

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 03 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.

On the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in consulting and technology solutions for government and commercial organizations that was established in 2005. In order to employ the beneficiary in what it designates as a business analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees 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. The petition will be denied.

In the petition signed on March 29, 2013, the petitioner indicates that it wishes to employ the beneficiary as a business analyst on a full-time basis at the rate of pay of \$60,000 per year. In addition, the petitioner states that the beneficiary will work at [REDACTED]. In the undated letter of support, the petitioner claims that the beneficiary will perform the following duties in the proffered position:¹

- Gathered, validate, analyze and document the stated business needs, and creates project visual models and reports from Subject Matter Experts (SME).
- Lead the creation and evolution of the enterprise architecture function/program including coordination of enterprise business, information, technical and solution architectures[.]
- Participate in strategic decisions regarding the technical aspects of IT for the enterprise[.]
- Developed and Implemented the Work Intake and resource allocation tool on the SharePoint[.]
- Designed business process model by grouping use cases and workflows into sequence and collaboration diagrams.

¹ In the letter, the petitioner mistakenly and repeatedly referenced the beneficiary in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

- Involved in validation of created data model to make sure that all data objects provided by the functional team are completely and accurately represented.
- Conducted Functional Requirement reviews and walkthroughs with the designers, developers and stakeholders.
- Ensured to satisfy the clients requirement for custody service supported by market leading FOHF Specific Custody Platform and proprietary Fund of Hedge Fund Experienced in working with Transaction Operational team of Hedge fund, Mutual fund, Gifts, etc.

In addition, the petitioner states, "The minimum requirements that we at [the petitioning company] establish for the position of Business Analyst include [a] bachelor's degree in computer science, IT, business administration, engineering or a related degree."

The petitioner states that the nature of the proffered position is to provide IT services on-site to the end-client. The petitioner continues by stating, "The beneficiary is expected to remain engaged in the delivery of IT services in this project for the next one year." The AAO observes that on the Form I-129 petition, the petitioner requested H-1B validity dates of October 1, 2013 to September 1, 2016.

With the initial petition, the petitioner submitted a copy of the beneficiary's transcript from the [REDACTED] which indicates that she was awarded a Master of Science in Technology Management and a Master of Business Administration on May 7, 2011. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcripts. The petitioner indicated that the beneficiary was maintaining nonimmigrant status as an F-1 student and was currently employed by the petitioner pursuant to post-degree optional practical training.

In addition, the petitioner submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1121, at a Level 1 (entry level) wage. The beneficiary's place of employment is listed as [REDACTED]
- A line-and-block organizational chart.
- The first page of the petitioner's Income Tax Return for 2011.
- A Consulting Services Agreement between the petitioner and [REDACTED] along with a purchase order. Both documents are dated July 16, 2012. The Consulting Services Agreement states that "CLIENT [REDACTED] will retain VENDOR [the petitioner] from time to time to provide professional software development services." In addition, the AAO observes that the purchase order states the following:
 1. VENDOR agrees to provide the services of [the beneficiary] (Consultant) to CLIENT.

2. Services shall be provided for [REDACTED]
 3. Contract Start Date: August 2, 2012
 4. Scheduled End / Renewal Date: Longterm Contract
- A letter from [REDACTED] The letter is dated March 18, 2013. In the letter, Ms. [REDACTED] states that the beneficiary "is working for a long term project at the [REDACTED] pursuant to our contract with [the petitioner], which is our preferred IT solutions vendor and our client [REDACTED]. In addition, Ms. [REDACTED] states, "As a leading software consultancy organization, [REDACTED] is currently performing IT project management's services to deploying several business applications at [REDACTED] located at [REDACTED] further states that "[t]his project is open-ended and is extended periodically based on business and economic conditions and performance." The AAO observes that Ms. [REDACTED] refers to the beneficiary's position as a business process analyst rather than as a business analyst. Further, she provides a job description that differs from the description provided by the petitioner.
 - A copy of the beneficiary's identification badge from [REDACTED] The badge indicates "VENDOR [REDACTED] It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company.
 - The petitioner's invoices to [REDACTED]
 - Copies of the pay statements issued to the beneficiary on February 15, 2013, February 28, 2013, and March 15, 2013. The beneficiary's address is in [REDACTED]
 - Weekly status reports ending on March 3, 2013, March 10, 2013, and March 17, 2013. The documents do not identify the beneficiary.
 - A document entitled "Benefit Summary" from [REDACTED] The AAO notes that neither the petitioner nor the beneficiary are named in the document.
 - The petitioner's job postings for various positions. The AAO observes that three of the job postings indicate "Various unanticipated locations throughout the U.S." None of the postings are for the proffered position of business analyst.
 - A photocopy of a [REDACTED] card issued to the beneficiary and naming the petitioner. The beneficiary's address is in [REDACTED]

