



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 18 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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 a software development business established in 2008. In order to employ the beneficiary in what it designates as a business systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on August 5, 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 and its counsel assert that the director's bases for denial of the petition were erroneous and contend that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. 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. Procedural and Factual History

In the petition signed on March 22, 2013, the petitioner indicates that it is seeking the beneficiary's services as a business systems analyst on a full-time basis at the rate of pay of \$61,000 per year. In addition, the petitioner states that the beneficiary will work at [REDACTED] Oregon [REDACTED]

In the March 22, 2013 letter of support, the petitioner claims that the beneficiary will be responsible for the following duties:

DAILY TASK ACTIVITY	TIME UTILIZED ON EACH TASK
System Design (Gross Design and Modification)	10%
System Analysis	20%
Software Development	10%
Write code and Develop programs	10%
Developing / implementing and creating	10%

new software	
Downloading historical data	10%
Unit and System testing, performance and debugging	20%
Generating management reporting and implementation and provision of technical software support.	10%

In detail, [the beneficiary] will work for [the petitioner] as a Business Systems Analyst and will be required to be responsible for Requirement Analysis, Validation and System Modeling; be responsible for organizing complex information into understandably subject areas and documenting these requirements in various required forms; design the application architecture, creating system flow and data validation between different system interfaces; and be responsible for development of code, creating test plan/scripts and writing complex SQL queries for research, testing and user ad-hoc reports.

In addition, he will be responsible for status reporting to business team on weekly basis; providing staff and users with assistance solving computer related problems, such as malfunctions and program problems; test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems; use object-oriented programming languages, as well as client and server applications development processes and multimedia and Internet technology; confer with clients regarding the nature of the information processing or computation needs a computer program is to address; and coordinate and link the computer systems within an organization to increase compatibility and so information can be shared.

He will also consult with management to ensure agreement on system principles; expand or modify system to serve new purposes or improve work flow; interview or survey workers, observe job performance or perform the job to determine what information is processed and how it is processed; determine computer software or hardware needed to set up or alter system; train staff and users to work with computer systems and programs.

In addition, the petitioner states that the proffered position requires "at least a Bachelor's degree in business or related fields, or its equivalent." However, further in the letter, the petitioner asserts that "[t]he minimum requirements for this professional position are a Bachelor's degree in Computer Science, Business, or Science or any related field and relevant work experience."¹

¹ The petitioner has 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).

With the initial petition, the petitioner submitted a copy of the beneficiary's Bachelor of Science degree in Electronics Engineering and transcript from [REDACTED] in Providence, Rhode Island. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript.

The petitioner also 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 Systems Analysts" – SOC (ONET/OES Code) 15-1121, at a Level I (entry level) wage. The beneficiary's places of employment is listed as follows:
 - [REDACTED] Oregon [REDACTED] and
 - [REDACTED] New Jersey [REDACTED]
- Copies of pay statements issued to the beneficiary from the petitioner, dated February 15, 2013 and March 15, 2013.²
- A letter from [REDACTED] Associate Partner for [REDACTED] Inc., dated March 28, 2013. In the letter, Mr. [REDACTED] states that [REDACTED] has contracted for the services of [the beneficiary] through [REDACTED]. In addition, Mr. [REDACTED] states that "[the beneficiary] is on the [REDACTED] project at [REDACTED] Oregon [REDACTED]." Mr. [REDACTED] also claims that the position of business system analyst "requires [a] Bachelors [sic] degree in Business Management, Information Systems, Engineering or equivalent training, experience and education."³
- An offer of employment letter, dated March 1, 2013. The letter indicates that the beneficiary "will be working at our client locations depending on the need."
- A Confidentiality and Employment Agreement between the petitioner and the beneficiary, effective March 1, 2013. The agreement indicates that the petitioner "can assign work at it's [sic] locations or it's [sic] client locations."
- Documents regarding the petitioner's business operations, including its Income Tax Return for 2012, printouts from its website, and an Office License Agreement.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 3, 2013. The director outlined the specific evidence to be submitted.

² The AAO observes that the beneficiary's address is in [REDACTED] Oregon. However, the beneficiary is paying New Jersey taxes. No explanation was provided by the petitioner.

³ Notably, the academic requirements vary from the petitioner's stated academic requirements for the proffered position in the March 22, 2013 letter of support.

