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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 18 2014 OFFICE: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 visa petition, the petitioner describes itself as an "IT Consulting" firm. To employ the beneficiary in what it designates as a Database Administrator position, the petitioner endeavors 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, finding that the petitioner failed to establish (1) that the beneficiary is eligible for an exemption from the numerical cap on H-1B visa petitions, (2) that it will have an employer-employee relationship with the beneficiary, and (3) that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner provided a discussion pertinent to exemption from the numerical cap and provided some additional evidence pertinent to the employer-employee issue. Although the petitioner provided no argument directly relevant to the specialty occupation issue, it provided some evidence to be considered in the discussion of that issue.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on each of the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

I. Facts and Procedural History

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a database administrator position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1141, Database Administrators, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I position.

The visa petition and the LCA both state that the beneficiary would work throughout the period of requested employment at . The visa petition states that the period of requested employment is from October 1, 2013 to August 31, 2016. An itinerary provided confirms that the beneficiary would work the entire three years at the location.

With the visa petition, the petitioner submitted evidence that the beneficiary studied business administration at . The record does not include evidence of the

equivalence of his studies at to any U.S. degree. The record does contain evidence that the beneficiary received a master's degree in business administration from the

The petitioner also submitted (1) an Employment Agreement ratified by the petitioner's president and the beneficiary on March 14, 2012; (2) a Sub-Contracting Agreement, dated May 10, 2012, entered into by the petitioner's president and an official of (3) a June 11, 2012 letter from the Director, Claims IT, of and (4) a letter, dated March 31, 2013, from the petitioner's president.

In the March 14, 2012 Employment Agreement, the beneficiary agreed, "to work anywhere in the United States as assigned by the [petitioner]." The beneficiary further agreed to perform his duties "at such place(s) as the needs, business, or opportunities of the [petitioner] may require from time to time."

In the May 10, 2012 Sub-Contracting Agreement the petitioner agreed to provide personnel to perform services for "as set forth in Consultant Schedule, which provides specific terms for each retained [worker provided by the petitioner]." An attached schedule states that the petitioner would provide the beneficiary to work at Farmers located at through November 16, 2016.[1]

In the June 11, 2012 letter from the , stated that the beneficiary had been provided to Farmers by and was then working at location as a [2] That letter states that the beneficiary's duties are:

- Design and Implement Solutions
- Automate Workflows
- Perform complex data aggregation and validation
- Manage databases
- Manage Logocal and Physical designs in SQL
- Manage complex ETL Process
- Migrating data from old server to new server
- Populating database
- Working on reports and automation work
- Maintaining work flows in stores
- Create new tables, queries, views and stored procedure for production support

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[1] The AAO observes that the petitioner has agreed to provide the beneficiary to beyond the end of the period of requested employment.

[2] The AAO observes that the instant visa petition is not for a programmer analyst, but for a database administrator.

further stated that the petitioner would assign projects and work to the beneficiary, but did not then explain how this is possible given the remote location of the job. She did not, for instance, identify a supervisor provided by the petitioner to work at the California job site. As to the educational requirements of the position, stated: "The minimum qualification required for the performance of the above specialty occupation duties is a Bachelor's Degree or equivalent in Computer Science/Engineering/related field."

The petitioner's president's March 31, 2012 letter reiterates that the beneficiary will work at the location, and provides a duty description that is nearly identical to that provided by

As to the supervision of the beneficiary, the petitioner's president stated that the petitioner would supervise the beneficiary's employment offsite through weekly telephone calls, the frequency of which might increase as necessary. He did not indicate that the petitioner would be providing a supervisor to the beneficiary's location. He stated that the beneficiary would utilize the tools and instrumentalities provided by "the end client." He cited the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) for the proposition that database administrator positions qualify as specialty occupation positions.

As to the educational requirement of the proffered position, the petitioner's president stated that it requires that its "Database Administrators possess, at minimum, a Bachelors degree (or its equivalent) in Computer Science or a related discipline . . . ."

On April 29, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence (1) pertaining to the beneficiary's eligibility for exemption from the numerical limitations contained in section 214(g) of the Act, and (2) that establishes a valid employer-employee relationship will exist for the duration of the requested validity period. The director outlined the specific evidence to be submitted.

In response, the petitioner submitted, *inter alia*, (1) a letter, dated June 24, 2013, from (2) the chapter of the *Handbook* pertinent to Database Administrators; and (3) a letter, dated July 10, 2013, from the petitioner's president.

