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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: [REDACTED]  
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:

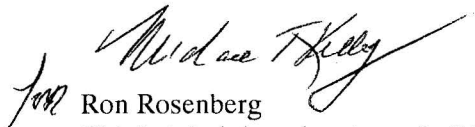
SELF-REPRESENTED

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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 200-employee information technology services company<sup>1</sup> established in 2000. In order to employ the beneficiary in what it designates as a full-time computer programmer position at a salary of \$60,000 per year,<sup>2</sup> 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, concluding that the evidence of record fails to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the failure of the evidence of record to demonstrate that the proffered position is a specialty occupation.<sup>3</sup> For this additional reason, the petition must also be denied.

## I. Standard of Review

As a preliminary matter, it is noted that in the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Jan. 9, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Computer Programmers," SOC (O\*NET/OES) Code 15-1131, and for which the appropriate prevailing wage level would be Level I (the lowest of the four assignable wage-rates).

<sup>3</sup> The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies. 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.*

The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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*, the AAO finds that the director's determination that the petitioner did not establish that it would engage the beneficiary in an employer-employee relationship was correct. Upon its 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, the AAO finds that the evidence of record does not demonstrate that an employer-employee relationship between the petitioner and the beneficiary "more likely than not" or "probably" exists. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that



leads the AAO to believe that the petitioner's claim that it would engage the beneficiary in an employer-employee relationship is "more likely than not" or "probably" true.

In similar fashion, as indicated by the AAO's supplemental finding made on appeal, the AAO also finds that the evidence of record does not establish that the proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

## **II. The Petitioner, the Proffered Position, and the Proposed Duties**

As noted above, the petitioner described itself on the Form I-129 as an information technology services company and stated that it has been in business since 2000, that it currently employs 200 individuals, and that it has a gross annual income of \$27 million. When asked to provide its net annual income, the petitioner did not respond.

At the outset, the AAO acknowledges the many documents of various types attesting, directly and indirectly, to the apparent vitality of the petitioner as a robust business entity in the IT areas in which it is engaged. However, neither the viability nor the strength and industry standing of the petitioner is an issue before the AAO. Nor is the petitioner's ability to pay the beneficiary in question. Rather, in light of the express basis of the director's denial, the AAO will focus upon whether the evidence of record establishes that approval of the petition would manifest and be based upon a business relationship between the petitioner and the beneficiary that would be sufficient to recognize them as being in an employer-employee relationship with each other, so as to qualify the petitioner as "United States employer" as defined at 8 C.F.R. § 214.2(h)(4)(ii), as is required for the petitioner to have standing to file an H-1B specialty occupation petition.

The following review is prelude to this decision's later discussion of the relevant statutory, regulatory, and common law aspects of the employer-employee distinction.

The petitioner filed the petition on April 15, 2013, and proposed employing the beneficiary as a computer programmer from October 1, 2013 through September 13, 2016 at a salary of \$60,000 per year. On the Form I-129 the petitioner, which is located in [REDACTED] New Jersey, stated that the beneficiary would provide his services to its client [REDACTED], California.

In its March 28, 2013 letter of support, which was signed by the petitioner's Director of Human Resources and Immigration, the petitioner described itself as follows:

[The petitioner] is a global IT expert consulting company, focusing on specialized practice areas of Identity and Access Management, Data Security, E-business Suite, Service Oriented Architecture, Business Process Management[,] and Business intelligence. Our customers hire us due to our many implementation experiences, deep technical product knowledge[,] and subject matter expertise. Our value added



portfolio of service offerings includes Advisory, Implementation, Managed Services[,] and Staffing.

For achieving the greatest results for our clients, we remain dedicated [to] staying focused [on] our core competencies in the areas of Identity and Access Management, Data Security, E-business Suite, Service Oriented Architecture, Business Process Management[,] and Business intelligence. Our focus helps us achieve a greater organization maturity, helps us to stay at the forefront of business and technology trends thereby driving better value and provid[ing] thought leadership to our customers.

[The petitioner] leverages its extensive global offshore infrastructure, offsite teams[,] and an effective delivery process to provide a global delivery model at a cost advantage to our customers.