On July 24, 2013, in response to the director's RFE, the petitioner and counsel provided additional supporting evidence, including the following documentation:

- An Itinerary of Services. The itinerary indicates the following:

Actual Employer: [the petitioner]

Mid Vendor: [redacted] Inc. a [redacted]

End-Client: [redacted] Inc.

Project Name: [redacted] ID

Start Date: 10/01/2013

End Date: 09/30/2016⁴

Work Site Address: [redacted] Oregon, [redacted]

Supervisor Details at the work site: Mr. [redacted]

Associate Partner – [redacted]

(at [redacted] Inc.)

Business System Analyst (at [redacted] Inc).

Email # [redacted]
com

[redacted] com

* * *

Supervisor Details ([the petitioner]): Mr. [redacted]

Vice President

Email # [redacted] [the petitioner].
com

- A line-and-block organizational chart.

⁴ The AAO notes that the petitioner requested on the Form I-129 and LCA that the beneficiary be granted H-1B classification from October 1, 2013 to September 10, 2016.

- A revised offer of employment letter, dated June 24, 2013.
- A second Confidentiality and Employment Agreement between the petitioner and the beneficiary, effective June 24, 2013.
- Copies of pay statements issued to the beneficiary from the petitioner, dated May 15, 2013 and June 17, 2013.
- A blank Performance Review form.
- A second letter from [REDACTED] Associate Partner for [REDACTED] Inc., dated June 13, 2013. In the letter, Mr. [REDACTED] states that [REDACTED] reviewed [the beneficiary's] qualifications and found that he meets the technical requirements for the position."
- A document entitled "Engagement # [REDACTED] IT BUS CONSULTING – PROF EXPERT (E)." The document indicates the following:

ENGAGEMENT

CLIENT

* * *

Name [REDACTED] Inc.

Start Date 09/03/2012

* * *

End Date 05/31/2014

Manager or Work Location
[REDACTED] Oregon

CONTACTS

Manager [REDACTED]

Supplier [REDACTED]

Inc. [REDACTED]

Worker Name [the beneficiary]

* * *

Job Title IT BUS CONSULTING – PROF EXPERT (E)

* * *

Education

Typically requires a Bachelors [sic] Degree and minimum of 8 or 9 years directly relevant work experience. Note: One of the following alternatives may be accepted PhD or Law + 6 yrs; Masters [sic] + 7yrs; Associates degree + 9 yrs; High School + 10 yrs.

- The beneficiary's work product at [REDACTED] Inc. The page entitled "PHONEBOOK ENTRY" indicates the following:

Name	[the beneficiary]
Title	BSA
Company	[REDACTED] Inc.

* * *

Email address	[the beneficiary]@[REDACTED].com
Address	[REDACTED] [REDACTED] OR [REDACTED]

Notably, the local-part of the beneficiary's email address is the username of the beneficiary (his first name and last name), and the domain name is "nike."

- A screenshot of [REDACTED] Inc.'s reporting structure. The document indicates that the beneficiary reports to [REDACTED]
- [REDACTED] Inc.'s Product Data and Integration Team Structure.
- A copy of the beneficiary's identification badge. The badge indicates "FLEX" and "WHQ." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company.
- A copy of the beneficiary's time sheet for June 10, 2013 to June 16, 2013. The petitioner's name is not on the document and there is no indication that the document refers to the petitioner. Notably, under "Time Sheet Transaction History," [REDACTED] of [REDACTED] approved the time sheet.
- [REDACTED] Inc.'s email correspondence mentioning the beneficiary.
- Email correspondence between the beneficiary and [REDACTED] Inc. Notably, at the end of the beneficiary's emails, he states "BSA | [REDACTED] TECH – PCS – PD&I."
- Photos of the beneficiary at [REDACTED] Inc.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 5, 2013. The petitioner submitted an appeal of the denial of the H-1B petition.

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). As discussed below, the AAO finds that the petitioner has not 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 as follows:

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

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

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B

visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section

101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁷

⁵ 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).

⁶ 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))).

⁷ That said, there are instances in the Act where Congress may have intended a broader application of the term

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

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

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

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

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to

"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).

whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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

In the instant case, the petitioner claims that it has an employer-employee relationship with the beneficiary. For instance, in the May 20, 2013 letter, submitted in response to the director's RFE, the petitioner states that "[the petitioner] is the sole employer of the beneficiary and has the right to control the beneficiary's work including supervision, payment of wages, hiring, firing, providing benefits, tax treatment etc." 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."

