



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 11 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. In the Form I-129 visa petition, the petitioner describes itself as a company providing information technology development and software services established in 2009. In order to employ the beneficiary in what it designates as a software quality assurance engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 31, 2013 finding that the petitioner failed to establish: (1) that it will have an employer-employee relationship with the beneficiary; and (2) that the proffered position is a specialty occupation. On appeal, the petitioner, through counsel, asserts that the director's grounds for denial of the petition are erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and supporting evidence.

The record of proceeding 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 Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner states in the Form I-129 petition that it seeks the beneficiary's services as a software quality assurance engineer to work on a full-time basis at a rate of pay of \$60,000 per year. According to the petitioner, the beneficiary will work off-site at [REDACTED]. The petitioner reports that the dates of intended employment are from October 1, 2013 to September 14, 2016.

In a letter dated March 29, 2013, the petitioner provided the following regarding the proffered position<sup>1</sup>:

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<sup>1</sup> Notably, the petitioner has described the duties of the beneficiary's employment in the same general terms as those used by the *Dictionary of Occupational Titles (DOT)* for the occupational category "Quality Assurance Analyst." That is, the wording of some of the duties as described by the petitioner for the proffered position are taken virtually verbatim from the tasks associated with the occupational category "Quality Assurance Analyst" from *DOT*. For more information, see <http://www.occupationalinfo.org/03/033262010.html> (last visited August 8, 2014).

The job offered to the Beneficiary is the professional position of a SQA Engineer who will be required to perform the following duties:

- Evaluates and tests new or modified software programs and software developments procedures used to verify that programs function according to user requirements and conform to establishment guidelines[.]
- Writes, revises, and verifies quality standards and test procedures for program design and product evaluation to attain quality of software economically and efficiently.
- Reviews new or modified program, including documentation, diagram, and flow chart, to determine if program will perform according to user request and conform to guidelines. Recommends program improvements or corrections to programmers.
- Reviews computer operating logs to identify program processing errors.
- Enters instructions into computer to test program for validity of results, accuracy, reliability, and conformance to establishment standards. Observes computer monitor screen during program test to detect error codes or interruption of program and corrects errors.
- Identifies differences between establishment standards and user applications and suggests modifications to conform to standards.
- Sets up tests at request of user to locate and correct program operating error following installation of program.
- Conducts compatibility tests with vendor-provided programs. Monitors program performance after implementation to prevent reoccurrence of program operating problems and ensure efficiency of operation.
- Writes documentation to describe program evaluation, testing, and correction.
- May evaluate proposed software or software enhancement for feasibility.
- May develop utility program to test, track, and verify defects in software program.
- May write programs to create new procedures or modify existing procedures and may train software program users.

The petitioner also claimed that the nature of the specific job duties of the position of a SQA Engineer at [the petitioner] are very complex and can only be performed by a person with a strong background in mathematics, science, and engineering or computer science. The petitioner stated that it requires a minimum of a bachelor's degree in one of the disciplines. The petitioner further indicated that the beneficiary will be working full time on all working days at [redacted] located at [redacted] for 40 hours a week during the normal working hours.

The petitioner provided copies of the beneficiary's foreign academic credentials and an academic evaluation to establish that the beneficiary attained the U.S. equivalent of a Bachelor's degree in Computer Science.



Moreover, the petitioner submitted the requisite Labor Condition Application in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational category "Computer Occupations, All Other" – SOC (ONET/OES Code) 15-1799. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner listed its address and also the address of [REDACTED] as places of employment.

The initial record also included a Masters Services Agreement (MSA) dated October 15, 2010 between [REDACTED] and the petitioner with a template Statement of Work (SOW) and a fee schedule. The term of the agreement is for two years from the effective date unless earlier terminated. The MSA also indicates that the agreement will remain in effect with respect to any SOW already issued prior to expiration of the term until such SOW is either terminated or the services are completed and the work accepted. At section 2.2 of the MSA, the parties agreed to the following:

Signature Requirement. A SOW is valid only if (i) it is signed by [REDACTED] and the Supplier [the petitioner], and (ii) [REDACTED] has issued a Purchase Order number to Supplier [the petitioner] covering the work in the SOW...