The petitioner stated that the beneficiary would spend 30% of his time analyzing software requirements and programming; 30% of his time designing software systems; 15% of his time evaluating interface feasibility between hardware and software; 10% of his time on unit and integration testing; 10% of his time installing systems; and 5% of his time maintaining systems.

The petitioner presented the following as duties for the beneficiary:

- Beneficiary will assist in designing, evaluating, programming, and implementing the application. Beneficiary will maintain computer systems, write program specifications[,] and undertake technical documentation. Beneficiary will design, write[,] and develop custom-made software applications as per specific requirements.
- Beneficiary will identify problems, study existing systems to evaluate effectiveness[,] and develop new systems to improve production or workflow. Beneficiary will write a detailed description of user needs, program functions, and steps required to develop or modify computer program. Beneficiary will also review computer system capabilities, workflow[,] and scheduling limitation to determine whether the program can be changed within existing system.
- Beneficiary will assist in developing application software based on specific needs. Beneficiary will provide technical evaluation of new products, assess time estimation[,] and provide technical support within the organization.
- Beneficiary will be responsible for trouble shooting, installation[,] and design and development of software applications. Beneficiary will maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

- Beneficiary will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and to describe logical operations involved by making use of the beneficiary's knowledge of computer science. Beneficiary will also prepare manuals to describe installation and operating procedures.

The petitioner also stated the following with regard to the duties of the proffered position:

**In Lay person terms,** Beneficiary will enter program codes into the computer systems and enter commands into the computer to run and test the programs. Beneficiary will replace, delete[,] or modify codes to correct errors. Beneficiary will provide technical support, solve problems[,] and troubleshoot systems. Beneficiary will specialize in developing programs for specific applications to certain industries. Beneficiary will be involved in systems integration, debugging, troubleshooting[,] and network installation. Beneficiary will offer solutions for various software and hardware problems and compatibility of various systems. All this requires a Bachelor's degree in Math, or Computer Science, or Engineering, or Business, or any related field.

The Beneficiary will also be responsible for updating existing software systems and updating management on new software that is developed. Beneficiary will maintain records to document various steps in the programming process. Beneficiary will also keep himself/herself updated by reading periodicals and other computer journals transferring the knowledge so gained into developing cutting edge software. . . .

### III. The Beneficiary

The beneficiary, a national of India, earned a bachelor of engineering degree in information science from [REDACTED] in India, in May 2009. He earned a master's degree in computer science from the [REDACTED] in New Jersey, in May 2012.

The beneficiary began working for the petitioner via a grant of [REDACTED] awarded pursuant to his F-1 student visa status. The beneficiary's employment authorization document (EAD) was issued on July 5, 2012, and the petitioner and the beneficiary executed an Employment Agreement in June 2012. In its May 20, 2013 letter, the petitioner stated that the beneficiary began working for it on July 20, 2012.

### IV. Employer-Employee Relationship Issue

The AAO will now address the sole basis that the director specified for denying this petition, that is, her determination that the evidence of record does not establish that the petitioner would engage the beneficiary in an employer-employee relationship.

**A. Evidentiary Background**

There are four business entities involved in this petition. These are (1) [REDACTED] (hereinafter referred to as [REDACTED], which is identified as the end-client or business entity generating the work for which the beneficiary would be assigned; (2) [REDACTED] (hereinafter referred to as [REDACTED]; (3) [REDACTED] (hereinafter referred to as [REDACTED] and (4) the petitioner, of course, who would make the beneficiary available for assignment.

According to the evidence of record, [REDACTED] are vendors involved in obtaining the beneficiary's services for [REDACTED]. The record also reflects that the petitioner is to provide the beneficiary to [REDACTED] clients as requested by [REDACTED] pursuant to an "Independent Contractor Agreement" between the petitioner and [REDACTED].

Submissions filed with the Form I-129

When it filed the petition, the petitioner submitted, *inter alia*, a copy of that "Independent Contractor Agreement" document executed between the petitioner and [REDACTED] which was dated February 1, 2013. It called for the petitioner to provide personnel to perform services for [REDACTED] clients. Exhibit A of that petitioner/[REDACTED] agreement document (1) called for the petitioner to provide services to [REDACTED] in [REDACTED] California, (2) provided a start date of February 11, 2013, and (3) provided an estimated project duration of "6 months with possible extension[.]"

