



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 14 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)

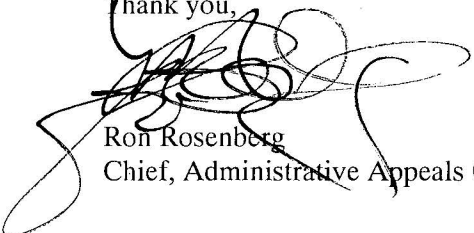
ON BEHALF OF PETITIONER:

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
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 an information technology services business established in 1999. In order to employ the beneficiary in what it designates as a build and release engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 25, 2013, concluding that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary; and (2) that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner subsequently filed an appeal. On appeal, the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that it satisfied all evidentiary requirements.

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.

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. Factual and Procedural Background

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a build and release engineer on a full-time basis at the rate of pay of \$60,000 per year. The petitioner indicates that the beneficiary will work at [REDACTED]

In the letter of support dated March 29, 2013, the petitioner states that the beneficiary "is presently working with end client [REDACTED] as a Build and Release Engineer at their [REDACTED] WA location." In addition, the petitioner claims that the beneficiary will be responsible for the following duties:

- Installing & Configuring TFS 2010 Environment along with Project Collections, Team Projects, Share point Services, SSRS Reporting Services[;]
- Creating automated build and deployment scripts for .Net Applications[;]
- Developing and maintaining the build environment, the source code control system and managing build packages using TFS[;]
- Performing build and deployment activities across multiple environments – Testing, Pre-Prod, UAT, Staging and Production environments[;]

- Administering IIS 7.5 – creating new Websites, Applications, Virtual Directories, App pools, Bindings and deploying websites and web applications[;]
- Customizing Build Process Templates XAML workflow and Work item Templates[;]
- Creating & deploying SQL database deployment scripts using TFS and SQL Server[;]
- Manage branching and merging of various code streams[;]
- Creating and maintaining build and deployment release manifest documents[; and]
- Assisting developers in TFS work items, versioning, coding and debugging in Visual Studio 2010 and also providing end to end application support including smoke tests.

Further, the petitioner states, "[t]he highly technical nature of the job duties described above implies that the incumbent in the position would require at least a Bachelor[']s degree in Computer Science, Engineering, and Technology or in the related fields of science." With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Science degree in Computer Science and transcript from the [REDACTED] as well as a copy of his foreign diploma and transcript.

In addition, the petitioner submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Programmers" – SOC (ONET/OES Code) 15-1131, at a Level I (entry level) wage. The beneficiary's place of employment is listed as [REDACTED] Complex West, Sacramento, California 95811.
- The petitioner's 2010 and 2011 Income Tax Returns.
- A letter from [REDACTED], dated March 22, 2013. In the letter, [REDACTED] states the following:

Pursuant to a contract between [REDACTED] and one of its Clients, [REDACTED] has offered [the beneficiary], a direct employee to [the petitioner], to work as a Build / Release Engineer at the [REDACTED] special occupation facility located at [REDACTED] from June 19, 2012 for a project assignment.

The project assignment where [the beneficiary] has been assigned is CA-EDD-DIA [California – Employment Development Department – Disability Insurance Automation] Web based Management System.

After successful screening of [the beneficiary], [REDACTED] has shown its interest and confirmed [the beneficiary] for their specialty occupation at their facility located as above as a Build / Release Engineer.

[REDACTED] further claims that "[t]he project is expected to be a long term ongoing assignment which may be extended further." In addition, [REDACTED] states that the position "requires at least a baccalaureate degree or its equivalent degree in Engineering and experience in the desired skills."

- A Corporation to Corporation Agreement between the petitioner and [REDACTED] Solutions, dated October 29, 2008, along with an Exhibit A – Statement of Work (SOW). The agreement indicates the following:

[The petitioner] agrees pursuant to the terms herein to provide programming and/or engineering and other specialized services of its personnel as an independent contractor directly to the Third Party User (TPU) who has engaged [REDACTED] to locate temporary staffing according to the training, skills, abilities and experience required by the TPU.

