



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 10 2014**

OFFICE: CALIFORNIA SERVICE CENTER

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a software development company established in 1996. In order to employ the beneficiary in what it designates as a systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner (1) failed to establish that it will have a valid employer-employee relationship with the beneficiary; and (2) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record as supplemented by the submissions on appeal does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel’s contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director’s determinations in this matter were correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner’s claims are “more likely than not” or “probably” true.

II. Factual and Procedural History

A. General Overview

This section will include certain preliminary findings that we have made in reviewing the evidence of record. They are an integral part of our overall analysis of the merits of the appeal, and they should therefore be regarded as so incorporated, whether or not we mention them again in our written analyses.

The record of proceeding reflects that there are five (5) entities connected to some degree or other with the project work that forms the basis of the basis of the petition. These include (1) [REDACTED]

[REDACTED] and (4) the petitioner, [REDACTED]. However, they also include another entity, from which no documentary evidence is presented and which the petitioner itself nowhere mentions—namely, the division or agency of the State of Kansas that has generated and is ultimately responsible for the [REDACTED] that the February 15, 2013 Accenture letter identifies as the project upon which the beneficiary would work.

In essence, then, the petition is based upon whatever work and associated control over that work would be generated by the interplay of various agreements and contractual documents involving a number of independent entities. The petitioner was not bound to present those documents. However, in a situation such as the one here - where the substantive requirements of the proffered position and also supervision and management of the project work appears to be at least partly a function of contractual arrangements - it behooved the petitioner to present sufficiently comprehensive, supported, and credible evidence to establish exactly how the mix of those arrangements would play-out in areas relevant to this appeal.

Here we are referencing such areas as (1) the relevant levels of control that the various parties would have in relevant areas such as (a) assigning and supervising the day-to-day work of the project workers, (b) discharging project workers for cause or for other reasons, (c) providing, monitoring, and controlling the means and instrumentalities of the project work, and (d) determining whether a project worker's performance on any project-assignment would merit full pay, any pay at all, or dismissal from the project. In addition to those "employer-employee" aspects of the petition, the petitioner should also provide sufficient evidence to establish that its characterizations of the nature of the proffered position and its associated duties comport with the related requirements set by the entity ultimately determining the nature of the work comprising the proffered position. The evidence of record succeeds in neither regard.

The petition identifies [REDACTED] as the business entity generating project work that would require the beneficiary's services at its Austin, Texas office. The petitioner asserts that such project work will constitute a specialty-occupation level position for the beneficiary in a Computer Systems Analyst occupational category, working under the job title "Systems Analyst."

According to the petition, [REDACTED] contracted with [REDACTED] California, to handle the project work to which the beneficiary would be assigned.

According to the [REDACTED] letter dated May 10, 2013, the beneficiary would work onsite at [REDACTED] offices as a systems analyst pursuant to an agreement between [REDACTED]. [REDACTED] letter further claimed that the beneficiary's salary would be paid by the petitioner, and that the beneficiary would at all times be operating under the management and supervision of the petitioner. The AAO accords little weight to this letter, in that it does not translate into practical terms what, if anything, "operating under the [petitioner's] management and control" means in the context of day-to-day determination, assignment, and supervisory control of the work that the beneficiary is to perform from day to day.

The AAO has considered the statements by the petitioner and others in the record of proceeding to the effect that, as the aforementioned [REDACTED] letter states, "the beneficiary would at all times be operating

under the management and supervision of the petitioner." Although we are not dismissing such statements, we are weighing them within the overall evidentiary context presented by the record of proceeding, in accordance with the "preponderance of the evidence" standard. In this regard, we observe that whatever management or supervisory control the petitioner would exert over the beneficiary in determining and assigning the day-to-day work that the beneficiary would perform and in determining the satisfactoriness of the efficiency, responsiveness, and quality of the beneficiary's day-to-day work would be a function of the interplay of the terms and conditions of various contractual understandings and agreements likely memorialized in some mix of pertinent contracts, work orders, statements of work, and the like, generated by (1) the State of Kansas agency regarding the unexplained [REDACTED] contract indicated by the aforementioned February 15, 2013 [REDACTED] letter as the ultimate source of the project-work to which the beneficiary would be assigned; (2) [REDACTED]. We find that, while the petitioner was not required to produce those documents, it still bears the burden of establishing a credible factual foundation for its claims and part of that factual foundation here necessarily includes establishing how the petitioner's claims accord with the contractual background in this case.