The petitioner also submitted a letter from [REDACTED] dated March 25, 2013. In that letter [REDACTED] stated that the beneficiary was currently providing services to [REDACTED]. [REDACTED] stated that it was contracting the services of the beneficiary through [REDACTED] which this [REDACTED] letter referred to as [REDACTED] "business partner. This [REDACTED] letter also stated that "we have [the beneficiary's] contract till August 11, 2013 with possible extensions as [the] end date for his services."

Finally, the petitioner also submitted with the Form I-129 a March 29, 2013 letter from [REDACTED]. In a section of this letter entitled "Project Duration," [REDACTED] stated that "[t]his is an ongoing project and [is] expected to continue till the year end with scope for extension." [REDACTED] also stated that the beneficiary was providing his services to the company "through" [REDACTED].

The AAO notes not only (a) that the March 29, 2013 [REDACTED] letter indicates that the petitioner had no direct contractual relationship with [REDACTED] although [REDACTED] was the end-client for whom the beneficiary would perform services, but also (b) that the record contains no contract documents of any kind that [REDACTED] executed.

Submissions in response to the RFE

The RFE, issued on April 23, 2013, requested, *inter alia*, additional evidence to demonstrate the existence of a valid employer-employee relationship between the petitioner and the beneficiary. Among other items, the petitioner submitted new letters from [REDACTED] dated May 14, 2013 and May 15, 2013, respectively.



In its May 14, 2013 letter, [REDACTED] stated that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that “we have an end date of August 11, 2013[.]”

In similar fashion, [REDACTED] stated in its May 15, 2013 letter that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that “at this time we have an end date of August 11, 2013[.]”

The director denied the petition on May 24, 2013, finding that the evidence of record did not demonstrate the existence of a valid employer-employee relationship between the petitioner and the beneficiary. In pertinent part, the director stated the following:

You submitted two letters from the vendor: [REDACTED] [REDACTED] dated May 2013 stating that the purchase order’s end date is August 11, 2013. However, this date is before the requested validity date which is October 1, 2013. . . .<sup>4</sup>

We observe again that up to this point the record of proceeding included no contractual document from [REDACTED], the entity which would generate the beneficiary’s work and pay for it.

Submissions on Appeal from [REDACTED]

On appeal, the petitioner submits new letters from [REDACTED]

The submissions on appeal include a June 17, 2013 letter from a person signing as Sourcing Manager at [REDACTED]. The letter states, in part, that “[the beneficiary’s] services have been arranged through our contractual agreements with [REDACTED].”

However, the record of proceeding does not contain a copy of any of those contractual agreements. The absence of complete copies of those referenced agreements – and particularly those between [REDACTED] – leave the record barren of contractual evidence of whatever actual specifications, terms, and conditions would govern the beneficiary’s work – including who would most directly and most substantially determine, direct, and manage the beneficiary and his work on a day-to-day basis. Further, the AAO also finds that the petitioner has not submitted into the record any other documents from [REDACTED] in which an authorized representative, who establishes the basis of his or her knowledge of the contracts involved, describes the substantive content of clauses relevant to such employer-employee-related issues as the exercise control of the beneficiary’s day-to-day work, the latitude of end-client to determine who would be assigned to it and for how long and under what conditions, the terms and conditions of such assignment, and the extent – if any – of the petitioner’s participation in determining what the beneficiary would on a day-to-day basis once assigned to [REDACTED].

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<sup>4</sup> As noted above, the petitioner proposed employing the beneficiary as a computer programmer from October 1, 2013 through September 13, 2016.

The AAO notes again that the record does include a copy of that single “Independent Contractor Agreement” document which appears to have been signed by the same [REDACTED] representative that signed the just-mentioned June 17, 2013 letter from [REDACTED]. That contractual document, signed on February 1, 2013, was entered by [REDACTED] and by the petitioner. We note that Exhibit A (Duties, Specifications, and Compensation) of that document includes a provision in section A, Duties, which states that the petitioner, as contractor,

will perform the services . . . as directed by client representative on day to day basis in the area of Business Intelligence/Reporting in Oracle BI/OBIEE functions, RPD etc.