The petitioner also submitted [REDACTED] with designation [REDACTED]. This document provides the following:

**THIS DOCUMENT MUST BE SIGNED BY BOTH PARTIES AND SENT TO THE CORPORATE PURCHASING DEPARTMENT AT [REDACTED]**

**NO WORK ON THIS PROJECT IS AUTHORIZED UNTIL A VALID PURCHASE ORDER IS DULY ISSUED BY [REDACTED]**

This SOW shall remain in effect until the later of: Completion and Acceptance of the Work or 12/30/2013.

[Emphasis in original.]

The document is signed by the petitioner's representative but is not signed by a [REDACTED] representative.

The initial record also included:

- [REDACTED] Purchase Order [REDACTED] dated March 27, 2013, for a Consultant for [REDACTED], with a delivery date of March 27, 2013; and
- [REDACTED] Purchase Order [REDACTED] dated October 9, 2012, for Contractors, with a delivery date of October 6, 2012.

The petitioner also submitted electronic mail correspondence, dated September 6, 2012, between the petitioner and [REDACTED] advising of an attached Purchase Order.



The petitioner further provided an employment agreement between itself and the beneficiary dated March 25, 2013. The agreement indicates that "[the petitioner] shall employ [the beneficiary] to carry out the responsibilities of his/her position in a manner specified by [the petitioner]." It further provides that "[the beneficiary] shall also perform such other duties as are customarily performed by an employee in a similar position, and such other and unrelated services and duties as may be assigned to Employee from time to time by Employer." The agreement does not include a description of the beneficiary's proposed duties.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 9, 2013. The director outlined the evidence to be submitted.

In response, the petitioner provided a second SOW entitled "Q1\_FY14 [REDACTED] [REDACTED] which indicated the work period is "07/27/2012 to 09/09/2013" and the work site described as "UNITED STATES. CALIFORNIA. SAN JOSE (142)." The petitioner also included:

- [REDACTED] Purchase Order [REDACTED], dated July 15, 2013, extension for 3 contractors, with a delivery date of October 26, 2013;
- [REDACTED] Purchase Order [REDACTED], dated August 8, 2013, for Q4FY14 and Q1FY14, with a delivery date of October 26, 2013; and
- [REDACTED] Purchase Order [REDACTED] dated August 29, 2013, for Q1\_FY14 [REDACTED] with a delivery date of September 9, 2013;

The petitioner also submitted electronic mail correspondence, dated August 29 and 30, referencing Purchase Order [REDACTED]. The petitioner resubmitted the SOW initially provided. The petitioner emphasized that it will be the beneficiary's employer, that it will provide a laptop with all necessary software, tools and utilities and cell phone, required for the beneficiary to perform duties as a SQA Engineer, and that the "Employee's services will also be supervised by an authorized official designated by the Petitioner and the end-client Company." The petitioner noted that "in this current project, Petitioner's authorized official would be [REDACTED] (CEO) and the authorized official for [REDACTED] would be [REDACTED] (Project Manager)." The petitioner's organizational chart, also submitted, shows three individuals who hold the positions of Chief Operating Officer (COO), Chief Financial Officer (CFO), and HR Manager and who all report to the CEO. The organizational chart lists 20 individuals on the engineering/technical team and indicates these individuals report to the COO, not the CEO.

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on October 31, 2013 for the reasons referenced above.

Counsel for the petitioner submits an appeal of the denial of the H-1B petition along with supporting documents. The appeal documents include an excerpt from the *Dictionary of Occupational Titles (DOT)* regarding the occupation of Quality Assurance Analyst and an excerpt from the Summary Report for O\*NET Online, regarding the occupation of Software Quality

Assurance Engineers and Testers. The record on appeal also includes several job postings from various companies and an Internet informational printout from U.S. Citizenship and Immigration Services (USCIS) regarding the issue of employer-employee relationship.

