be seen, the [REDACTED] Subcontractor Agreement counters and deflates this claim, by indicating that the most immediate, continuous, and substantive supervision, direction, and control of the beneficiary and his work at [REDACTED] – not the petitioner. This factor, of course, weighs against the petitioner's claim.
2. [The beneficiary] will telephone or otherwise communicate directly with [the petitioner] no less than once a week regarding his/her progress on the assigned work.
  - We note that the petitioner is located in Texas and that the [REDACTED] worksite is in Pennsylvania. Further, the petitioner nowhere states that it has a representative at the worksite. Thus, we reasonably conclude that such "direct" communication with the petitioner will not be face to face.
  - Further, it is not reasonable to infer from this statement about work-progress communication that the petitioner is involved in assigning the beneficiary particular work day-to-day at [REDACTED] in supervising the beneficiary's day-to-day work at [REDACTED] or in setting/applying the performance standards by which [REDACTED] will judge the quality and efficiency of the beneficiary's work.
3. [The beneficiary] will report to [REDACTED] (Project Manager), who also works at the client location.
  - As the record does not expressly identify Mr. [REDACTED] as being a person representing or working on behalf of the petitioner, we accord no weight to this statement. From the overall evidentiary context related to this person it also appears likely that he is a [REDACTED] representative.
4. [The beneficiary] has acknowledged that [the petitioner] has the right to control the work of the [the beneficiary] on a day-to-basis.

- We do not accord any significant weight to this assertion, even though the beneficiary's signature appears to endorse it. This is because, for the purposes of the employer-employee common-law analysis, "right of control" is a technical and conclusory term, and there is nothing in the record that indicates the beneficiary's understanding of that term. Further, absent more comprehensive information than is contained in the record about the onsite daily supervision and control of the beneficiary and his work at Deloitte, we are not persuaded that the statement is accurate, even if signed by the beneficiary.
5. [The beneficiary] has acknowledged that only [the petitioner] has hired, and will pay, and will have the ability to fire [him].
- This is a factor to be weighed in the petitioner's favor.
  - However, its inclusion raises some countervailing factors, reflected in the record, that also appear appropriate for consideration on the employer-employee issue, namely, that it appears that the beneficiary's job and job duration that are the basis for this petition would ultimately depend upon [REDACTED] and be a matter that [REDACTED] controls.
6. [The beneficiary] will be subject to regular progress/performance reviews from his supervisor at [the petitioner] based upon his work product with continued employment dependent upon those reviews.
- This is another factor to be considered in the petitioner's favor. However, its weight is reduced by the fact that the record of proceeding does not establish that these performance reviews can override the end-client's contrary determinations in this area, or that the end-client or [REDACTED] pays any attention to, or are even informed about, the petitioner's performance reviews.
  - This worth of this factor is further diminished by the fact that the record of proceeding does not provide whatever contractually terms and conditions may govern the rights of [REDACTED] in setting performance standards, applying them to the beneficiary, and in deciding whether the beneficiary's performance merits remuneration or his retention. Such are also factors that should be weighed – but they are not included in the record of proceeding.
7. [The beneficiary] will be provide [the petitioner] with all instrumentalities and tools required for this position, including computer, if not already available at the worksite.
- How the beneficiary's providing tools and instrumentalities to the petitioner would factor as an indication of the requisite employer-employee relationship is not apparent to us. More importantly, though, the petitioner should note that we are interested in the claimed-employment situation that is the particular subject of this petition – and, I that regard, we find that the record of proceeding does not show that either the petitioner or

the beneficiary would provide means or instrumentalities for the work to be performed at [REDACTED]. Further, we note that there is no evidence that for the [REDACTED] work the petitioner would provide or use any proprietary material owned by it. Further still, given the nature of the duties described by the petitioner, the [REDACTED] work would likely involve the beneficiary's having to use non-petitioner tools and instrumentalities, such as, access to and use of another entity's information technology (IT) resources and applications.

8. [The petitioner] will retain the full right to assign additional duties to [the beneficiary] at all times.

- In light of the context of the [REDACTED] Subcontractor Agreement (discussed soon below), we are not persuaded that this is an accurate statement in the context of the present petition, where it appears that, by contract, [REDACTED] alone has the right to determine the scope of the beneficiary's work at [REDACTED]

9. [The petitioner] will retain full discretion over when and how long [the beneficiary] will work, the provision of employee benefits, the method of payment, and the right to hire and pay any assistants required by [the petitioner].