- Monthly time sheet for the beneficiary. The petitioner's name is not on the document and there is no indication that the document refers to the petitioner.
- A brochure for the petitioner's business.
- The beneficiary's resume.² The beneficiary indicates the following:
Employer: [the petitioner]
Client: [REDACTED]
August 2012 – Present
Role: Business Process Analyst

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on April 24, 2013. The director outlined the specific evidence to be submitted.

On June 14, 2013, the petitioner provided a letter regarding the proffered position and supporting evidence. More specifically, the petitioner submitted copies of previously provided documents, as well as new evidence including the following documentation:³

- A letter from [REDACTED] Relationship Analyst at [REDACTED]. The letter is dated May 7, 2013. In the letter, Ms. [REDACTED] states that [REDACTED] and [REDACTED] have executed a Systems Primary Sourcing Agreement (Sourcing Agreement) effective 07/17/2009 – 07/17/2013." In addition, Ms. [REDACTED] states that "[REDACTED] is performing such IT solutions and services pursuant to the Sourcing Agreement and its attached 'Area Level Work Order ICP 1' Work Order effective 01/01/2013 – 12/31/2013, subject to annual renewal by mutual agreement." Notably, the petitioner did not provide the Sourcing Agreement or the work order referenced by Ms. [REDACTED]
- Undated letters from [REDACTED] VP – Talent Management at [REDACTED]. In the letters, Ms. [REDACTED] states that "the assignment of [the beneficiary] an employee of [the petitioner] will be working at work location site at [REDACTED]"

² The AAO notes that the resume represents a claim by the beneficiary regarding his credentials, rather than evidence to support that claim.

³ Again, the petitioner mistakenly and repeatedly referenced the beneficiary in the letter in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter submitted with the RFE response and whether the information provided is correctly attributed to this particular position and beneficiary.

⁴ In the letters, Ms. [REDACTED] also mistakenly and repeatedly referenced the beneficiary in the masculine pronoun case. Likewise, the AAO must question the accuracy of the letters and whether the information provided is correctly attributed to this particular position and beneficiary.

[REDACTED] as Business Analyst." In addition, the letters indicate "Duration of the Project: Long Term Project – Renewed Annually."

- A document entitled "RIGHT OF CONTROL OVER [THE BENEFICIARY] (EMPLOYEE)." ⁵ The document is dated June 3, 2013. The AAO observes that the document indicates "[the beneficiary] will also report to [REDACTED] who also works at the client location." The validity period is "Long Term."
- A copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2012. The beneficiary's address is in [REDACTED]
- Email correspondence between [REDACTED] and the beneficiary. The AAO notes that the local-part of the beneficiary's email address is the username of the beneficiary (her first name and last name) and [REDACTED] and the domain name is [REDACTED]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on June 20, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted new evidence.⁶

⁵ Again, the petitioner mistakenly and repeatedly referenced the beneficiary in the document in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the document and whether the information provided is correctly attributed to this particular position and beneficiary.

⁶ With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the evidence and finds that it does not establish eligibility for the benefit sought.