## II. LAW AND ANALYSIS

### A. Standard of Proof

In light of counsel's implicit reference to the requirement that 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) (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.*

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

We reviewed the record of proceeding in its entirety. We will first discuss 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 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).

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.<sup>2</sup>

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.<sup>3</sup>

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).<sup>4</sup>

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<sup>2</sup> 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).

<sup>3</sup> 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))).

<sup>4</sup> That said, there are instances in the Act where Congress may have intended a broader application of the



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 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).

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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).



In the instant case, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. 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 is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. 8 C.F.R. § 214.2(h)(4)(iv)(B)

Upon review of the submitted employment agreement, we note that it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. The agreement states the salary to be paid to the beneficiary, but it does not specify the location of the employment. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. Nor does the petitioner's organizational chart and the performance appraisal template detail the beneficiary's proposed duties or otherwise establish who has the right to fire, supervise or otherwise control the performance of the beneficiary's work. 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.

Moreover, there is a lack of consistent information in the record as to how the day-to-day work of the beneficiary will be supervised and overseen. The organizational chart depicting the petitioner's staffing hierarchy only shows the management level and lists [REDACTED] the CEO, at the top supervising COO, CFO, and HR Manager positions. The chart is followed by a list of names for the Engineering/Technical Team that reports to the COO. The chart does not depict the beneficiary or any of the Engineering/Technical Team reporting to the [REDACTED] the CEO. 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). Further, the petitioner did not submit a description of the beneficiary's supervisor's job duties and/or other probative evidence on the issue. Here, the record contains insufficient probative evidence to demonstrate that the petitioner will be overseeing and directing the work of the beneficiary.

Significantly, the petitioner did not provide a valid SOW substantiating the beneficiary's proposed work. As will be discussed in more detail below, the SOW of work submitted is not signed by [REDACTED] as required by the MSA, and it is not dated. Thus, it is not possible to ascertain the validity of the SOW. Even if the SOW is considered valid, the purchase orders submitted do not detail the project to which the beneficiary will be assigned, the work the beneficiary will perform as it relates

specifically to the project, the length of the assignment, and any restrictions or conditions placed on the petitioner regarding the work to be performed. Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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). 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.

The evidence of record is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

### C. Specialty Occupation

We will now address the second basis of the director's decision, namely whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

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 387. 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 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.

Further, to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

In the instant case, the petitioner asserts that the duties of the proffered position can be performed by a person with a degree in mathematics, science, and engineering or computer science. Such an assertion on its face suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

Provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however,

a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, for example, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do 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 provided again, that the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the petitioner claims that a general degree in "science" is sufficient to perform the duties of the proffered position. The field of "science" is broad and includes a large number of specific disciplines, related only through basic principles, such as biology and physics. Accepting such a general degree as sufficient to perform the duties of the position is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Further, the petitioner claims that a degree in engineering is acceptable for the proffered position. The issue here is that the field of engineering is also a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent (1) that a general degree in engineering or one of its other sub-specialties, except for electrical engineering, is closely related to computer science (i.e., that mathematics, science, and engineering or computer science are closely related fields); or (2) that any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Moreover, 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 company'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 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 before the director was devoid of substantive information from the end client regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the end client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects.<sup>5</sup> The record of proceeding does not contain documentation on this issue from, or endorsed by, the actual end client, the company that has been or will be utilizing the beneficiary's services as a software quality assurance engineer (as stated by the petitioner).<sup>6</sup>

We find 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, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, we turn next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar

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<sup>5</sup> We observe on appeal, counsel submits a job posting from [REDACTED] the purported end client in this matter. Upon review, of the posting, [REDACTED] typically requires a MS EE-CS with 5-7 years related experience or BS EE/CS continued with 7-10 years of experience." We note that these more specific requirements conflict with the petitioner's general educational requirements and the petitioner's lack of information regarding necessary experience. No explanation for this apparent inconsistency regarding the petitioner's educational requirements and the end client's educational and experience requirements to perform the position is offered.