- It does appear that the overall record of proceeding indicates that the petitioner will be in charge of any benefits, that it will directly pay the beneficiary, and decide the method by which the beneficiary shall be paid. Thus, these are factors for consideration in the employer-employee common-law analysis.
- However, the petitioner's claims of "full discretion over when and how long [the beneficiary will work]" has been not been substantiated by the record. Again, we are interested in the petitioner's latitude of control within the context of this petition, and the record indicates that there are contractual documents that may have terms addressing [REDACTED] interests in determining length of the beneficiary's employment. We here refer the petitioner to our discussion (which follows below) about the [REDACTED] Subcontractor Agreement # DC-0431. As will be discussed that document indicates that [REDACTED] could trump the petitioner's desire to continue the beneficiary's assignment [REDACTED] directed [REDACTED] to remove him. We find that this right-to-removal retained by [REDACTED] is another factor suggesting that that the petitioner would not have the requisite employer-employee relationship with the beneficiary. he petitioner.
- We accord no weight to the claimed "right to hire and pay any assistants required by [the petitioner]." The beneficiary would be working pursuant to contractual terms and conditions, and there is no evidence of record that [REDACTED] the end-client, has agreed that the petitioner would have the right to exercise such a prerogative with respect to any work by the beneficiary at [REDACTED]

Subcontractor Agreement # DC-0431

This agreement between [REDACTED] appears to be operative with regard to the beneficiary's assignment to [REDACTED]. As such, its content is relevant to this appeal.

We note that the contract has several aspects that appear to be factors weighing against the petitioner's claim of the requisite employer-employee relationship with the beneficiary.

- Paragraph 2 (Subcontractor Personnel) includes this statement: ' [REDACTED] may in its sole discretion and at any time during the term of a Work Order, require [REDACTED] to remove any person from performing Services."
- Subparagraph (a) of paragraph 2 (Project Management) appears to reserve for [REDACTED] *exclusive* day-to-day control over the beneficiary, his work assignments, his time schedules, and his hours, for this section states:  
  
(a) [REDACTED] or others whom [it] may designate, will supervise and direct the performance of the Services, including, without limitation, assigning specific duties to [REDACTED] fixing time schedules in which the duties are to be performed, and establishing or approving standard hours (reporting time and working hours), overtime, vacations of longer than two weeks (requires a minimum 90 day notice of and approval) and holidays. . . .
- Paragraph 7 (Termination) appears to provide [REDACTED] basically unfettered discretion to terminate the beneficiary's assignment, stating, in part, that [REDACTED] "may terminate any Work Order at any time and for any reason effective immediately upon giving oral notice of such termination to the Subcontractor [REDACTED]"

Email traffic involving the beneficiary at [REDACTED] the beneficiary's [REDACTED] I.D. card; the absence of proof of any particular project that is the basis of the beneficiary's [REDACTED] work; and the duration of the [REDACTED] assignment (coextensive with the requested H-1B employment period).

In response to the director's RFE, the petitioner submitted email correspondence between [REDACTED] and the beneficiary. Notably, the local-part of the beneficiary's email address is the username of the beneficiary (the first two initials of his first name and his last name), and the domain name is [REDACTED]. The beneficiary's assigned email address suggests that he is an employee of [REDACTED]

Although we see repeated references to "the project" to which it is said that the beneficiary would be assigned, we do not see any documentation that identifies any project name, states its objectives, or describes whatever distinguishes the unidentified "project" from [REDACTED]'s usual general range of work. In the light of the totality of the evidence, and particularly the aspects of that we just head-noted above, we find it more likely than not that the beneficiary has been and would continue to be basically placed with [REDACTED] to do the work of a temporary staff member, subject to the complete day-to-day control of [REDACTED] for the entire period of his placement at [REDACTED]. This finding also

weighs against the petitioner's claim of an employer-employee relationship with the beneficiary.

On appeal, counsel submitted a brief and a letter from [REDACTED] a Technology Lead at [REDACTED] stating that the beneficiary is currently working for [REDACTED] as a contractor, as a Computer System Analyst, and further referencing the duties being performed by the beneficiary. The duties are identical to those previously provided by Mr. [REDACTED] in response to the director's RFE.