Further, the AAO will briefly note that the Professional Services Agreement between [REDACTED] and [REDACTED] submitted by counsel with the appeal is dated May 9, 2013 – approximately a month after the Form I-129 petition was submitted. 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). Moreover, the AAO observes that the Professional Services Agreement is not signed by all of

The primary issue for consideration is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

The term "United States employer" is defined in the Code of Federal Regulations 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 a LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its

the parties. It must also be noted that the letter from [REDACTED] a business relationship manager at [REDACTED] states that the beneficiary works under his supervision.

second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁷

⁷ 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

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 318-319.⁸

extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

⁸ 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))).

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).⁹

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, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

⁹ 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).

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).

In the instant case, the petitioner and its counsel claim that the petitioner has an employer-employee relationship with the beneficiary. On appeal, counsel states that "[i]t should be clear that it is [the petitioner] that controls when, where and how the job of [the beneficiary] is performed." The AAO has considered the assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

As a preliminary matter, the AAO notes that the petitioner has provided inconsistent information regarding who will supervise the beneficiary. For instance, in the undated letter of support, the petitioner states that the beneficiary "will be directly supervised by Mr. [REDACTED] Director of [the petitioning company], and his associates." The petitioner also submitted an organizational chart with the initial petition, which indicates that the "Business System Analysts" report to [REDACTED] Director/President of the petitioning company. However, the document entitled "RIGHT OF CONTROL OVER [THE BENEFICIARY] (EMPLOYEE)," submitted in response to the RFE, indicates that "[the beneficiary] will also report to [REDACTED] who also works at the client location." No further information regarding Mr. [REDACTED] was provided. Further, in the undated letter from [REDACTED] Business Relationship Manager at [REDACTED] submitted on appeal, he states that the beneficiary "works as a Business Analyst under the supervision of [REDACTED]"

The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner provide such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., brief description of job duties, specific location).

With the initial petition, the petitioner submitted copies of pay statements issued to the beneficiary on February 15, 2013, February 28, 2013, and March 15, 2013. In addition, in response to the RFE, the petitioner submitted a copy of the beneficiary's Form W-2 for 2012.¹⁰ Further, the petitioner provided a

¹⁰ In the instant case, the petitioner has provided letters from [REDACTED] which state that the beneficiary has been working at [REDACTED] However, the AAO observes that several document in the record indicate an address in [REDACTED] for the beneficiary. Moreover, on the

health insurance card issued to the beneficiary that includes the petitioner's name. The AAO acknowledges that the method of payment of wages and health benefits can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The petitioner provided an Employment Agreement that is dated March 14, 2013, which is several days prior to the H-1B submission. It indicates that the beneficiary may be assigned to one of the petitioner's external clients but does not provide any further specific information. Notably, in the letter of support, the petitioner claims that the beneficiary is assigned to work on a project for the end-client, [REDACTED] in [REDACTED]. Further, the petitioner claims that the project is long-term. Moreover, the petitioner indicated that the beneficiary is currently employed in the position. However, the Employment Agreement does not convey that (1) a specific place of employment, (2) for particular client on a defined project, (3) with an established duration, had been established prior to the filing of the H-1B petition. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In the document entitled "RIGHT OF CONTROL OVER [THE BENEFICIARY] (EMPLOYEE)," submitted in response to the RFE, the petitioner states that "[the beneficiary] will provide [the petitioner] with all instrumentalities and tools required for this position, including computer, if not already available at the work site." Thus, the petitioner will not provide the instrumentalities and tools required to perform the proffered position.

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 1, 2016. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED]. No other work locations were provided.

Form I-129, the petitioner indicated that the beneficiary's current address is in [REDACTED]. No explanation was provided by the petitioner.

With the initial petition, the petitioner submitted a Consulting Services Agreement between itself and [REDACTED] along with a purchase order. Notably, the Consulting Services Agreement states that "CLIENT [REDACTED] will retain VENDOR [the petitioner] from time to time to provide professional software development services." The petitioner submitted a purchase order dated July 16, 2012, indicating that the beneficiary will serve as a consultant on a long term contract.

