

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **AUG 05 2014**

Office: CALIFORNIA SERVICE CENTER

File: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. On the Form I-129 visa petition, the petitioner states that it is a software development and consulting/custom computer programming business with 98 employees, established in 1998. In order to employ the beneficiary in a position to which it assigned the job title "Programmer Analyst," 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 November 19, 2013, finding that: (1) the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation; (2) the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary; and (3) the petitioner did not submit an appropriate and valid Labor Condition Application (LCA). On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as Programmer Analyst to work on a full-time basis at a salary of \$65,000 per year. The petitioner stated the beneficiary will work at [REDACTED] WI [REDACTED]. The dates of intended employment are from October 1, 2013 until September 17, 2016.

The petitioner submitted an LCA in support of the instant H-1B petition. The LCA designation selected by the petitioner for the Programmer Analyst position corresponds to the occupational classification "Computer Systems Analysts" - SOC (ONET/OES) Code 15-1121 at a Level I (entry level) wage.

¹ We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)).

In a support letter dated April 1, 2013, the petitioner indicated that the beneficiary will be assigned to work for "our long-standing client. [REDACTED], at the [REDACTED] worksite location as [REDACTED]. The petitioner also indicated the beneficiary will be responsible for performance of the following duties:

- Responsible for understanding the requirements and documents the same.
- Ability to evaluate, interpret, and develop technical designs
- Good understanding of leading software development methodologies (UML, OO)
- Solid understanding of J2EE and some knowledge of Oracle
- Ability to evaluate, interpret, and develop technical designs
- Experience with JSP, Servlets, Web Services, XML, JDBC, EJB, Swing, HTML, DHTML and JavaScript
- Very good Java programming skills
- Experience in the design and implementation of Enterprise\ Distributed Systems
- Experience with WebSphere, Weblogic, or JBOSS
- Experience with Oracle PL/SQL is a plus
- Efficient time management skills
- Ability to understand others code
- Provide consistent on-time delivery of high quality solutions.

The petitioner added:

At [the petitioner], our Programmer Analysts must possess at a minimum, bachelor degrees, or their comparable equivalents, in specialized fields such as Computer Science, Computer Information Systems, Engineering, or related field, and relevant experience. . . . Our clients, who as noted above are insurance and finance industry leaders, would not accept our personnel on projects we are performing for them unless they have at least a bachelor's degree in one of the enumerated fields or a related field, because of the complexity of the duties and the high stakes for our clients who are developing systems core to their business operations and need our assistance to do so.

The petitioner also explained that the beneficiary will be supervised by an employee of the petitioner, [REDACTED] Client Services Director, and that he will have the beneficiary "communicate via telephone or in person on at least a monthly basis, and on an as-needed basis, to Mr. [REDACTED] to report on project progress, any client site issues or changes that Petitioner may need to address with the client on behalf of the Beneficiary, and administrative issues."

In addition, the petitioner submitted, among other things, the following documents in support of the petition:

- A copy of pages from the petitioner's website.

- A copy of a document entitled, "Master Service Agreement," entered into on November 21, 2007, between the petitioner and Rural Mutual Insurance Company.

On August 1, 2013, the director issued an RFE requesting, in part, information regarding the employer-employee relationship with the beneficiary. The director outlined the evidence that could be submitted.

In response to the RFE, in a letter dated October 16, 2013, the petitioner contends that the beneficiary will work with [REDACTED] throughout the duration of the requested H-1B period. The petitioner explains that it and [REDACTED] have been working together for almost 6 years and the "relationship is expected to continue for the foreseeable future." The petitioner explained further that even if for some reason the relationship will end with [REDACTED], "[the petitioner] has clients throughout the United States for whom it performs projects in its niche fields of insurance and finance information technology."

The petitioner also quoted sections from Donald Neufeld's January 2010 guidance as clarified by more recent guidance issued in March 2012, entitled *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions*. The petitioner contends that it is not required to submit a letter from the end client.