In his June 24, 2013 letter, has a contract with the petitioner for provision of the petitioner's workers to has a contract with for provision of workers to . He also stated that has an agreement with

In his July 10, 2013 letter, the petitioner's president referred to the *Handbook* as evidence that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. Although the petitioner provided a portion of the *Handbook* pertinent to database administrators, the petitioner's president's letter cited to the following which refers to a different occupation – software engineers:

> **Education and training**: For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs kindly see **Exh. 'D.'**

Although Exhibit D is the *Handbook* chapter pertinent to Database Administrators, the AAO notes that the petitioner's president expounded at length on the requirements of software engineer positions. The AAO observes, again, that the LCA states that the proffered position has been represented to be a database administrator position.

The director denied the petition on July 23, 2013. On appeal, the petitioner provided, *inter alia*, (1) a document headed "Affidavit of [the Beneficiary]"; and (2) a letter, dated July 3, 2013, from who identifies himself as a principal of

The body of the document headed "Affidavit of [the Beneficiary]" reveals that it is actually the affidavit of dated August 26, 2013 and executed August 27, 2013, who identified himself as an He stated that he knows the beneficiary to be an employee of the petitioner working at Farmers as a database administrator.

The July 3, 2013 letter of states:

> confirms that [the beneficiary] contracted through since May 14, 2012. As a Senior Consultant, [the beneficiary] is be [sic] responsible for (i) enhancing and troubleshooting existing Datamart functionality, (ii) working closely with the business to identify reporting requirements and data delivery needs and Production Support, (iii) and scheduling and executing SQL Server jobs.

In its brief, the petitioner contends that while is a "non-accredited institution," it should nonetheless be "given due accreditation in the United States" because it is recognized by several governments abroad. The petitioner also asserts that it has "maintained a valid employer-employee relationship with the [beneficiary] throughout the H-1B status period." The petitioner did not directly address the specialty occupation issue.

II. The H-1B Cap

In general, H-1B visas are numerically capped by statute. Section 214(g) of the Act provides in pertinent part the following:

(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed---

* * *

(vii) 65,000 in each succeeding fiscal year. . . .

However, section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Section 101(a) of the Higher Education Act of 1965, (Pub. Law89-32), 20 U.S.C. § 1001(a), defines an institution of higher education as follows:

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means an educational institution in any State that—

(1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091 (d) of this title;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Additional institutions included

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" also includes—

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students individuals—

(A) who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) who will be dually or concurrently enrolled in the institution and a secondary school.

The petitioner filed the Form I-129 on April 1, 2013, with a requested start date of October 1, 2013. The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter, "H-1B Supplement"), at Part C, Numerical Limitation, reads as follows:

1. Specify how this petition should be counted against the H-1B numerical limitation (a.k.a. the H-1B "Cap"). *(Check one):*

   ☐ a. CAP H-1B Bachelor's Degree
   ☐ b. CAP H-1B U.S. Master's Degree or Higher
   ☐ c. CAP H-1B1 Chile/Singapore
   ☐ d. CAP Exempt

The petitioner checked box b, indicating that the petitioner claimed that the beneficiary is exempt from the numerical limitation pursuant to section 214(g)(5)(C) of the Act, the advanced degree exemption.

Further, in response to item "2" of that section, which requested that the petitioner identify the beneficiary's advanced degree and the institution where the beneficiary received it, the petitioner indicated that the beneficiary received a master's degree from Evidence in the record confirms that the beneficiary received a master's degree from that institution on June 27, 2011.

In the RFE, the director stated:

> You indicate that the beneficiary received a Master of Business Administration degree in from [sic] the According to public records, it appears the [does not qualify as an institution of higher education as described 20 U.S.C. § 1001(a) because it is not accredited and is a for-profit institution. Therefore, provide evidence that the beneficiary is eligible to be counted against the H-1B Master's Degree or Higher Cap as a graduate of an institution of higher education as defined in [20 U.S.C. § 1001(a)].

In his July 10, 2013 letter, the petitioner's president stated, ' is certified to operate in See **Exhibit 'A'** attached herewith." Exhibit A consists of content from the website. A portion of that web content dated March 11, 2010, states: "I decided to clarify that the [is certified to operate by the [and is accredited by the

The petitioner also provided a letter, dated May 6, 2013, from the Chancellor of which states:

> The [ ] was accredited by the Accrediting Council for Independent Colleges and Schools (from April, 2003 to August 31, 2008. Currently, the is not accredited but is working diligently towards reacquiring accreditation. As of today, the].

Neither the petitioner's president's letter nor the letter from the chancellor contains any indication that is a public or other nonprofit institution, and no indication, therefore, that

was an institution of higher education as defined in 20 U.S.C. § 1001(a) at the time the beneficiary was awarded his degree. Because the beneficiary does not have an advanced degree from a qualifying institution, he is not entitled to that exemption. Without evidence that the institution the beneficiary attended is such an institution, the beneficiary has not been shown to be entitled to the advanced degree exemption.[3] The appeal will be dismissed and the visa petition denied for this reason.