To conclude, based upon our review of the record of proceeding under the common-law concepts that we will discuss below, and balancing the various indicia of control evident in the record, we find that there is insufficient evidence to render a determination that the petitioner would have the requisite employer-employee relationship with the beneficiary. We also find that, particularly as a function of the absence of evidence of pertinent Work Orders and the full contractual agreements between [REDACTED] the record of proceeding is not sufficiently comprehensive for us to conclude that any of the business entities involved would more-likely than not have the requisite employer-employee relationship.

In any event, the record of proceeding lacks a sufficient factual foundation for a reasonable determination that weighing the relevant common-law employer-employer factors establishes that it is more likely than not that the petitioner would have requisite employer-employee relationship with the beneficiary. Accordingly, the appeal will be dismissed and the petition will be denied.

#### B. Common-law Foundation for our Decision to Dismiss the Appeal

The applicable common-law test supports our conclusion that that the evidence fails to establish that the petitioner will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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

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

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

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

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

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

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

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

is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>6</sup>

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.

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<sup>6</sup> 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).

*Darden*, 503 U.S. at 318-319.<sup>7</sup>

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).<sup>8</sup>

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

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

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

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<sup>7</sup> 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))).

<sup>8</sup> 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).

regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

While such items such as wages, tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

Also, while an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

### III. TWO ADDITIONAL GROUNDS FOR DENIAL

Beyond the decision of the director, we find two aspects of the record of proceeding which would each preclude approval of this petition even if the petitioner had established the requisite employer-employee relationship with the beneficiary. These are (1) insufficient evidence to establish that the proffered position is a specialty occupation, and (2) the clause in the Employment Agreement which indicates that the beneficiary would be subject to impermissible "benching," that is that he would not be paid when work was not available through no fault of his own. For each of these additional reasons the petition cannot be approved.

#### A. Proffered Position not Established as a Specialty Occupation

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

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, Cisco) may require as the ultimate employment of the beneficiary. See generally *Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

As recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client company's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

*Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. In other words, as the nurses in *Defensor v. Meissner* would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id* at 387-388.

We note first that the range of acceptable degree-majors or academic concentrations specified by the petitioner weigh against its argument that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

The petitioner stated that "[t]he minimum requirements that we are [the petitioning company] establish for the position of a Computer System Analyst include bachelor's degree in computer science, IT, engineering, business administration or a related degree." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Again, in the letter of support, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree in computer science, IT, engineering, business administration or a related degree. However, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of the disciplines (including any and all engineering

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

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

As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>9</sup>

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

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<sup>9</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree.

Having made that preliminary finding, we turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding. In doing so, we recall the position's duties as stated in the May 29, 2013 letter from ██████████ writing as Senior Associate-

- Involve in analysis, design and development of the application[.]
- Involve in loading data from XML files to Database[.]
- Expert in handling Dataset and data tables; (iv) Use data grid to review and manipulate data[.]
- Use ADO.NET objects such as Data Reader, Dataset and Data Adapter, Data View for consistent access to SQL Server data sources[.]
- Develop ASP.Net MVC 3 web services and classic WebForms administrative web sites.

This description is virtually the same as what the petitioner provided in its letter of support filed with the Form I-129. We focus on what ██████████ provided, however, in line with the principle reflected earlier in this decision that where, as here, the work that is asserted as the basis for the H-1B specialty occupation petition is to be performed as part of another entity's project, that entity's requirements for the project work to be performed by the beneficiary must be a primary consideration in determining whether, in fact, the proffered position qualifies as a specialty occupation.

We find that, as evident in the bullet-phrase descriptions quoted above, the record of proceeding presents the proffered position and its constituent duties in relatively abstract terms of generalized functions that are not supplemented by explanations and/or documentation sufficient to establish that they are so complex, specialized, and/or unique as to distinguish themselves from those in the Computer Systems Analysts occupational group that neither require a person with at least a bachelor's degree in a specific specialty nor require the nature and level of knowledge usually associated with at least a bachelor's degree in a specific specialty. Further, the evidence of record fails to establish in specific, substantive terms what the beneficiary would actually do on a day-to-day basis in the actual performance of those generally stated duties. Consequently, we find that the evidence of record does not develop the proffered position and the proposed duties with sufficient specificity and substantive detail to establish the position or its duties as more specialized, complex, and/or unique than positions in the Computer System Analysts occupational group that do not require the services of a person with at least a bachelor's degree or the equivalent in a specific specialty and whose duties are not of such a nature that their performance would require knowledge usually associated with at least a bachelor's degree in a specific specialty.