As a preliminary matter, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Notably, the record of proceeding contains materially inconsistent information regarding the beneficiary's place of employment. In the Form I-129, the petitioner indicates that the worksite for the beneficiary is [REDACTED] Oregon [REDACTED]. However, in the LCA, the petitioner indicates that the beneficiary's places of employment are [REDACTED] Oregon [REDACTED] and [REDACTED] New Jersey [REDACTED]. In the offer of employment letter (dated March 1, 2013, over a month prior to the H-1B submission), the petitioner states that the beneficiary "will be working at our client locations depending on the need." Thus, the offer letter does not convey that (1) a specific place of employment, (2) for a particular client on a defined project, (3) with an established duration, had been established immediately prior to the filing of the H-1B petition. The petitioner did not acknowledge or provide any explanation for the discrepancies.

Moreover, there are additional discrepancies and inconsistencies in the record of the proceeding with regard to who will supervise the beneficiary. For instance, in the letter dated July 23, 2013, submitted in response to the RFE, counsel states that "[t]he Beneficiary reports directly to Mr. [REDACTED]." However, the Itinerary of Services, submitted in response to the RFE, indicates that the beneficiary will be supervised by [REDACTED] Associate Partner – [REDACTED], Inc. and

Business Systems Analyst at [REDACTED] Inc., and [REDACTED] Vice President at the petitioning company. In addition, the organizational chart shows the beneficiary reporting to the vice president/CEO, [REDACTED]. However, a screenshot of [REDACTED] Inc.'s reporting structure shows the beneficiary reporting to [REDACTED]. Further, the beneficiary's time sheet indicates that it was approved by [REDACTED]. No explanation for the variances was provided.

In support of the H-1B petition, the petitioner submitted pay statements that it issued to the beneficiary. 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.

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 two offer of employment letters (dated March 1, 2013 and June 24, 2013) and two Confidentiality and Employment Agreements between the petitioner and the beneficiary, effective March 1, 2013 and June 24, 2013.

Upon review of the documentation, the AAO notes that they fail to adequately establish several critical aspects of the beneficiary's employment. For example, the offer letters and agreements do not provide specific information regarding where he will work. The offer letters state that the beneficiary "will be working at our client locations depending on the need." Further, the agreements state that the beneficiary "agrees that [the petitioner] can assign work at its [sic] office locations or its [sic] client locations." According to the offer letters and agreements, the beneficiary may be placed at various locations and not necessarily in [REDACTED] Oregon as indicated in the instant petition. The documentation also does not provide the requirements for the position. While an offer letter or an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

In addition, the offer letters and agreements indicate that the beneficiary will be eligible for medical 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.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the

position. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. The AAO notes that the Confidentiality and Employment Agreements indicate that "[the petitioner] will provide necessary technical support and equipment to perform required tasks at client." However, the petitioner did not provide any further information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to fully address or submit probative evidence on the issue.

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

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 10, 2016. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED] Oregon [REDACTED]. Furthermore, the petitioner submitted an itinerary, stating that the beneficiary would be employed at this worksite from October 1, 2013 to September 30, 2016. In response to the RFE and on appeal, the petitioner submitted a document entitled "Engagement [REDACTED] IT BUS CONSULTING – PROF EXPERT (E)." The document indicates the following:

ENGAGEMENT

CLIENT

* * *

Name [REDACTED] Inc.

Start Date 09/03/2012

* * *

End Date 05/31/2014

Manager or Work Location
[REDACTED] Oregon

CONTACTS

Manager [REDACTED]

Supplier [REDACTED]

Inc. [REDACTED]

Worker Name [the beneficiary]

* * *

Job Title IT BUS CONSULTING – PROF EXPERT (E)

* * *

Education

Typically requires a Bachelors [sic] Degree and minimum of 8 or 9 years directly relevant work experience. Note: One of the following alternatives may be accepted: PhD or Law + 6 yrs; Masters [sic] + 7yrs; Associates degree + 9 yrs; High School + 10 yrs.