<sup>6</sup> Although the record includes a SOW that lists tasks associated with a particular work product, the SOW also indicates "NO WORK ON THIS PROJECT IS AUTHORIZED UNTIL A VALID PURCHASE ORDER IS DULY ISSUED BY [REDACTED] and further states that this SOW "defines Services to be performed for and Work Product to be delivered to [REDACTED] under Consulting Services Agreement (CSA) No. [REDACTED]" However, the petitioner did not provide the CSAs or valid purchase orders that support this SOW. Moreover, the tasks associated with the work product, does not match the beneficiary's purported duties. Similarly, the SOW entitled "Q1\_FY14\_[REDACTED]" is also not signed and the description does not match the beneficiary's duties. Notably, the work period is indicated as "07/27/2012 to 09/09/2013," and thus is not valid for the petitioner's requested dates for the beneficiary's intended employment.

organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by us when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

We will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>7</sup>

The petitioner stated on the visa petition that the proffered position is a Software Quality Assurance Engineer position. We reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category. This chapter of the *Handbook* describes a "software quality assurance engineer" as a subspecialty of this occupational category:

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

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***Software quality assurance (QA) analysts*** do in-depth testing of the systems they design. They run tests and diagnose problems in order to make sure that critical requirements are met. QA analysts write reports to management recommending ways to improve the system.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited August 8, 2014).

The duties attributed to the proffered position are generally consistent with the duties of software quality assurance analysts as described in the Computer Systems Analyst chapter of the *Handbook*.

The *Handbook* states the following about the educational requirements of computer systems analyst positions, including software quality assurance analyst positions:

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<sup>7</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.



**How to Become a Computer Systems Analyst**

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 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.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited August 8, 2014).

The *Handbook* makes clear that computer systems analyst positions do not require as a category a minimum of a bachelor's degree in a specific specialty or the equivalent, as it indicates that many systems analysts have a liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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."

Counsel also cited O\*NET information pertinent to Software Quality Assurance Engineers and Testers as evidence that the proffered position qualifies as a specialty occupation position. Upon review of the pertinent section of the O\*NET Internet site, which addresses Software Quality Assurance Engineers and Testers under the Department of Labor's Standard Occupational Classification code of 15-1199.01, the O\*NET does not state a requirement for a bachelor's degree. Rather, it assigns Software Quality Assurance Engineers and Testers a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the O\*NET does not indicate that the four-year bachelor's degrees that may be required by some Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the O\*NET information is not probative of the proffered position's being a specialty occupation.

In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position." Further, we find that, to the extent that they are described in the record of proceeding, the duties ascribed to the proffered position indicate a need for a range of technical knowledge in the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

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

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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



In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

On appeal, counsel for the petitioner submits five job postings from various companies, including the end client [REDACTED]. First, one of the job advertisements has printed so poorly that it is indecipherable. Second, as footnoted above, the job advertisement from [REDACTED] for a Software Engineer – QA lists a specific degree requirement plus experience in the related field. Of the remaining three advertisements, one from [REDACTED] requires a specific degree and eight years of experience, another requires a bachelor's degree in computer science and 5 years of experience, and another appears to require a bachelor's degree in either computer science or a general engineering degree. Upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

In addition, some of the advertisements do not appear to be for parallel positions. Three of the four decipherable advertisements appear to be for more senior positions than the proffered position. That is the advertised positions require the successful incumbent to have five to ten years of experience. However, the petitioner in this matter has designated the proffered position on the LCA as a Level I (entry level) position, the lowest of four possible designations. According to DOL guidance, this wage rate indicates that 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.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here. That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not

necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. 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 evidence of record also does not 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties that comprise the proffered position entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties that collectively constitute the proffered position 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 required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