III. Specialty Occupation

The AAO will next address the specialty occupation basis of denial. Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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[3] The AAO observes that the visa petition was submitted on April 1, 2013, and the FY 2014 cap final receipt date was April 5, 2013. As such, when the visa petition was submitted, the cap had not been exhausted.

The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) states, in pertinent part:

> Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.

The instant visa petition was submitted with an indication that it was exempt from the cap pursuant to section 214(g)(5)(C) of the Act. An RFE asking the petitioner to demonstrate that the visa petition was eligible for the exemption claimed was issued on April 29, 2013, a date after the final receipt date. On that date, the director had not yet determined that the instant visa petition was subject to the cap. That determination was made on July 23, 2013, when the director issued the decision of denial. The visa petition was correctly denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO notes that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The AAO observes that the petitioner claims that the beneficiary would work on a project at the location of [redacted] Assuming that [redacted] controls the project, divides it into modules to be developed by teams or individuals, and integrates those modules, then the record contains evidence pertinent to the duties the beneficiary would perform and the educational requirement the end-user requires for the performance of those duties.[4] That is, in her June 11, 2012 letter, [redacted] stated: "The minimum qualification for the performance of the [duties of the proffered position] is a Bachelor's Degree or equivalent in Computer Science/Engineering/related field."

[4] If, on the other hand, [redacted] who provides the beneficiary to the project at [redacted] location, controls the project, dividing it into modules, assigning those modules to teams or individuals for development, and subsequently integrating those modules, then the record contains no evidence from the end-user of the beneficiary's services of the educational requirement the end-user requires for the performance of the beneficiary's duties, as the record contains no statement from any official of [redacted] of the minimum educational requirements of the proffered position. That would also indicate that the visa petition must be denied as the record would then contain no evidence from the end-user of the beneficiary's services of the educational requirements it places on the proffered position, as required by *Defensor v. Meissner*, *supra*.

However, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in engineering is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

The AAO notes that such an assertion, i.e., the duties of the proffered position can be performed by a person with a degree in any engineering discipline, implies that the proffered position is not, in fact, a specialty occupation. The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. 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 or engineering, 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). Because the evidence suggests that the educational requirement placed on the proffered position by the end-user of the beneficiary's services could be satisfied by an otherwise undifferentiated bachelor's degree in engineering, it suggests that the proffered position is not a specialty occupation position. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook* on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook*, cited by the petitioner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[5]

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[5] The *Handbook,* which is available in printed form, may also be accessed on the Internet, at http://www.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1141, Database Administrators from O*NET. The AAO reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Database Administrators," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of database administrators:

> **What Database Administrators Do**
>
> Database administrators use specialized software to store and organize data, such as financial information and customer shipping records. They make sure that data are available to users and are secure from unauthorized access.
>
> **Duties**
>
> Database administrators typically do the following:
>
> - Identify user needs to create and administer databases
> - Ensure that the database operates efficiently and without error
> - Make and test modifications to the database structure when needed
> - Maintain the database and update permissions
> - Merge old databases into new ones
> - Backup and restore data to prevent data loss
> - Ensure that organizational data is secure
>
> Database administrators, often called DBAs, make sure that data analysts can easily use the database to find the information they need and that the system performs as it should. DBAs sometimes work with an organization's management to understand the company's data needs and to plan the goals of the database. Database administrators are responsible for backing up systems to prevent data loss in case of a power outage or other disaster. They also ensure the integrity of the database, guaranteeing that the data stored in it come from reliable sources.
>
> Some DBAs oversee the development of new databases. They have to determine what the needs of the database are and who will be using it. Database administrators often plan security measures, making sure that data are secure from unauthorized access. Many databases contain personal or financial information, making security important.
>
> Many database administrators are general-purpose DBAs and have all these duties. However, some DBAs specialize in certain tasks that vary with the organization and its needs. Two common specialties are as follows:
>
> ***System DBAs*** are responsible for the physical and technical aspects of a database, such as installing upgrades and patches to fix program bugs. They typically have a

background in system architecture and ensure that the firm's database management systems work properly.

Application DBAs support a database that has been designed for a specific application or a set of applications, such as customer service software. Using complex programming languages, they may write or debug programs and must be able to manage the aspects of the applications that work with the database. They also do all the tasks of a general DBA, but only for their particular application.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2014-15 ed., "Database Administrators," http://www.bls.gov/ooh/computer-and-information-technology/database-administrators.htm#tab-2 (last visited Feb. 12, 2014).