The AAO finds that, although project work is the basis of the specialty occupation claim, the record of proceeding lacks substantive evidence showing (1) the immediate supervisory chain under which the beneficiary would perform his day-to-day assignments at the worksite; (2) any role that the petitioner has in assigning, and supervising the beneficiary's day-to-day work during the project to which he would be assigned.

We also observe that, despite the fact that the director's RFE and denial decision clearly conveyed the relevance of contractual information, the petitioner provided nothing substantive about the agreements to which [REDACTED] was a party, despite the fact that [REDACTED] its agreements with the [REDACTED] client and with [REDACTED] appear to be critically determinant of the ultimate work and work-requirements for the project to which the beneficiary would be assigned.

Next, not only does the record show that the petitioner is geographically remote from Accenture, the entity to which the beneficiary would be assigned, but the record also contains no documentary evidence that the petitioner (1) was a party to any discussions, negotiations, or contractual documents setting the scope of the project to which it is said the beneficiary would be assigned, or (2) would have a role in assigning, supervising, and evaluating the efficiency and quality of the beneficiary's work and satisfactoriness of his work products during the beneficiary's day-to-day performance of the proffered position once the beneficiary was assigned.

Further, the AAO finds that, notwithstanding the single-page Accenture letter submitted on appeal, and the documents submitted by [REDACTED], the record lacks documentary evidence that provides (1) a clear description of any applications of highly specialized knowledge that the beneficiary would have to employ to perform the [REDACTED] project work; (2) a persuasive explanation of any correlation between the work to be required of the beneficiary and the need for at least a bachelor's degree, or the equivalent, in any specific specialty; (3) the supervisory framework under which the beneficiary would be directed and under which the quality and progress of his work would be reviewed, day-to-day, for compliance with the project requirements; (4) the nature of any role that the petitioner would have in determining (a) the nature and requirements of the project upon which the beneficiary would be

working at [REDACTED] and (b) the nature and range of substantive tasks that the beneficiary would be performing from day-to-day at [REDACTED] (5) the supervisory arrangements that would be in place for directing, monitoring, and evaluating the beneficiary's project work for [REDACTED] on a day-to-day basis.

Further, there are several remarkable aspects of the copy of the [REDACTED] Agreement that eviscerates that document of any evidentiary value towards overcoming the grounds of denial. First, at least a paragraph of the Scope of Services section has been blacked-out. Second, the submission is missing pages 2 and 5. Third, it also does not include Exhibit A, which, as described in the document's first page, would set forth the specifications of the services to be provided to [REDACTED] client. We find that, as the content of the portions of the document that have been provided indicates that the full content of the document and its Exhibit A may have material value to the issues before it, the aspects that we have noted also reflect unfavorably on the overall credibility of the petitioner's claims.

We do take into account the time sheets and performance appraisal forms that the petitioner submitted into the record of proceeding. We find that they and other elements of the record of proceeding establish that the petitioner has likely assumed responsibility for the social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and any other work-related benefits to which the beneficiary may be entitled. Further, we consider these aspects of the petitioner/beneficiary relationship as relevant factors in determining the employer-employee issue. And we also have taken this fact into consideration in our review of the entire record of proceeding on the employer-employee issue. However, as we hope is reflected in our discussions, the evidence of record is simply not sufficiently comprehensive and detailed to show sufficient indicia of control under the common-law employer-employee analysis for the AAO to determine that the petitioner has established the requisite control or right to control the beneficiary and his work.