In response to the RFE, the petitioner submitted, among other things, the following additional evidence:

- A copy of a Service Agreement between the petitioner and [REDACTED] as evidence that the petitioner has other on-going projects should the beneficiary need to change projects.
- A copy of the Master Services Agreement between the petitioner and [REDACTED] of Nebraska as evidence that the petitioner has other on-going projects should the beneficiary need to change projects.
- A copy of a Master Services Agreement between the petitioner and [REDACTED] as evidence that the petitioner has other on-going projects should the beneficiary need to change projects.
- A copy of a Contractor Agreement between the petitioner and [REDACTED] as evidence that the petitioner has other on-going projects should the beneficiary need to change projects.
- A copy of the offer letter and employment agreement between the petitioner and the beneficiary.
- A copy of the petitioner's performance appraisal form.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought for the reasons outlined above. The director denied the petition on November 19, 2013.² Counsel for the petitioner submits an appeal of the denial of the H-1B petition and supporting documentation.

II. LAW AND ANALYSIS

A. Standard of Review

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

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

* * *

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

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987)

² Although the petitioner in this matter provides several contracts with other companies in different locations to support its claim that it has sufficient work for the beneficiary to perform, the petitioner does not claim that at the time it filed the petition it intended to move the beneficiary to a different location. Accordingly, the LCA submitted for the petition appears to correspond to the certified LCA submitted. The director's determination to the contrary is withdrawn. We observe, however, as will be discussed below, that the petitioner does not submit sufficient evidence establishing that it had non-speculative specialty occupation employment available for the beneficiary when the petition was filed.

(discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

As footnoted above, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

B. Lack of Standing to File the Petition as a United States Employer

Applying the preponderance of the evidence standard, we conclude that the petitioner has not 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). We 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." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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

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

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). 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 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.³

³ 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

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 318-319.⁴

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).⁵

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)).

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).

⁴ 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))).

⁵ 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).

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 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."

The petitioner claims that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work offsite with the end-client, [REDACTED]. The petitioner's LCA corresponds with the Form I-129 in that the beneficiary will be working off site with [REDACTED] located at [REDACTED].

The petitioner submitted a Master Service Agreement (MSA) between the petitioner and [REDACTED] entered into on November 21, 2007. In Section 1, Services, it states that "[the petitioner] agrees to provide professional services and/or qualified personnel ("Personnel") to perform such services ("Services") as described in the Statement of Work ("SOW") hereafter executed by the Parties in substantially the form of Exhibit A attached hereto." However, the petitioner did not submit any statements of work specifically naming the beneficiary and indicating the scope of services the beneficiary will provide to the end client, [REDACTED]. 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. 190).

The petitioner has indicated that it has a long standing relationship with [REDACTED] and on appeal the petitioner submits several statements of work between [REDACTED] and the petitioner that were created throughout the previous years. Counsel for the petitioner contends that the "petitioner uses its expertise to define the work that needs to be done to complete specific projects and assigns work to its employees in accordance with the work that must be done to meet the terms of its engagement with [REDACTED]." Counsel also asserts that the "Petitioner and [REDACTED] execute SOW's on an as needed basis and work can and does continue past the initial validity date of an SOW." However, as noted above, without a specific Statement of Work for the beneficiary, we are unable to discern the day-to-day job duties he will perform for [REDACTED] the amount of direct supervision he will receive, the team, if any, he will work with, or the length of time the specific work will be performed.

On appeal, the petitioner submits a letter from [REDACTED] dated December 19, 2013, which confirms it has "an ongoing relationship with [the petitioner] to obtain certain IT consulting services." The letter also states that "we issue a Statement of Work ("SOW") on an as-needed basis and our general practice is to extend SOWs automatically as needed." This letter does not specifically state that the beneficiary will work for [REDACTED], or describe the job duties he will perform, or indicate that there is sufficient specialty occupation work at [REDACTED] that will continue until September 17, 2016. 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.

In addition, although the [REDACTED] letter indicates that the petitioner has the responsibility to ensure that its employees perform their job duties satisfactorily, the MSA provides [REDACTED] the authority to have the petitioner's personnel it finds incompetent or unqualified removed from employment at [REDACTED]. This section of the MSA appears to place a significant restriction on the petitioner's right to control the beneficiary's work and the manner in which it is accomplished. Further, the petitioner indicates that the beneficiary will be supervised by an employee of the petitioner, [REDACTED] who will have the beneficiary "communicate via telephone or in person on at least a monthly basis, and on an as-needed basis, to Mr. [REDACTED] to report on project progress, any client site issues or changes that Petitioner may need to address with the client on behalf of the Beneficiary, and administrative issues." Accordingly, it does not appear that the petitioner will directly supervise the beneficiary on a day-to-day or even weekly basis. Such limited supervision, raises questions regarding the petitioner's control of the beneficiary's work. In this matter, as there is no SOW identifying the beneficiary and the work he will be performing at the end client it is not possible to ascertain the exact project to which he would be assigned, the specific duties thereon, the necessity of an actual