The duties described in June 11, 2012 letter are consistent with the duties of a database administrator, and more specifically, an applications database administrator. Notwithstanding that characterized the proffered position as a programmer analyst position, the AAO finds, on the balance, that the proffered position is a database administrator position as described in the *Handbook.*

The *Handbook* states the following about the educational requirements of database administrator positions:

How to Become a Database Administrator

Database administrators (DBAs) usually have a bachelor's degree in an information- or computer-related subject. Before becoming an administrator, these workers typically get work experience in a related field.

Education

Most database administrators have a bachelor's degree in management information systems (MIS) or a computer-related field. Firms with large databases may prefer applicants who have a master's degree focusing on data or database management, typically either in computer science, information systems, or information technology.

Database administrators need an understanding of database languages, the most common of which is Structured Query Language, commonly called, SQL. Most database systems use some variation of SQL, and a DBA will need to become familiar with whichever programming language the firm uses.

Licenses, Certifications, and Registrations

Certification is a way to demonstrate competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms. Some companies may require their database administrators to be certified in the product they use.

Work Experience in a Related Occupation

Most database administrators do not begin their careers in that occupation. Many first work as database developers or data analysts. A database developer is a type of software developer who specializes in creating databases. The job of a data analyst is to interpret the information stored in a database in a way the firm can use. Depending on their specialty, data analysts can have different job titles, including financial analyst, market research analyst, and operations research analyst. After mastering one of these fields, they may become a database administrator. For more information, see the profiles on software developers, financial analysts, market research analysts, and operations research analysts.

Advancement

Database administrators can advance to become computer and information systems managers.

Important Qualities

Analytical skills. DBAs must be able to monitor a database system's performance to determine when action is needed. They must be able to evaluate complex information that comes from a variety of sources.

Communication skills. Most database administrators work on teams and must be able to communicate effectively with developers, managers, and other workers.

Detail oriented. Working with databases requires an understanding of complex systems, in which a minor error can cause major problems. For example, mixing up customers' credit card information can cause someone to be charged for a purchase he or she didn't make.

Logical thinking. Database administrators use software to make sense of information and to arrange and organize it into meaningful patterns. The information is then stored in the databases that these workers manage, test, and maintain.

Problem-solving skills. When problems with a database arise, administrators must be able to diagnose and correct the problems.

Id. at http://www.bls.gov/ooh/computer-and-information-technology/database-administrators.htm #tab-4 (last visited Feb. 12, 2014).

That database administrators *usually* have a bachelor's degree in an information- or computer-related subject indicates that some do not. That *most* database administrators have a bachelor's degree in management information systems or a computer-related field indicates that some do not. The *Handbook* does not support, therefore, that database administrators, as a category, require a minimum of a bachelor's degree in a specific specialty or its equivalent.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Finally, as was noted above, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in specific

specialty or its equivalent, the petitioner would be obliged to demonstrate that other Level I database administrator, entry-level positions requiring only a basic understanding of database administration, require a minimum of a bachelor's degree in a specific specialty or its equivalent, the proposition of which is not supported by the *Handbook.*

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner also has not satisfied 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

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

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation that the *Handbook's* suggests may not require a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The record contains no evidence pertinent to anyone that the petitioner has ever previously hired to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).[6]

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as managing databases and populating databases do not sufficiently demonstrate that the duties of the proffered position are more specialized and complex than the duties of database administrator positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner filed the instant visa petition for a Level I database administrator position, a position for an entry level employee with only a basic understanding of database administration. This does not support the proposition that the duties of the position are so specialized and complex relative to other database administrators such that their performance is associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to database administration.

For the reason discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

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[6] While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

IV. Employer-Employee

Another basis for the decision of denial is the director's finding that the petitioner failed to demonstrate that it has standing to file the visa petition as the beneficiary's prospective employer.

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).

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

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

States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the 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.[7]

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

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

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

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

"employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[8]

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).[9]

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).

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[8] 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)).

[9] 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).

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

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

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

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

As was noted above, the petitioner is located in New Jersey and the beneficiary would work in California. The petitioner would provide the beneficiary to work there on the project of another company. There is no indication that the petitioner exerts any control over that project or over the beneficiary. Under these circumstances, notwithstanding the assertion of [redacted] in her June 11, 2012 letter, which the AAO notes was written over one year before the requested employment period, that the petitioner will coordinate the beneficiary's projects, and the assertions of the petitioner's president in his March 31, 2013 letter, it has not been demonstrated that the petitioner would assign the beneficiary's duties and supervise his performance. Neither letter sufficiently explains how the petitioner will maintain an employer-employee relationship with the beneficiary.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the

AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record does not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed and the visa petition denied for this additional reason.

V. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.