B. Additional Details of the Record of Proceeding

In the petition signed on March 21, 2013 and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary as a computer systems analyst on a full-time basis at the rate of pay of \$60,000 per year. In addition, the petitioner indicates that the beneficiary will be employed at [REDACTED]

[REDACTED] In the support letter dated March 21, 2013, the petitioner states that the beneficiary would be employed to perform the following duties:

Specifically, as a Systems Analyst, the Beneficiary will analyze computer problems of existing and proposed systems and initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients'

business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used, and format the output to meet user's needs. As a Systems Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

In addition, the petitioner states, "As with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field." It behooves us to note that the petitioner provides no documentary support for this pronouncement. The same holds for the petitioner's observation that "[f]or a position at the level offered, it is not uncommon for the incumbent to also possess a master's degree and/or a number of years of experience of increasing responsibility in programming analysis or engineering." Accordingly, we accord no evidentiary weight to either of these pronouncements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition to the letter of support, the petitioner submitted, in part, the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The occupational category is designated as "Computer Systems Analysts" at a Level I (entry) wage level. The AAO notes that the LCA lists the places of employment as the following:
 - [REDACTED]
 - [REDACTED]
- Diplomas, transcripts, and training certificates pertaining to the beneficiary.
- A document entitled "Itinerary of Services for [the beneficiary]." The AAO notes that the itinerary states that the beneficiary will be performing services at [REDACTED] from October

1, 2013 to September 4, 2016. Further, the itinerary contains a list of the beneficiary's responsibilities.

- A Subcontractor Agreement between the petitioner and [REDACTED], effective October 10, 2012. Although the agreement indicates that it is five pages in length, the petitioner submits only pages 1, 3 and 4. In addition, paragraph two on the first page of the document is intentionally blacked out.
- An offer of employment letter from [REDACTED], Vice President for the petitioner, dated March 14, 2013. In the letter, [REDACTED] states that it is offering the beneficiary "the position of Systems Analyst at [the petitioning company] starting from October 1, 2013."
- An Employee Handbook. The AAO notes that the petitioner's name is not in the Handbook and there is no indication that the Handbook refers to the petitioner. Moreover, the petitioner submitted only a few pages of the handbook.
- A blank weekly time sheet.
- A blank performance appraisal form.
- A line-and-block organizational chart.
- Copies of the beneficiary's paystubs for the period from December 1, 2012 to February 28, 2013.
- A printout from the petitioner's webpage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 3, 2013. The petitioner was asked to submit additional documentation, including (1) probative evidence that a valid employer-employee relationship will exist between the petitioner and the beneficiary and (2) evidence to demonstrate that there is sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period.

The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. See 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12).

On May 20, 2013, in response to the director's RFE, the petitioner provided a letter regarding the proffered position, along with additional supporting evidence, including the following documentation:

- A letter from [REDACTED] Administration Manager for [REDACTED] dated May 10, 2013. In the letter, [REDACTED] states that the beneficiary is working onsite for its client, [REDACTED] located at [REDACTED] in the position of Systems Analyst.
- Copies of Affidavits by [REDACTED] attesting that they work at the [REDACTED] site with the beneficiary on the [REDACTED] project.
- Copies of email messages to the beneficiary from other workers on the [REDACTED] project.
- An Employment Agreement between the petitioner and the beneficiary, dated March 14, 2013.
- Copies of weekly time sheets for the beneficiary.

In the instant case, the director notified the petitioner, through the RFE, that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the notice was appropriate, as the evidence requested was material in that it (1) addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claims that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition, and (2) would be in an employer-employee relationship with the beneficiary. The RFE put the petitioner on notice that additional evidence was required and also afforded the petitioner a reasonable opportunity to provide it before the visa petition was adjudicated.

The director reviewed the response to the RFE and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on June 4, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief and additional evidence.

III. Analysis

A. Employer-Employee Relationship

The issue for consideration is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). As already stated, the AAO finds that the record of proceeding is fundamentally incomplete with regard to the employer-employee issue. As reflected in our comments and findings in the preceding

section of this decision, the record lacks evidence that would establish the relative extent of the any supervision and control that the petitioner would assert over the beneficiary and his work, and the evidence of record also fails to surface a sufficient range of employer-employee indicia for us to reasonably determine that the petitioner more likely than not has the requisite employer-employee relationship with the beneficiary. Accordingly, the appeal must be dismissed, and the petition must be denied.