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



We will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.<sup>8</sup>

The petitioner did not provide any evidence pertinent to anyone it has ever hired anyone to fill the proffered position. However, the petitioner's acknowledgment that an otherwise unspecified bachelor's degree in science or engineering or a degree in mathematics or computer science would be a sufficient educational qualification for the proffered position strongly suggests the position is not a specialty occupation. As was explained above, an educational requirement that may be satisfied by an otherwise unspecified bachelor's degree in science or engineering is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. Thus, the petitioner appears to indicate that it hires employees for the proffered position who do not have a minimum of a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, identifying and addressing problems in software, have not been described with sufficient specificity to show that they are more specialized and complex than the duties of computer systems analyst positions, including other software QA analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.<sup>9</sup>

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

<sup>9</sup> Moreover, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). 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. 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

For the reasons discussed above, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

#### D. Non-Speculative Employment

We also find, beyond the decision of the director that although the petitioner has asserted that the beneficiary will work at [REDACTED] location throughout the period of requested employment, no evidence in the record corroborates the assertion that the beneficiary's anticipated work there will continue to the end of that period.

The documents submitted to substantiate that the petitioner has sufficient work available for the beneficiary for the duration of the requested employment period, either do not contain sufficient details and appear to be incomplete or provide inconsistent details that undermine the validity of the documents. For example, the [REDACTED] purchase orders designate the petitioner as the supplier, but list its address as [REDACTED] which differs from its address in the record of proceeding. A search of the Internet indicates that this is a residential address.<sup>10</sup> Further, the purchase orders do not provide substantive information to establish the services the petitioner will be providing or the personnel working on the project. Specifically, the section "line supplier item/description" contains technical contractual terms such as "4 contractors Ban# [REDACTED]-Contractors extension-automation" (PO dated October 9, 2012) or "consultant for [REDACTED]" (PO dated March 27, 2013).

Likewise, as noted above the SOWs in the record of proceeding do not contain sufficient details and are incomplete. For example, [REDACTED] SOWs entitled "Project Title-System Engineer" states "THIS DOCUMENT MUST BE SIGNED BY BOTH PARTIES AND SENT TO THE CORPORATE PURCHASING DEPARTMENT AT [REDACTED]". However, neither of the documents is signed by both parties. On appeal, counsel asserts that the "contracts and Purchase Orders (POs) are emailed between Petitioner and [REDACTED] in the regular course of business and therefore are not physically signed by the parties." Counsel further claims "[r]ather than physically signing and mailing contracts, the correspondences are generally used via emails, which has been an accepted form of communication for many years." Notably, the record of proceeding contains copies of two emails from [REDACTED] sent to the petitioner. However, the emails do not contain sufficient information to establish that the petitioner is exempt from the signature requirement stated in the SOW. For example, an email dated September 6, 2012 merely states, "please find attached is

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evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>10</sup> Similarly, [REDACTED] address on the purchase orders is also different, but upon search of the Internet, this address appears to be another location for [REDACTED].



the copy of PO." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

There is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. The purchase orders in the record indicate delivery dates that expire prior to or a month after the beneficiary's requested starting date of October 1, 2013. The SOWs entitled "Project Title-System Test Engineer" also do not appear valid for the requested term of employment. One of the SOWs states that it "shall remain in effect until the later of: Completion and Acceptance of the Work or 12/30/2013" and the other one indicates it "shall remain in effect until the later of: Completion and Acceptance of the Work or AUG/9/2013." Neither petitioner nor counsel have provided probative evidence that the SOWs continue to remain in effect.

Rather than establish non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed that the beneficiary would be working for the end client for the requested period. The petitioner did not submit probative evidence substantiating specific work for the beneficiary, let alone H-1B specialty occupation work. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. 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). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.<sup>11</sup> For this additional reason, the petition may not be approved.

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<sup>11</sup> 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

### III. CONCLUSION

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

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

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

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