As the above discussion and findings are an intrinsic part of our analysis of each of the criteria at 8C.F.R. § 214.2(h)(4)(iii)(A), we hereby incorporate them into the analysis of each criterion that follows below.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>10</sup> As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Computer System Analysts" occupational category.

The *Handbook's* discussion of the duties and educational requirements of the Computer System Analysts occupational group states, in pertinent part, the following:

Computer System Analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals

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<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

Computer systems analysts use a variety of techniques to design computer systems such as data-modeling, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. Analysts conduct in-depth tests and analyze information and trends in the data to increase a system's performance and efficiency.

Analysts calculate requirements for how much memory and speed the computer system needs. They prepare flowcharts or other kinds of diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up. Most analysts do some programming in the course of their work.

Most computer systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

Because systems analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer System Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (accessed July 8, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Most computer system analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a

company, it may be helpful to take business courses or major in management information systems.

\* \* \*

Although many computer system analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (accessed July 8, 2014).

The statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook*'s statement that "most" computer system analysts possess a bachelor's degree in a computer-related field, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of Computer System Analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

Additionally, with regard to positions that do require attainment of a bachelor's degree or equivalent, the *Handbook* indicates that a bachelor's degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer system analysts have liberal arts degrees and gained their programming or technical expertise "elsewhere."

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the computer system analyst occupational group is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor has the petitioner submitted any letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Next, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's in a specific specialty or its equivalent is required to perform that position. Rather, the petitioner and the end-client have not distinguished either the proposed duties, or the position that they comprise, from generic computer system analyst work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

With respect to this criterion, the petitioner has submitted "previous job advertisements that [the petitioner] has run for its employees and that listed a bachelor's degree as a requirement for the job." First, while some of the advertisements bear the title "Computer System Analyst," it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we see that the duty descriptions are not substantially similar to the proffered position's duties as stated in the petitioner's letters submitted with the H-1B petition and in the petitioner's RFE response. We also see that the extensive IT experience that some of the job advertisements specify as hiring requirements as well as the senior-level designation of some of the advertised positions suggest that they involve the application of greater occupational knowledge than the proffered position, a Level II position.

Additionally, many of the submitted advertisements do not specify a requirement for a bachelor's or higher degree in a specific specialty or its equivalent. By way of example, one of the advertisement for "Computer Systems Analyst" submitted by the petitioner fails to reference any requisite

educational requirements. The advertisement for "Computer Systems Analyst," created on July 3, 2012, only states "Master Degree" without any specification of any particular academic major.

As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook*'s entries for positions falling within the "Computer System Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite); and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's and end-client's letters of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's or end-client's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent. We incorporate into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty.<sup>11</sup> For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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<sup>11</sup> It must be noted that the petitioner has submitted an LCA that had been certified for a Level II wage-level, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.dol.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.dol.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Therefore, it is not credible that the position is one with sufficiently specialized and complex duties.

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Consequently, the petition must be denied on this basis also.

#### B. Employment Agreement Does Not Accord With the LCA Obligations

Here we refer the petitioner to the statement quoted below from its Employment Agreement with the beneficiary (emphasis added):

Your total employment compensation will be an annual salary of Sixty[-]Five Thousand (U.S.) Dollars (\$65,000), paid in 24 equal installments made on the 15<sup>th</sup> day and the 30<sup>th</sup> day of each month starting on the first day on which you are employed (*subject to a pro rate [sic] reduction to account for days you did not work during the pay period immediately preceding your first workday*). *Each such installment will be for work performed in the preceding pay period. . . .*

This aspect of the Employment Agreement indicates that the petitioner would not be paying the beneficiary in accordance with the Department of Labor's regulations governing LCA obligations at 20 C.F.R. § 655.731 (*What is the first LCA requirement, regarding wages?*). In particular, we note that the above-quoted section of the Employment Agreement does not comply with the aspect of the petitioner's wage-obligation stated at 20 C.F.R. § 655.731(c)(7) (*Wage obligation(s) for H-1B nonimmigrant in nonproductive status*), which we quote below:

**(7) Wage obligation(s) for H-1B nonimmigrant in nonproductive status—**

(i) *Circumstances where wages must be paid.* If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the DHS and incorporated by reference on the LCA. If the I-129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 et seq.

(ii) *Circumstances where wages need not be paid.* If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). Payment need not be made if there has been a bona fide termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

For this additional reason also, the petition may not be approved.

#### IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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