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 as follows:

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

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

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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

be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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.¹

¹ 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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.²

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).

² 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

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).³

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

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

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

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))).

³ 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).

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, we find that the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

In the March 21, 2013 letter of support, the petitioner states that "[o]ur company will directly pay the Beneficiary's salary." The petitioner further states that "[the beneficiary] is paid by our company only and any tax implications of the Beneficiary's employment are [sic] borne solely by our company." The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while items such as wages, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an employment agreement between the petitioner and the beneficiary dated March 14, 2013. Notably, the Employment Agreement was signed prior to the submission of the Form I-129 petition. However, the petitioner did not include the Employment Agreement with its initial submission.

Upon review of the document, the AAO notes that the employment agreement does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to address or submit any probative evidence on the issue.

Moreover, through the RFE, the director provided the petitioner an opportunity to submit documentation regarding the beneficiary's role in hiring and paying assistants. In the instant case, the petitioner did not address this issue or provide any documentation regarding the beneficiary's role in hiring and paying assistants.

Furthermore, the Subcontractor Agreement between the petitioner and [REDACTED] dated October 10, 2012, states in the first paragraph as follows:

Subcontractor agrees to provide consulting services set forth in the specifications (attached hereto as "Exhibit A") and incorporated liaison by reference. The daily activities of **Subcontractor's** [sic] assigned to work with Client (named in "Exhibit A") in fulfillment of this agreement will be directed and controlled by the Client. The Client will be the sole judge of performance and capabilities, and may at any time request removal of **Subcontractor**.

(Emphasis in original).

According to the agreement, [REDACTED] is the contractor and the petitioner is the subcontractor. The record does not contain a copy of "Exhibit A" referenced above, which, according to the agreement, would specifically identify the client to which the agreement pertains. Additionally and as previously noted, two of the five pages of this agreement are omitted from the record, and the third paragraph on page 1 of this agreement is intentionally obstructed from view. Moreover, this document does not provide any information as the duration of the agreement.

The petitioner provided no explanation for the omissions noted above, nor does the record contain any other documentary evidence establishing the claimed contractual path to the beneficiary's ultimate assignment with [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In response to the RFE, the petitioner submitted a letter from [REDACTED] Administration Manager for [REDACTED] dated May 10, 2013. [REDACTED] states that the beneficiary was currently assigned to the [REDACTED] project and commenced work on this project on October 15, 2012, noting that his assignment is pursuant to a [REDACTED].

Although the claimed existence of a contractual agreement between [REDACTED] is noted based on the claims set forth in this letter, neither that agreement nor synopses or explanations of the relevant aspects of such agreement were submitted into the record, despite the RFE's emphasis on the importance of relevant factors that would likely be reflected in contractual documents bearing on this petition.

Additionally, the petitioner submitted two affidavits from [REDACTED] dated May 14, 2013. The petitioner claims that these individuals are co-workers of the beneficiary on the Accenture project. The statements contained in the affidavits are virtually identical, with both individuals stating that the beneficiary is currently employed with them as a Java Developer on the [REDACTED]. The AAO notes that, for the first time in the record, these affidavits describe the beneficiary's position as a Java Developer as opposed to a systems analyst. We note this as significantly inconsistent with nature of the position claimed by the petitioner. In this same vein, we note that the aforementioned [REDACTED] letter refers to the position in question as that of a "Developer"- not a Systems Analyst as asserted by the petitioner.⁴

Additionally, those two affidavits are vague and provide little to no detail regarding the nature of the beneficiary's work on the alleged Accenture project.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. Although the AAO notes the petitioner's submission of a letter from [REDACTED] on appeal, this letter is insufficient to establish eligibility in this matter. The petitioner claimed in its May 20, 2013 letter in response to the RFE that "[d]ue to its confidentiality policies, Accenture is unable to provide an end-client letter about the Beneficiary's assignment." However, the letter submitted on appeal, from [REDACTED], Project Manager for the [REDACTED], is dated February 15, 2013, over three months prior to the petitioner's response to the RFE and thus clearly indicating that it was previously available to the petitioner. The petitioner provides no explanation for not providing this letter earlier in the adjudication process. This aspect of the record of proceeding also reflects unfavorably upon the petition's credibility.