The agreement also indicates that "[e]valuation of [the petitioner] personnel performance, if any, shall be made by the TPU."

The SOW indicates the following:

In accordance with the Master Services Agreement signed between the undersigned parties on June 12, 2012 it is agreed as follows that [the petitioner] (hereinafter 'Contractor')...contracts to provide services to the third party user, [REDACTED] beginning June 19, 2012 ('start date') and terminating approximately on TBD ('end date').

* * *

2. Contractor personnel will work on the project as: Build/Release Engineer
3. The following personnel of the Contractor, who will work on this project, have been informed and understand their obligations under this Statement of Work and the Master Services Agreement.

Consultant Name: [the beneficiary] [REDACTED]

* * *

6. [The petitioner] agrees to complete the assignment within the guidelines as provided by the TPU or within any reasonable changes in the guidelines as provided by the TPU.
- An offer of employment letter from the petitioner to the beneficiary, dated March 19, 2013. Notably, the letter states that the beneficiary will be "reporting to [REDACTED], Director of Operations at [the petitioner's business]."
 - Copies of pay statements and Form W-2, Wage and Tax Statement, issued to the beneficiary from the petitioner.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 19, 2013. The director outlined the specific evidence to be submitted.

On July 22, 2013, counsel responded to the RFE with a brief and additional supporting evidence, including the following documentation:

- The petitioner's payroll statements.
- An organizational chart for the petitioner's operations. The chart shows that the build engineers report to the [REDACTED] who reports to the CEO, [REDACTED].
- A list of the petitioner's employees, which indicates their status in the United States, job title, and employment status. The document indicates the beneficiary's job title as a build and release administrator.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on July 25, 2013. The petitioner submitted an appeal of the denial of the H-1B petition, along with a brief from counsel and additional evidence.¹

¹ With regard to documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the

II. Review of the Director's Decision

A. Employer-Employee

The first 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). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

(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.

initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted for the first time on appeal. Nevertheless, the AAO reviewed the evidence submitted. However, for the reasons discussed below, the AAO finds that the petitioner did not establish eligibility for the benefit.

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

Neither the legacy Immigration and Naturalization Service ("INS") nor 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.²

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

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

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "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" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated 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. §

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

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

214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

The petitioner and its counsel repeatedly claim that the petitioner and the beneficiary have an employer-employee relationship. The AAO has considered the assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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."

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 offer of employment letter from the petitioner to the beneficiary, dated March 19, 2013. The letter indicates the beneficiary's job title and salary; however, upon review of the document, the AAO notes that it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position.

In addition, the letter indicates that the beneficiary "will be eligible for the company's standard benefits." However, a substantive determination cannot be inferred regarding these "benefits" as no

further information regarding the plans, including eligibility requirements, was provided to USCIS. While an offer of employment letter 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.

Moreover, in support of the H-1B petition, the petitioner submitted pay statements issued to the beneficiary from June 2012 to May 2013. The AAO notes that the beneficiary's pay rate is inconsistent throughout the record. For example, in January 2013, the beneficiary earned \$3,150 per pay period. From February 1 to March 15, 2013, the beneficiary received \$3,375 per pay period. From March 16 to March 31, 2013, the beneficiary earned \$7,750. From April 1 to April 15, 2013, the beneficiary received \$2,775. The petitioner did not explain the reasons for fluctuations in the beneficiary's salary.

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

In response to the director's RFE, counsel states that "[t]he petitioner's employees utilize the company's unique and complex delivery processes, tools and methodologies for providing services and solutions for the client's IT and financial needs." On appeal, counsel states that "[the petitioner's] employees need not get any tools as their work is majorly on work stations and work servers." Counsel further claims that "[m]ost clients for whom they have off site assignments provide these machines" and "if needed the employees are provided with company's lap tops." The petitioner and counsel did not provide any further information on this matter.

Further, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. The petitioner and counsel have provided inconsistent information regarding the place of employment and the end client. However, assuming *arguendo*, that the beneficiary would be working at [REDACTED] on the California Employment Development Department Disability Insurance Automation (CA-EDD-DIA) Web based Management System project, the AAO finds that the petitioner did not establish that H-1B caliber work exists for the beneficiary for the duration of the requested period.