Notably, the document does not indicate the proffered position of business systems analyst but rather an "IT BUS CONSULTING – PROF EXPERT (E)." There is no indication that the duties of a business systems analyst are the same as an IT business consulting – prof expert (E). In addition, the list of duties and responsibilities in the document do not correspond to the job description provided by the petitioner with the initial petition. Moreover, the requirements for the position as stated in this document are not consistent with the academic requirements for the proffered position as asserted by the petitioner in the letter of support dated March 22, 2013. No explanation was provided. Furthermore, the document indicates "End Date 05/31/2014."

In addition, the petitioner submitted two letters from [redacted] Associate Partner for [redacted] Inc. Both letters state that [redacted] has contracted for the services of [the beneficiary] through [redacted]. In addition, the letters state that "[the beneficiary] is on the [redacted] Oregon [redacted]. The AAO notes that in one of the letters, Mr. [redacted] states that [redacted] reviewed [the beneficiary's] qualifications and found that he meets the technical requirements of the position."

Moreover, Mr. [redacted] claims in the letters that the position "requires [a] Bachelors [sic] degree in Business Management, Information Systems, Engineering or equivalent training, experience and education." The AAO observes that the requirements for the position as stated in the letters are not consistent with the academic requirements for the proffered position as asserted by the petitioner in the letter of support dated March 22, 2013. No explanation was provided. Further, in both letters, Mr. [redacted] provides a list of the beneficiary's duties, which contains vague tasks such as responsible for requirement analysis, validation and system modeling, and responsible for organizing complex information into understandable subject areas and documenting these requirements in various required forms. The list of duties fails to provide the beneficiary's specific role in performing such tasks. Furthermore, he failed to provide any information regarding the expected duration of the project, when the project commenced, whether or not the project has been extended in the past, et cetera.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from October 1, 2013 to September 10, 2016. However, the documentation does not establish that the Nike project will continue through September 10, 2016. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa

petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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 in the instant case, the petitioner claims that the beneficiary will be physically located at the [REDACTED], Oregon office of [REDACTED] Inc. The petitioner is located approximately 2,918 miles away in New Jersey.

As previously discussed, the petitioner has provided inconsistent information as to who will supervise the beneficiary. The AAO incorporates by reference the prior discussion on the matter. Further, in the Confidentiality and Employment Agreements, the petitioner states that "[e]mployee agrees that he or she will send regular status reports to IT Manager at [the petitioner] with complete work done in that duration."

In response to the director's RFE, the petitioner submitted a blank Performance Review form. The record of proceeding lacks information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the specific criteria for determining bonuses and salary adjustments.

The petitioner also submitted the beneficiary's time sheet for June 10, 2013 to June 16, 2013. However, as previously noted, the petitioner's name or other identifying information is not in the document. Based upon the document, there is no indication that the petitioner is or has been the beneficiary's employer.

In addition, the petitioner submitted the beneficiary's work product with [REDACTED] Inc. As previously discussed, on the page entitled "PHONEBOOK ENTRY," the local-part of the beneficiary's email address is the username of the beneficiary (his first name and last name), and the domain name is [REDACTED]. The beneficiary's assigned email address suggests that he is an employee of Nike, Inc.

Moreover, the petitioner provided a copy of a photo identification badge stating the beneficiary's name, [REDACTED] "FLEX," "WHQ," and [REDACTED]. 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 FLEX or WHQ; there is no indication that the beneficiary is employed by the petitioner.

Furthermore, the petitioner submitted email correspondence between the beneficiary and [REDACTED] Inc. As previously discussed, at the end of the beneficiary's emails, he states "BSA | [REDACTED] TECH – PCS – PD&I." This information suggests that the beneficiary is an employee of [REDACTED] Inc.

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). 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).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence does not indicate that the petitioner will oversee the beneficiary's work. The day-to-day work of the beneficiary appears to be supervised and overseen by [REDACTED] Inc. or [REDACTED] Inc., with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client or end client. *See Defensor v. Meissner*, 201 F.3d at 388.

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.

As previously discussed, the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the March 22, 2013 letter of support, the petitioner stated that the proffered position requires "at least a Bachelor's degree in business or related fields or its equivalent." However, further in the letter, the petitioner stated that "[t]he minimum requirements for this professional position are a Bachelor's degree in Computer Science, Business, or Science or any related field and relevant work experience." The petitioner also provided two letters from [REDACTED] of [REDACTED] Inc., who stated that the business systems analyst position "requires [a] Bachelors [sic] degree in Business Management, Information Systems, Engineering or equivalent training, experience and education." No explanation for the variances was provided. Thus, it must be noted that within the record of proceeding, the petitioner and its counsel have represented that an acceptable academic credential for the proffered position is a bachelor's degree in computer science, business, or science (without further specification), business management, information systems, or engineering.