We find that the above contractual term is material to the employer-employee issue, because it is a binding contractual acknowledgement that tends to indicate that primary and decisive control over the beneficiary and the substantive requirements of the beneficiary’s work on a day-to-day basis resides not with the petitioner, or any of its personnel, but with the “client representative,” whoever he or she may be (i.e., a representative of [REDACTED]).

At section G of Exhibit A of this Independent Contractor Agreement, we find another indication of substantial control over the beneficiary’s work, namely, the power to evaluate the quality and efficiency of the beneficiary’s work and ultimately whether the petitioner will receive payment for his efforts. Per section G of Exhibit A, the petitioner is to be compensated only for invoices accompanied by “client approved timesheet for the number of hours of services provided to client.” This indicates that [REDACTED] has ultimate evaluative and decisional authority as to whether the beneficiary’s work on assignment to [REDACTED] for any given pay period would merit payment.

Next, we note that [REDACTED] submission on appeal is a June 17, 2013 letter from a person signing as [REDACTED] General Manager. In like manner as the June 17, 2013 letter from the [REDACTED] Sourcing Manager discussed above, this [REDACTED] letter states that “[the beneficiary’s services for [REDACTED] have been arranged through valid contracts through [REDACTED] and [REDACTED].” We note, however, that the letter’s author does not establish either the basis or the extent of her knowledge of any contracts between [REDACTED]. More importantly, though, neither [REDACTED] provide copies of any contractual documents to which [REDACTED] is a signatory. Additionally, neither [REDACTED] nor any other source has provided a copy of whatever contractual documents between [REDACTED] pertain to the work that the beneficiary is to perform if this petition were approved.

While the evidence of record indicates that the petitioner will regularly evaluate the beneficiary’s performance for the end-client [REDACTED] as part of the petitioner’s performance-evaluation procedures of persons that it assigns, the evidence of record does not establish that the petitioner – which, by the way, is located in New Jersey – has assigned any supervisor to [REDACTED] California location where the beneficiary would work. As earlier noted, the record reflects that beneficiary would be assigned to [REDACTED] California.



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When it filed the petition, the petitioner submitted, *inter alia*, an Independent Contractor Agreement executed between the petitioner and [REDACTED] dated February 1, 2013, which called for the petitioner to provide personnel to perform services for [REDACTED] clients. Exhibit A of that document called for the petitioner to provide services to [REDACTED] California, provided a

start date of February 11, 2013, and provided an estimated project duration of “6 months with possible extension[.]”

The petitioner also submitted a letter from [REDACTED] dated March 25, 2013. In that letter [REDACTED] stated that the beneficiary was currently providing services to [REDACTED] [REDACTED] stated that it was contracting the services of the beneficiary through its business partner, a company called [REDACTED] [REDACTED] also stated that “we have [the beneficiary’s] contract till August 11, 2013 with possible extensions as [the] end date for his services.”

Finally, the petitioner submitted a March 29, 2013 letter from [REDACTED] In a section of this letter entitled “Project Duration,” [REDACTED] stated that “[t]his is an ongoing project and [is] expected to continue till the year end with scope for extension.” [REDACTED] also stated that the beneficiary was providing his services to the company “through” [REDACTED]

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In its May 14, 2013 letter, [REDACTED] stated that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that “we have an end date of August 11, 2013[.]” In similar fashion, [REDACTED] stated in its May 15, 2013 letter that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that “at this time we have an end date of August 11, 2013[.]”

The director denied the petition on May 24, 2013, finding that the evidence of record did not demonstrate the existence of a valid employer-employee relationship between the petitioner and the beneficiary. In pertinent part, the director stated the following:

You submitted two letters from the vendor: [REDACTED] [REDACTED] dated May 2013 stating that the purchase order’s end date is August 11, 2013. However, this date is before the requested validity date which is October 1, 2013. . . .<sup>5</sup>

On appeal, the petitioner submits new letters from [REDACTED]

In its June 17, 2013 letter, [REDACTED] states that the [REDACTED] project “is expected to be a long term project with a high likelihood of multi-year extensions.” [REDACTED] made a similar assertion in its

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<sup>5</sup> As noted above, the petitioner proposed employing the beneficiary as a computer programmer from October 1, 2013 through September 13, 2016.