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to August 26, 2016. In the March 29, 2013 letter of support, the petitioner claims that "[t]he present project has been going on from June 2012 and it is a multi-year project."⁵ In support of

⁵ As mentioned, in the letter of support, the petitioner refers to the project as "Quick View project." However,

its assertion, the petitioner provided a letter dated March 22, 2013 from [REDACTED], Director for [REDACTED], which states:

Pursuant to a contract between [REDACTED] [REDACTED] has offered [the beneficiary], a direct employee to [the petitioner], to work as a Build / Release Engineer at the [REDACTED] special occupation facility located at [REDACTED] from June 19, 2012 for a project assignment.

In addition, [REDACTED] claims that "[t]he project is expected to be a long term ongoing assignment which may be extended further." Further, the petitioner provided an SOW between itself and [REDACTED] which states the following:

In accordance with the Master Services Agreement signed between the undersigned parties on June 12, 2012 it is agreed as follows that [the petitioner] (hereinafter 'Contractor')...contracts to provide services to the third party user, Deloitte (TPU) beginning June 19, 2012 ('start date') and terminating approximately on TBD ('end date').

On appeal, counsel submitted a letter from [REDACTED] Accounting Manager for [REDACTED] Inc., dated August 13, 2013. In the letter, [REDACTED] states that "[t]he project is projected to be a long term ongoing assignment which is expected to continue for approximately thirty – six (36) months." Counsel also submitted a work order from [REDACTED]. The work order indicates the following:

1. List of Subcontractor Personnel Assigned to Perform Services/Billing Rate

Name	Role	Individual's Actual Start Date	Individual's Work Order Start Date	Rate (Deloitte Accounting Period)	Overtime Rate (Hourly)
[the beneficiary]	Build/Release Engineer	6/19/2012	1/13/2013		

* * *

f) [REDACTED]

The work order does not indicate the end date. The record does not contain a written agreement between the petitioner and [REDACTED] or any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

the letters from [REDACTED], submitted with the initial petition and on appeal, indicate the project as [REDACTED] Web based Management System."

The AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested the beneficiary be granted H-1B classification from October 1, 2013 to August 26, 2016, there is a lack of substantive documentation to establish existence of an ongoing project for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed that the beneficiary would be working on the CA-EDD-DIA Web based Management System project during the requested validity dates. However, the petitioner did not submit probative evidence substantiating the actual project or specific work for the beneficiary. 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. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In addition, 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. It must be noted that the record indicates that the beneficiary will be physically located in Sacramento, California. The petitioner is located approximately 2,730 miles away in [REDACTED]

The petitioner has provided inconsistent information regarding who will supervise the beneficiary. For instance, the offer of employment letter indicates that the beneficiary will report to the petitioning company's director of operations, [REDACTED]. However, in the June 10, 2013 letter, submitted in response to the RFE, counsel states that the beneficiary "is supervised, trained and his performance is evaluated by his Project Manager who is also a full-time employee of [the petitioner]." The organizational chart indicates that the build engineers report to the project manager, [REDACTED].

In the offer of employment letter, the petitioner states that "[s]hould [the beneficiary] be assigned to work on a project off-site for one of our clients, [the beneficiary] will be required to engage in weekly progress reports with our headquarters so that we may effectively supervise [the beneficiary's] work product and employment particulars." In the appeal brief, counsel states the "supervision is conducted based on progress report submitted on a weekly basis, feedback from the client company's management, and skill evaluation and training conducted by [the petitioner]." Counsel further asserts that "[t]hrough automated time sheet and project update which is weekly submitted to [the petitioner] employee portal, supervision of their services merely works through employee evaluation."

On appeal, counsel submitted a project update report, which indicates the beneficiary's first name under "Owner." The tasks for each week are general and the beneficiary does not make any references to the petitioner. The record does not indicate how the report was transmitted from the beneficiary to the petitioner. Further, there is no evidence that the petitioner responded to the beneficiary. Notably, the record does not contain any information from the petitioner regarding the specific purpose of the report; the methods used for assessing the report; any instructions provided to the beneficiary regarding the document; the consequences, if any, of failing to prepare the document; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the report to the matter here.