It must be noted that the petitioner's representation regarding the requirements 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 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 claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in business, science or social science (and provided letters from Sparta that a degree in business management, information systems, or engineering is acceptable).⁸ The issue here is that, based on the evidence presented, it is not readily apparent that these fields of study are closely related or that any and all of these fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of these disciplines are closely related fields, or (2) that all of the fields are directly related to the duties and responsibilities of the proffered position. As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge in a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a degree in any of these fields suggests that

⁸ For instance, the term "business" is defined as "1. The occupation, work, or trade in which one is engaged. . . . 2. Commercial, industrial, or professional dealings. 3. A commercial enterprise or establishment." WEBSTER'S II NEW COLLEGE DICTIONARY 153 (2008). A degree in business may include a range of disciplines, some of which may not directly relate to the duties of the proffered position. U.S. News and World Report publishes a guide for colleges. The entry for Harvard University indicates that its business school offers concentrations in a range of disciplines, including arts administration, e-commerce, health care administration, human resources management, not-for-profit management, organizational behavior, public administration, public policy, real estate, sports business, as well as many others. See U.S. News and World Report on the Internet at http://www.usnewsuniversitydirectory.com/graduate-schools/business/harvard-university_01110.aspx (last visited April 17, 2014).

The term "science" is defined as "1a. The observation, identification, description, experimental investigation, and theoretical explanation of natural phenomena. . . . 2. Methodological activity, disciplines, or study <culinary science> 3. An activity that appears to require study and method." WEBSTER'S II NEW COLLEGE DICTIONARY 1012 (2008). U.S. News and World Report's guide for colleges designates science programs into various subcategories, including biological sciences, chemistry, earth sciences, math, physics, statistics, as well as social science programs such as criminology, economics, English, history, political science, psychology, and sociology. See U.S. News and World Report on the Internet at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-science-schools> (last visited April 17, 2014).

the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

Moreover, the petitioner claims that a degree in business is sufficient for the proffered position. The claimed requirement of a degree in business for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). Although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).⁹

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.

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

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

In the instant case, the record of proceeding is devoid of substantive information from [REDACTED] Inc. 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] Inc., the company that will actually be utilizing the beneficiary's services (according to the petitioner).

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.¹⁰ As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts." 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.¹¹ That is, in accordance with the relevant DOL

¹⁰ 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. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Computer Systems Analysts."

¹¹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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 Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.¹² However, contrary to the assertions of the petitioner, the *Handbook* does not indicate that "Computer Systems Analysts" 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 Systems Analyst" states the following about this occupation:

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

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

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.

¹² For additional information regarding computer systems analyst positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited April 17, 2014).

Some employers prefer applicants who have a master of business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

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

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited April 17, 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 these positions. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees. Notably, the AAO observes that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement.

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

In the letter of support, the petitioner references the Occupational Information Network (O*NET) OnLine Summary Report for the occupational category "Computer Systems Analysts" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the Summary Report in its entirety. However, upon review of the Summary Report, the AAO finds that it

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 Summary Report for computer systems analysts 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 the petitioner's assertion to the contrary, the O*NET Summary Report is not probative evidence that the proffered position qualifies as 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.

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.

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, 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 business systems analyst position. Specifically, the petitioner failed to credibly 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 business systems analyst 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 business systems analyst 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 LCA indicates a wage level based upon the occupational classification "Computer Systems Analysts" at a Level I (entry level) wage, which is the lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Without further evidence, the petitioner has not established that the 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."¹³

Therefore, the evidence of record does not establish that this position is significantly different from other computer systems analyst positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer systems analyst 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 professional work experience in the IT industry will assist him in carrying out the duties of the proffered position. However, as previously mentioned, 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,

¹³ 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.

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 36 employees and was established in 2008 (approximately five years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary 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 an entry-level position relative to others within the occupational category of "Computer Systems Analysts." 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, the petitioner has not demonstrated that the proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level.¹⁴ 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."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, 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. Conclusion and Order

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.

¹⁴ If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in [REDACTED] Oregon at that time would have been \$72,405 per year for a Level II position, \$85,051 per year for a Level III position, and \$97,718 per year for a Level IV position.