June 17, 2013 letter, stating that the [REDACTED] project “is long term in duration and [REDACTED] expects that current contractual agreements will be extended.” Finally, [REDACTED] states in its June 18, 2013 letter that “[t]his is expected to be a long term project, with multiple extensions.”

## **B. Law, Interpretations, and Analysis**

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the petitioner and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.

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) . . . .

“United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

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

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application (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 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. at 440 (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>6</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.

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<sup>6</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).

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).



*Cf. Darden*, 503 U.S. at 318-319.<sup>7</sup>

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

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,

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<sup>7</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>8</sup> 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).

regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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

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

Applying the *Darden* and *Clackamas* tests to this matter, the AAO finds that 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 evidence of record, therefore, does not demonstrate the requisite employer-employee relationship between the petitioner and the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, 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 petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter, particularly in a situation, such as exists here, where the petitioner would be providing the beneficiary to one of its clients. 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)).

As will now be discussed, based on the tests outlined above, the evidence in the record of proceeding has not established that the petitioner or any of its clients 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 petition will be denied and the appeal dismissed on this basis.



As will now be discussed, the record contains some indicia both for and against the proposition that the petitioner has established the requisite employer-employee relationship within the context of the analytical framework that we reviewed above. Ultimately, we find that the evidence of record is not sufficient for us to find that it is more likely than not that the petitioner meets this requirement.

The AAO considers the following factors as somewhat favorable to the claim of the requisite employer-employee relationship:

1. It appears that the petitioner will hire, pay, and have the ability to fire the beneficiary. However, we must note that the petition is premised upon only one assignment – the only one addressed in the petition – that is, the assignment to [REDACTED]. In this regard, we note again that few of the related contractual terms are presented in the proceeding, but that the totality of the evidence indicates that the end-client would retain the power to at least control the extent to which the petitioner would be compensated for the beneficiary's work, at least to the extent that the end-client would not have to pay for work that does not comport to its requirements. Also, based upon the evidence of record, without the end-client's use of the beneficiary, the basis for H-1B employment under this petition would evaporate, for the petition did not specify and present substantive evidence regarding any other particular work for the beneficiary.
2. It appears that the petitioner would be responsible to pay the beneficiary, provide any benefits and insurance, and shoulder whatever taxes would be required due to the beneficiary's being carried in the petitioner's payroll.
3. It is also likely that the petitioner would claim the beneficiary for tax purposes.
4. The petitioner will provide regular, periodic performance evaluations and reviews. However, the totality of the related evidence indicates that such evaluations and reviews are not continuous or contemporaneous with the beneficiary's day-to-day performance, and that they are conducted at a site that is remote from the beneficiary's day-to-day work location.

The AAO will now note numerous aspects of the evidence of record that we regard as factors weighing against a favorable determination on the petitioner's claim that it satisfies the employer-employee requirement. In this regard, we find that the evidence of record:

1. Indicates that the beneficiary would be assigned to a location (in California) that is distant from the petitioner's (which is in California).
2. Does not indicate that the petitioner has placed any supervisory person at the beneficiary's work site.
3. Indicates that the petitioner's management and evaluation actions regarding the beneficiary's work (a) are not provided at the workplace, and (b) are neither continuous



nor based upon daily or other regular observation of the beneficiary by the petitioner in the regular course of the beneficiary's work for [REDACTED]