Counsel also submitted the beneficiary's time sheets for July 2013. However, the petitioner's name or other identifying information is not in the documents. The AAO observes that the time sheets are from [REDACTED]. They identify the user as the beneficiary and the "Company" as "[REDACTED]". Based upon the documents, there is no indication that the petitioner is or has been the beneficiary's employer.

In the instant case, the petitioner and counsel claim that the petitioner will evaluate the beneficiary's work. In the offer of employment letter, the petitioner states the beneficiary's "work will be subject to ongoing performance reviews, and [the beneficiary] will receive at least one formal performance review annually." The petitioner further claims that the beneficiary's "supervisor will conduct this review of all work product(s) [the beneficiary has] completed and other progress made both in-house and at client sites." In addition, the petitioner states that "[s]alary increases will be dependent upon this review as well as on the weekly progress reports submitted to [the beneficiary's] supervisor throughout the year." On appeal, counsel claims that "[t]he petitioner routinely evaluates the work of all employees and have [sic] set a team of employees to perform project management and employee evaluations." Further, counsel claims that "[t]he Project Managers [for] [the petitioner] perform such reviews as a result of which they continue to service the projects efficiently" and the "[e]mployees are often evaluated for promotions based on their technical review." However, the AAO observes that the petitioner and counsel did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, who will prepare the reports, the criteria for determining bonuses and salary adjustments, et cetera.

On appeal, counsel submitted a Certificate of Excellence issued to the beneficiary from [REDACTED] on August 7, 2013. It is noted that in the Corporation to Corporation Agreement between the petitioner and [REDACTED] it states that "[e]valuation of [the petitioner] personnel performance, if any, shall be made by [REDACTED]." Further, in the SOW, it indicates "[the petitioner] agrees to complete the assignment within the guidelines as provided by the [REDACTED] or within any reasonable changes in the guidelines as provided by the [REDACTED]." Based on the evidence presented, it appears that [REDACTED] provides guidelines for assignments and evaluates the beneficiary's work.

As mentioned, on appeal, counsel provided a copy of a photo identification badge stating the beneficiary's name, "VENDOR," and "State of California Employment Development Department EDD." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced. Upon review of the photocopy of the badge, it suggests, at best, that the beneficiary is working for the State of California EDD; there is no indication that the beneficiary is employed by the petitioner.

Furthermore, counsel submitted an email correspondence between [REDACTED] and the beneficiary. Notably, the email correspondence between [REDACTED] and the beneficiary, indicates the local-part of the beneficiary's email address is the username for the beneficiary (his first name and last name), and the

domain name is "EDD." The beneficiary's email domain name does not establish an employer-employee relationship with the petitioner.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter 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). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. 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).

Moreover, there is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, 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). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

B. Specialty Occupation

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.

Here, the petitioner and counsel have provided inconsistent information regarding the minimum requirements for the proffered position. In the March 29, 2013 letter of support, the petitioner stated that "the incumbent in the position would require at least a Bachelor[']s degree in Computer Science, Engineering, and Technology or in the related fields of science." However, in the March 22, 2013 letter from [REDACTED] submitted with the initial petition, Ms. [REDACTED] stated that the build and release engineer position "requires at least a baccalaureate degree or its equivalent degree in Engineering and experience in the desired skills." In the August 13, 2013 letter from [REDACTED], submitted on appeal, [REDACTED] stated that the position requires "at least a baccalaureate degree or its equivalent degree in Computer Engineering and experience in the desired skills." On appeal, counsel states, "these complex functions cannot be performed by any individual who has less than a baccalaureate degree in Computer Science, Information Systems, or related disciplines." No explanation for the variances was provided.⁶ Further, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "Computer Science, Engineering, and Technology or in the related fields of science" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation.