direct supervisor for such project, or whether additional limitations or restrictions have been placed on the petitioner regarding the right to control the beneficiary and his work. Accordingly, despite counsel's assertions to the contrary, the record lacks sufficient probative evidence to establish that the petitioner has the right to control the beneficiary and to thus establish the employer-employee relationship. The record does not include the probative corroborating documentation establishing the beneficiary's control of the beneficiary and his actual work.

The petitioner also claims that should the project with [REDACTED] end prior to the H-1B validity dates, the petitioner has several projects with other companies that the petitioner can work on. The petitioner provided copies of agreements with other companies as evidence of on-going projects. However, the petitioner did not provide specific job duties that the beneficiary would perform with these companies, and thus, it is impossible to determine if the beneficiary would perform specialty occupation work for these other companies. Furthermore, as noted by the director, the addresses of these different end clients are not listed on the LCA and do not correspond with the information listed on the Form I-129. Thus, any change in employment would require the filing of a new petition with a corresponding LCA. As always, 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). Accordingly, without more, these documents do not appear relevant to establishing the employer-employee relationship.

The petitioner also submitted an offer letter and employment agreement with the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will more likely than not exist between the petitioner and the beneficiary.

Based on the tests outlined above, and the lack of probative information submitted, 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).

C. Failure to Establish that the Proffered Position Qualifies as a Specialty Occupation

We will now address the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

We note 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.* The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly

specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, the record of proceeding is devoid of sufficient information from the claimed end client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for this client. The letter submitted from [REDACTED] does not provide any detail of the duties to be performed by the beneficiary, and the petitioner did not submit a statement of work outlining in detail the duties it agreed the beneficiary would perform for the end client. The record does not include sufficient probative evidence regarding any of the services to be performed at [REDACTED] to demonstrate that the work involved comprises the duties of a specialty occupation.

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.

We affirm the director's determination that the record of proceeding does not include a description of the actual work the beneficiary will perform for the end client. For this reason, the appeal will be dismissed and the petition denied.

Assuming for the sake of argument, however, that the proffered duties as generally described by the petitioner in its initial letter would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, we turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We 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 that is the subject of the petition.

We recognize the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ As previously discussed, the petitioner asserts in the LCA that the proffered position falls

⁶ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The references to the *Handbook* are to the 2014-2015 edition available online.

within the occupational group "Computer Systems Analysts."

Upon review of the information in the *Handbook* regarding the occupational category "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category, the *Handbook* does not support a conclusion that computer systems analyst positions normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

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.

Some employers prefer applicants who have a master's degree in 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 July 30, 2014).

The *Handbook* does not report that, as an occupational group, "Computer Systems Analysts" require at least a bachelor's degree in a specific specialty. The *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field," but "[s]ome employers prefer applicants who have a master's degree in business administration (MBA) with a concentration in information systems." In addition, the *Handbook* states that "[a]lthough many computer systems analysts have technical degrees, such a degree is not always a requirement," and "[m]any analysts have liberal arts degrees and have gained programming or technical expertise elsewhere." Accordingly, 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 the computer systems analysts occupational group. Rather, the occupation accommodates a wide spectrum of educational credentials. While the *Handbook* states that most computer systems analysts have a bachelor's degree, the *Handbook* does not report that it is an occupational, entry requirement. Moreover, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 147.

Furthermore, while the *Handbook's* narrative indicates that most computer systems analysts obtain a degree in computer-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 that occupation. The term "most" is not indicative that a particular position within the wide spectrum of computer systems analyst jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of employees in this occupation have a bachelor's degree in a specific specialty, or its equivalent, it could be said that "most" of the individuals have such a degree. It cannot be found, therefore, that a statement that "most" employees possessing such a degree in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

On appeal, counsel for the petitioner contends that the *Dictionary of Occupational Titles* (hereinafter the *DOT*) list computer systems analysts as falling with the parameters of an SVP 7.0 to < 8 rating. Upon review, however, we find that the *DOT* does not support the assertion that assignment of an SVP rating of 7.0 to < 8 is 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 Specific Vocational Preparation (SVP) rating system.⁷ 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);
- 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

⁷ The Appendix can be found at the following Internet website: <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

- | | |
|---|---|
| 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 range of 7.0 to < 8.0 for "computer systems analysts" simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training. Notably an SVP range does not indicate that any degree must be in a specific specialty closely related to the occupation to which this rating is assigned. Accordingly, the *DOT* does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this position and is not probative of the proffered position being a specialty occupation.