In response to the director's RFE, the petitioner submitted a letter from [REDACTED] Relationship Analyst at [REDACTED] dated May 7, 2013. In the letter, Ms. [REDACTED] states that [REDACTED] have executed a Systems Primary Sourcing Agreement (Sourcing Agreement) effective 07/17/2009 – 07/17/2013." In addition, Ms. [REDACTED] states that [REDACTED] is performing such IT solutions and services pursuant to the Sourcing Agreement and its attached 'Area Level Work Order ICP 1' Work Order effective 01/01/2013 – 12/31/2013, subject to annual renewal by mutual agreement." Thus, she indicates that the end date of the work order is December 31, 2013 (three months after the requested start date). The petitioner did not provide a written contract or agreement to establish that the parties extended the work order.

In addition, the petitioner submitted two undated letters from [REDACTED] – Talent Management at [REDACTED]. Both letters state that "the assignment of [the beneficiary] an employee of [the petitioner] will be working at work location site at [REDACTED] as Business Analyst." In addition, the letters indicate "Duration of the Project: Long Term Project – Renewed Annually." In one of the letters, Ms. [REDACTED] indicates the beneficiary's duties and responsibilities. Notably, the duties and responsibilities listed in the letter differ from the list of duties in Ms. [REDACTED] March 18, 2013 letter. Further, the list of duties and responsibilities in the letter, submitted in response to the RFE, does not correspond to the job description provided by the petitioner with the initial petition.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from October 1, 2013 to September 1, 2016. However, the documentation does not establish that the petitioner has H-1B caliber 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).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. It must be noted that the record indicates that the beneficiary will be physically located at the [REDACTED] office of [REDACTED]. The petitioner is located approximately 815 miles away in [REDACTED].

As previously discussed, the petitioner has provided inconsistent information as to who will supervise the beneficiary. The AAO incorporates by reference the prior discussion on the matter. Further, the AAO notes that in the undated letter of support, the petitioner states that "[t]he supervision of [the beneficiary's] work will take the form of weekly conference calls and/or status reports, time-sheets, and other communications as needed on a frequent and ongoing basis." In addition, in the document entitled "RIGHT OF CONTROL OVER [THE BENEFICIARY] (EMPLOYEE)", submitted in response to the

RFE, it states that the beneficiary "will telephone or otherwise communicate directly with [the petitioner] no less than once a week regarding his/her progress on the assigned work."

With the initial petition, the petitioner submitted weekly status reports ending on March 3, 2013, March 10, 2013, and March 17, 2013. The documentation does not mention the beneficiary. The list of accomplishments for each week is general and the beneficiary does not make any references to the petitioner. The record does not indicate how the documents were transmitted from the beneficiary to the petitioner. Further, there is no evidence that the petitioner responded to the beneficiary. Notably, the record does not contain any information from the petitioner regarding the specific purpose of the reports; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the documents; the consequences, if any, of failing to prepare the documents; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the documents to the matter here.

The petitioner also submitted the beneficiary's monthly time sheet for March 2013. However, as previously noted, the petitioner's name or other identifying information is not in the document. The AAO observes that the time sheet indicates "Client Name [REDACTED] Based upon the document, there is no indication that the petitioner is or has been the beneficiary's employer.

Moreover, the petitioner provided a copy of a photo identification badge stating [REDACTED] the date "08/02/2014," the beneficiary's name, and "VENDOR [REDACTED] Corporate." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced. Upon review of the photocopy of the badge, it suggests, at best, that the beneficiary is working for [REDACTED] there is no indication that the beneficiary is employed by the petitioner.