More specifically, 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

⁶ The petitioner and counsel have provided inconsistent information regarding the minimum educational requirement for the proffered position. 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).

satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," 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 "Computer Science, Engineering, and Technology or in the related fields of science." 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 computer science or technology 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, fails to provide sufficient evidence to establish that (1) computer science, technology and engineering (including any and all engineering specialties) are closely related fields, or (2) a degree in engineering (including any and all engineering specialties) is directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Furthermore, the 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'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.

In the instant case, the record of proceeding is devoid of substantive information from [REDACTED] regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain sufficient corroborating documentation on this issue from, or endorsed by, [REDACTED], the company that will actually be utilizing the beneficiary's services (according to the petitioner).⁷

The AAO finds that the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the proffered duties as described in the record would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The AAO will now look at the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ As previously noted, the petitioner asserts in the LCA

⁷ As previously discussed, the petitioner has provided inconsistent information regarding the end-client.

⁸ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

that the proffered position falls under the occupational category "Computer Programmers." When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁹ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.¹⁰ However, contrary to the assertions of the petitioner, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupation:

The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Computer Programmers."

⁹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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.

¹⁰ For additional information regarding computer programmer positions, see 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-1> (last visited April 9, 2014).

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

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-4> (last visited April 9, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships.

The *Handbook* states that most computer programmers have a bachelor's degree, but the *Handbook* does not report that it is normally the minimum requirement for entry into the position.¹¹ The text

¹¹ Even if a specific specialty were designated, it must be noted that "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. For instance, the first definition of "most" in *Webster's New Collegiate*

suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree. The *Handbook* does not support the petitioner's claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

The AAO observes that on appeal, counsel references the Occupational Information Network (O*NET) OnLine Summary Report for the occupational category "Computer Programmers." The AAO finds that the O*NET is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. The O*NET indicates that the occupational category "Computer Programmers" has a designation of Job Zone 4. This indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The O*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertion to the contrary, the O*NET OnLine Summary Report is not probative evidence that the proffered position qualifies as a specialty occupation.

In addition, counsel references the Dictionary of Occupational Titles (hereinafter the DOT). It is important to note, however, that DOT was last updated in 1991 (approximately 20 years prior to the submission of the H-1B petition) and has been superseded by O*NET.¹² Although counsel references

College Dictionary 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a relatively low-level position relative to others within the occupation. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

¹² See, for instance, this note at the opening page of the U.S. Department of Labor Internet site at <http://www.oalj.dol.gov/libdot.htm> (last visited April 9, 2014):

The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases

DOT, he fails to establish its relevancy to establish the current educational requirements for entry into the occupation.

Nevertheless, the AAO reviewed the DOT entry regarding computer programmers in its entirety. However, it does not support a finding that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. More specifically, the occupational title of "Computer Programmers" has a Specialized Vocational Preparation (SVP) rating of 7. It must be noted that an SVP rating of 7 is not indicative of a specialty occupation. This is obvious upon reading Section II of the DOT's Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.¹³ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O*NET.**

(Emphasis in the original).

¹³ Section II of the DOT's Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation. Rather, an SVP rating of 7 indicates that over *two years* (but not more than four years) of preparation is required for average performance of the duties of the occupation. Moreover, DOT indicates that preparation for the occupation may be the result of vocational training, including vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Accordingly, DOT does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally required to perform the duties of the occupation. Therefore, the DOT information regarding the SVP rating is also not probative of the proffered position being a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a

baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding 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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. 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.

On appeal, the petitioner and counsel submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner and counsel's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as an information technology services business established in 1999, with 157 employees. The petitioner claims that it has a gross annual income of \$16,882,030 and a net annual income of \$55,244. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.¹⁴ The NAICS code is designated for "Custom Computer Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating, "This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012

¹⁴ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited April 9, 2014).

NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 9, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner and counsel. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the advertisements include positions with [REDACTED] ("one of the world's leading management consulting firms for executable strategy, operations, technology, and human capital advisory services") and [REDACTED]. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Upon review, the AAO finds that the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these advertising organizations. The petitioner failed to supplement the record of proceeding to establish that the advertising organization is similar to it.