Regardless, after reviewing the petitioner's submission of this letter on appeal, the record is still devoid of sufficient evidence establishing the contractual path of the beneficiary's assignment with Accenture. Although the letter from [REDACTED] claims that a contractual agreement exists between

⁴ A review of O*Net Online reveals that the occupational title of "Java Developer" is classified under SOC (O*NET/OES) Code 15-1131 or "Computer Programmers." As noted earlier in this decision, the LCA submitted in support of the petition is certified for the position of "Systems Analyst" under SOC 15-1121 or "Computer Systems Analysts." See <http://www.onetonline.org/> (last visited on March 26, 2014). If the affidavits and Accenture letter correctly state the nature of the beneficiary's position, it would appear that the LCA does not correspond to the proffered position in this petition. This significant discrepancy has not been addressed by the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[REDACTED], no such agreement has been submitted. Likewise, although the May 10, 2013 letter from [REDACTED] claims that a Master Subcontractor Agreement exists between [REDACTED], this agreement likewise has not been submitted into the record. Finally, as already noted, the record's copy of the subcontractor agreement between the petitioner and [REDACTED] has a redacted portion and omits pages and Exhibit A which apparently would identify the particular client to which the agreement pertains and would provide specifications of the services to be provided.

The minimal amount of documentation pertaining to the exact nature of the beneficiary's employment renders it impossible for the AAO to conclude that an employer-employee relationship exists between the petitioner and the beneficiary.

Finally, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 4, 2016. However, the documentation does not establish that an [REDACTED] project, or any other project, for that matter, for the beneficiary to serve as a systems analyst (performing the duties as stated by the petitioner) will commence/continue from October 1, 2013 to September 4, 2016. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. Although the petitioner's submitted itinerary claims that the beneficiary's project with [REDACTED] will continue through this date, the record contains no documentary evidence supporting this contention. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Finally, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. With the initial petition, the petitioner submitted an organizational chart. The chart shows the systems analyst reporting to the manager – operations (SDG). In response to the RFE, the petitioner submitted an employment agreement between the petitioner and the beneficiary. Notably, the employment agreement does not indicate the employer contact for the beneficiary. The agreement states in Paragraph F: "[e]mployer contact for such reporting is: [no name indicated.]" The petitioner also submitted copies of the Weekly Time Sheets of the beneficiary with the initial petition and in response to the RFE. The AAO observes that the time sheets are signed by [REDACTED] President for the petitioning company. Although the position of Vice President appears on the organizational chart, this position is tasked with supervising two different departments and there is no hierarchical relationship between the Vice President and the position of systems analyst. The petitioner did not provide any further information regarding the supervision of the beneficiary for this project (or any other projects). In any event, there is no evidence anywhere in the record of proceeding that whatever evaluative and supervisory functions the petitioner may have performed

would affect the actual, day-to-day supervision and evaluation of the beneficiary and his work on the project in which he would participate.

Moreover, it must be noted again that the petitioner claims that the beneficiary will be working for [REDACTED]. The petitioner indicated that its office is located in [REDACTED] Ohio. These locations are approximately 1,200 miles apart from each other, raising serious questions as to who will supervise, control and oversee the beneficiary's work. The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner did not provide specific information regarding the beneficiary's supervisor (e.g., supervisor's name, brief description of job duties, location) or how and how often the supervisor would exercise his or her responsibilities towards the beneficiary.