In response to the director's RFE, the petitioner submitted email correspondence between [REDACTED] and the beneficiary. Notably, the local-part of the beneficiary's email address is the username of the beneficiary (her first name and last name) and [REDACTED] and the domain name is [REDACTED] The beneficiary's assigned email address suggests that she is an employee of [REDACTED]

In the RFE, the director requested the petitioner provide information regarding the beneficiary's role in hiring and paying assistants. In the response, the petitioner elected not to address this issue or provide any information on this matter. Here, the petitioner was given an opportunity to clarify the beneficiary's role on this issue, but it failed to submit any probative evidence on the issue.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service 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 letter of support, the petitioner claimed that the "minimum requirements that we at [the petitioning company] establish for the position of Business Analyst include [a] bachelor's degree in computer science, IT, business administration, engineering or a related degree." In response to the RFE, the petitioner submitted a letter dated May 7, 2013 from the end-client, (according to the petitioner) [REDACTED]. In the letter, [REDACTED] stated the beneficiary's duties and responsibilities. The AAO observes that [REDACTED] did not state that the business analyst position has any particular academic requirements.¹¹ In a letter submitted with the appeal, [REDACTED] claims that the duties requires at least a bachelor's degree in an IT related field. Thus, the record contains inconsistent information with regard to the requirements of the proffered position.

Further, upon review of the job descriptions, the petitioner and its client did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the record fails to specify which tasks are major functions of the proffered position. Moreover, the evidence does not establish the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, the record does not establish the primary and essential functions of the proffered position.

Upon review of the record of proceeding, the AAO notes that while the petitioner has identified its proffered position as that of a business analyst, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be

¹¹ [REDACTED] does not claim that the position 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, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act.

appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

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

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns 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 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 the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies 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)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹² The petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts," including the

¹² All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

sections regarding the typical duties and requirements for this occupational category.¹³ However, contrary to the assertions of the petitioner and its counsel, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

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

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

Education

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

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

Some analysts have an associate's degree and experience in a related occupation.

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4>.

¹³ For additional information regarding computer systems analyst positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1>.

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁴ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that (relative to others within the occupation) the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including an associate's degree and degrees not in a specific specialty.

The narrative of the *Handbook* states that some analysts have an associate's degree and experience in a related occupation. The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees. Notably, the AAO observes that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement.

The text of the *Handbook* suggests that a baccalaureate degree or higher may be a preference among employers of computer systems analyst in some environments, but that some employers hire

¹⁴ 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.

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.

employees with less than a bachelor's degree, including candidates that possess an associate's degree or a bachelor's degree in an unrelated specialty. Thus, the *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO will 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; 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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

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 industry in positions that are both: (1) parallel to the proffered position; and (2) located in similar organizations.

For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.¹⁵ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level at a Level I (entry level) wage. The wage-level of the proffered position indicates that (relative to others in the occupation) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

It appears that if the proffered position involved complex or unique duties, the petitioner would have classified it as a higher level position, such as a Level IV (fully competent) position. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.¹⁶

The petitioner has failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Further, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

The description of the duties does not specifically identify any tasks that are so complex or unique that

¹⁵ As previously mentioned, the end-client does not claim that the proffered position requires at least a baccalaureate in a specific specialty, or its equivalent. Thus, it cannot be found that the particular position proffered in this matter meets this criterion of the regulations under the end-client's own standards.

¹⁶ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

only a specifically degreed individual could perform them. Thus, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other similar 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 of business analyst is so complex or unique relative to other 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 its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation

merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner provided copies of its job vacancy advertisements for various positions.¹⁷ The petitioner did not provide an advertisement for the proffered position. The AAO finds that the advertisements are irrelevant to this matter as they are not advertisements for the proffered position.

Moreover, the petitioner stated in the Form I-129 petition that it was established in 2005 (approximately eight years prior to the submission of the H-1B petition). However, the petitioner did not submit probative evidence to establish that for the proffered position of a business analyst, it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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

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

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." It is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

¹⁷ The AAO notes that two of the job advertisements are illegible. Consequently, the positions and/or the information regarding the requirements for the positions cannot be ascertained.

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

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the petition cannot be approved.

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

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

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

ORDER: The appeal is dismissed.