Counsel also references the Occupational Information Network (O*NET) Summary Report for 15-1121 – Computer Systems Analyst, as set out in the FLC Data Center's Online Wage Library (OWL) in support of the claim that the proffered position is a specialty occupation. Upon review, however, the O*NET's report on computer systems analyst positions ascribes a designation of Job Zone 4 -- Education and Training Code: 5 indicating that such a position requires considerable preparation to the occupation. 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). More specifically, the OWL statement is a condensed version of what the O*NET actually states about its Job Zone 4 designation. See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 4, which explains that this Zone signifies only that most but not all of the occupations within it require a bachelor's degree. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertions to the contrary, the OWL and O*NET information is not probative of the proffered position qualifying as a specialty occupation.

Upon review of the totality of the evidence in the entire record of proceeding, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required 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 proffered 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we review the record 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 in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the 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. Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. 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 petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner in this matter provided a broad description of the duties of the proffered position. As determined above, it is not possible to ascertain what the beneficiary will actually do on a daily basis. Again, absent supporting documentary evidence the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As the petitioner fails to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis, complexity or uniqueness of the position cannot be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In addition, we must also note that the petitioner designated the prevailing wage for the proffered position as a wage for a Level I (entry level) position on the LCA.⁸ This designation is indicative of

⁸ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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 Level I wage rate is only appropriate for a position in which the beneficiary is required to have only a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary 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.

By way of comparison, a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty. Additionally, given the *Handbook's* indication that computer systems analyst positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (rev. Nov. 2009), which is accessible at the Department of Labor Internet site http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

Id.

specific instructions on required tasks and expected results, and close review *would* contain such a requirement. Thus, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other computer systems analyst positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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 the equivalent, for the position.

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 a 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.

On appeal, counsel for the petitioner contends that "the Petitioner's past practice has consistently been to hire individuals with a bachelor's degree or equivalent or higher in these positions as you can see from the sampling of educational credentials." The petitioner submitted the educational credentials and paystubs of W-2 forms of 10 individuals; however, the petitioner did not establish that these individuals are employed by the petitioner in the same position as the proffered position. In addition, the petitioner did not establish that these individuals worked with the end client, [REDACTED] and performed the same duties of the proffered position. This evidence, therefore, is not sufficient to establish that the petitioner previously hired degreed individuals to fill the proffered position in the past and, therefore, the petitioner has not satisfied this criterion.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The evidence of record does not convey either the substantive nature or the specialization and complexity of any specific duties that the beneficiary

would perform, and it does not distinguish the duties of the proffered position from the generic duties generally performed in the computer systems analysts occupational group, which the *Handbook* indicates no usual association with at least a bachelor's degree in a specific specialty.

In this regard, we incorporate into this analysis our earlier comments and findings about the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the pertinent occupational category. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

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. Accordingly, for this additional reason, the petition cannot be approved.

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

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the 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. Therefore, we need not and will not address the beneficiary's qualifications.

D. Speculative Employment

The petitioner has not established that it has specialty occupation work available for the beneficiary for the requested employment period. In that regard, we have reviewed the information in the record regarding the petitioner's IT and management consulting business. Upon review of this information, we find that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects or actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the entire time requested. For example, the petitioner did not submit a statement of work with [REDACTED] that includes employment until September 17, 2016. The petitioner contends that the petitioner and [REDACTED] have been working together for almost 6 years and the "relationship is expected to continue for the foreseeable future." The letter from [REDACTED] also stated that they expect the relationship with the petitioner to continue. However, the petitioner did not submit documentation to corroborate this

claim and did not provide sufficient documentary evidence to establish the beneficiary will work for the end client until September 17, 2016.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E). In this matter, even if the petitioner had established the position proffered here is a specialty occupation, which it has not, the petition must still be denied for this additional reason.

III. CONCLUSION

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

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

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