Additionally, the petitioner has not established that all of the advertisements are for parallel positions. The job postings include positions for a release manager, epic testing coordinator/tester, EMS senior software engineer, and release engineer, chromecast. Notably, the duties of some of the advertised positions are described in general terms. For example, for [REDACTED] release manager position, the individual is responsible for "directing activities to ensure that software products meet quality standards and performance objectives within defined time and budget targets." Further, for the epic testing coordinator/tester position, the responsibilities include "[t]rack issues/defects and resolution for all testing efforts" and "[m]onitor, review, and report on the progress of all testing initiatives." Based on such general descriptions, it is not possible to determine important aspects of the jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these positions are the same or parallel to the proffered position.

Moreover, the AAO notes that it appears that some of the advertised positions may be for more senior positions. For example, the petitioner and counsel provided a job posting for an EMS senior software engineer with [REDACTED] which requires a degree and "[s]trong (5+ years) developing high volume and scalable solutions." In addition, the petitioner and counsel submitted a job posting for a release engineer, chromecast with [REDACTED] which requires a degree and "2 years [of] experience in software engineering, release engineering and/or configuration management." The AAO reiterates that the petitioner designated the proffered position in the LCA as a Level I (entry level) position. After reviewing the job postings, the AAO notes that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of all of the advertised positions are parallel to the proffered position.

Further, the advertisement from [REDACTED] for the epic testing coordinator/tester position indicates under "Preferred Skills," "Bachelor's degree in Healthcare Information Management, Business Management or IT Management." Obviously, a *preference* for a degree in healthcare information management, business management, or IT management is not an indication of a minimum *requirement*. Thus, the qualifications listed in the posting do not support a finding that the advertised position requires at least a bachelor's degree in a *specific specialty*, or its equivalent. Contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions.

The AAO reviewed all of the advertisements submitted in support of the petition.¹⁵ However, as discussed, 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 for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent,

¹⁵ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the build and release engineer position. Specifically, the petitioner failed to demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Further, the petitioner failed to demonstrate how the build and release engineer 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 related courses may be beneficial, or even essential, in performing certain duties of a build and release engineer 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 proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO notes that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique in comparison to others within the occupation; as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁶

¹⁶ For additional information on wage levels, 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.

Therefore, the evidence of record does not establish that this position is significantly different from other computer programmer positions such that it refutes the *Handbook's* information to the effect that a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty, is acceptable for computer programmer positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer programmer positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and work experience in the field of information technology will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area (or its equivalent). The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or, in this case, by the client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific 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 petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 157 employees and was established in 1999 (approximately fourteen years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide probative evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a

Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level.¹⁷ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Upon review of the record, the AAO finds that the petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. The petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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.

III. Beyond the Director's Decision

Beneficiary's Qualifications

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the

¹⁷ If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in Sacramento, California at that time would have been \$67,850 per year for a Level II position, \$79,726 per year for a Level III position, and \$91,624 per year for a Level IV position. For additional information regarding the prevailing wage for computer programmers in [REDACTED] County, see the All Industries Database for 7/2012 - 6/2013 for this occupation at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?area=40900&code=15-1131&year=13&source=1> (last visited April 9, 2014).

petitioner did not submit an evaluation of his foreign academic credentials or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty.¹⁸ As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

IV. Conclusion and Order

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 (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.

¹⁸ It must be noted that the petitioner submitted a copy of the beneficiary's Master of Science degree and transcript from the [REDACTED], issued on June 30, 2012. However, the AAO observes that the [REDACTED] is not accredited by an institutional accreditation organization recognized by the U.S. Department of Education. The Database of Accredited Postsecondary Institutions and Programs reports that the Accrediting Council for Independent Colleges and Schools terminated the University of Northern Virginia's accreditation on August 6, 2008. *See U.S. Dept. of Ed., Database of Accredited Postsecondary Institutions and Programs*, available on the Internet at <http://www.ope.ed.gov/accreditation/Search.aspx> (last visited on April 9, 2014). The beneficiary's transcript indicates that he attended the University of Northern Virginia between 2010 and 2012, after the school's accreditation was terminated. Thus, the documentation does not establish that the beneficiary possesses a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(I).