Additionally, the petitioner submitted a copy of its Employee Handbook. However, as previously noted, the petitioner's name or other identifying information is not in the handbook. Further, the AAO notes that the petitioner did not provide copies of all the pages of the Handbook. The petitioner also submitted a copy of its Performance Appraisal Form. The record of proceeding lacks information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the specific criteria for determining bonuses and salary adjustments. Moreover, the Subcontractor Agreement between the petitioner and [REDACTED] indicates that "the Client," who was not identified, will direct and control the daily work of the subcontractor (in this case, the petitioner and its employees), and will also "be the sole judge of performance and capabilities, and may at any time request removal of the Subcontractor." This clause contradicts the claims by the petitioner that it will retain complete control over the beneficiary's daily activities. In any event, there is no evidence that any of the other entities related to this petition would have any interest in the appraisals for which the forms would be used.

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

B. The Specialty Occupation Issue

The AAO will now address the issue of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory

requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R.

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the instant case, the AAO notes the petitioner stated in its letter of support (dated March 21, 2013) that its minimum educational requirement for the proffered position is a bachelor's degree in computers, engineering, or a related field. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different

specialties. Section 214(i)(1)(B) (emphasis added).

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

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

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

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

There are no submissions from [REDACTED] client, and, consequently, no confirmation that even the job description in the aforementioned [REDACTED] letter comports with that client's agreement with [REDACTED] as to the nature of the work and positions that it was authorizing [REDACTED] to address.

Further, we note that there is nothing in the [REDACTED] letter that stipulates that the proffered position would require a person with at least a bachelor's degree in a specific specialty or the equivalent.

Moreover, as briefly noted in the previous section, the record contains conflicting information regarding the true job title and associated duties of the beneficiary.

The beneficiary's claimed co-workers on the [REDACTED] project provide sworn affidavits in which they identify the beneficiary's position title as that of a Java Developer. Likewise, the [REDACTED] letter states that the beneficiary would "work on the [REDACTED] as a Developer," commencing October 15, 2012. That Accenture letter also states the following as to the beneficiary's duties:

[The beneficiary's] primary job responsibilities will include: develop the components from the given designs, implement the designed component as software code. The components worked will include are [(sic)] JSPs, business logic, data access objects, create and update unit tests, execute assembly test, support system test, user acceptance test by performing bug fixes and assisting testers
As need[ed], support ongoing development and application and changes to the application as required.

The technical environment will include: J2EE, JSP1.2, Spring, RAD 7.0, HTML, XML, Java Script, Spring Batch, JMS, and DB2.

It is not evident that the position, duties, and occupational classification indicated by [REDACTED] statements quoted above are the same as the Computer Systems Analysts position and related duties that the petitioner claims.

A review of O*Net Online reveals that the occupational title of "Java Developer" is classified under SOC (O*NET/OES) Code 15-1131 or "Computer Programmers," whereas the LCA submitted in support of the petition is certified for use with a job prospect within the occupational classification of "Systems Analyst" under SOC 15-1121 or "Computer Systems Analysts." See <http://www.onetonline.org/> (last visited on April 1, 2014). The AAO notes that the petitioner repeatedly claims that the beneficiary will be employed as a systems analyst throughout the petition.

The U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook*, which the AAO acknowledges as an authoritative source on the duties and educational requirements of the wide variety

of occupations that it addresses, provides the following overview of the duties associated with a systems analyst:

Computer systems analysts study an organization's current computer systems and procedures and design information systems solutions to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited April 1, 2014).

The position of java developer, however, entails significantly different duties and responsibilities than that of a systems analyst. The position title of java developer is included under the occupational category of Computer Programmers, and the duties of this occupation are described in the *Handbook* as follows:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited April 1, 2014).

As this appears to present a material discrepancy with regard to the nature of the position that is the subject of this petition, we shall proceed no further. This aspect of the record of proceeding renders us unable to determine that, in fact, the proffered position and its associated duties are what the petitioner claims them to be. The conflicting accounts of the actual job title and associated duties of the beneficiary as noted above, render it impossible for the AAO to determine the true nature, and corresponding occupational classification, of the proffered position in this matter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

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

alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

IV. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.