4. Does not indicate that the petitioner plays any substantial role in determining the particular duties and tasks that the beneficiary would perform in the day-to-day work that it would perform for [REDACTED]. In this regard, we have considered the letter-input from the firms involved in the beneficiary's assignment as a computer programmer, but we find that their assertions about the petitioner's control over the beneficiary and his work do not specifically address or relate who would determine the particular, daily scope of the beneficiary's computer-programmer work at [REDACTED].
5. Contains documentary evidence indicating that the day-to-day control of the beneficiary's work would reside in the client's representative - and not in the petitioner. That evidence resides in (1) the aforementioned statement of the role of the "client's representative" at Exhibit A of the UP/petitioner Independent Contractor Agreement, and (2) at section G of that same Exhibit A, the indication that the petitioner would only be paid for such work as the client (Live Nation) determined to be satisfactory by endorsing a timesheet for such work.
6. Nowhere indicates that the work to which the beneficiary would be assigned would require the petitioner to provide its own proprietary information or technology.
7. Provides no indication that the end-client requires, or for that matter, even allows, the use of that petitioner-issued laptop computer upon which the petitioner focuses as proof of its supplying instrumentalities for the beneficiary's use on the job.
8. By virtue of (a) the computer application and programs mentioned in the various descriptions of the beneficiary's duties, (b) the fact that the beneficiary's computer programming duties inherently require *access to and use of* the end-client's IT instrumentalities (such as [REDACTED] own IT systems, computer programs, and software applications) indicates that [REDACTED] - and not the petitioner - is the supplier of the necessary means and instrumentalities without which the beneficiary could not perform the assigned duties. (And we again note that there is no evidence that the petitioner-supplied laptop is even needed for the beneficiary's work.)
9. The beneficiary would not be used to produce an end-product for the petitioner's its own use. Rather, the totality of the evidence indicates that whatever might be produced by the beneficiary is solely for the end-client [REDACTED] use and benefit and must conform to [REDACTED] requirements - not the petitioner's.

We will not speculate as to the full constellation of material terms and conditions that the key engines of the beneficiary's work - that is, the relevant contracts, work orders, amendments, etc. - may have imposed. However, we do find (a) that [REDACTED] petitioner Independent Contractor Agreement is the only contract submitted into the record; (b) and that there is no other probative evidence in the record that provides specific information with regard to the actual supervisory and management

framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED]. Based upon this fact and upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, the AAO concludes that the evidence of record is inconclusive on the issue of whether it is more likely than not that the petitioner and the beneficiary's business relationship would satisfy the requisite employer-employee relationship in the context of the work to be performed if this petition were approved. We reach this conclusion based upon the application of the above-discussed common law principles to the totality of the evidence of record. As it is the petitioner's burden to establish that such employer-employee relationship exists, the petition must be denied.

It should be noted that we fully considered all of the submissions from the entities involved, including the letters submitted by representatives of [REDACTED]. We find, however, that the evidentiary value of those letters is greatly diminished because they do not remedy the record's lack of detailed factual information regarding the particular terms and conditions in the pertinent contractual documents executed by the business entities involved that would determine such material factors as, for example: (1) the day-to-day supervisory chain under which the beneficiary would work; (2) the particular work-assigning, supervising, and performance-evaluating powers that the particular supervisors and their employing entities would have over the beneficiary; (3) the roles, if any, [REDACTED] would have with regard to specifying day-to-day, and evaluating day-to-day, the particular work that the beneficiary would perform during his assignment at [REDACTED]; (4) the powers that [REDACTED] would have over determining whether the beneficiary's employment at [REDACTED] should continue and for how long; (5) whether [REDACTED] possessed the right to terminate the beneficiary's assignment; and (6) what restrictions, if any, were placed upon the petitioner's ability to reassign the beneficiary away from [REDACTED] during the period requested in the petition. We note the statement in a [REDACTED] letter that "in the performance of his duties" the beneficiary would be "supervised and controlled" by the petitioner's Mr. [REDACTED] – but the area code of the associated phone number does not indicate that Mr. [REDACTED] would be located at or near the beneficiary's work.

We also note the letters' suggestions or statements that the petitioner would solely supervise the beneficiary is undercut by the aforementioned clause in the [REDACTED] petitioner contract about the "clients representative's" control over the day-to-day work to be performed. Here are our comments from earlier in this decision:

The AAO notes again that the record does include a copy of that single "Independent Contractor Agreement" document which appears to have been signed by the same [REDACTED] representative that signed the just-mentioned June 17, 2013 letter from [REDACTED]. That contractual document, signed on February 1, 2013, was entered by [REDACTED] and by the petitioner. We note that Exhibit A (Duties, Specifications, and Compensation) of that document includes a provision in section A, Duties, which states that the petitioner, as contractor,

will perform the services . . . as directed by client representative on day to day basis in the area of Business Intelligence/Reporting in Oracle BI/OBIEE functions, RPD etc.



We find that the above contractual term is material to the employer-employee issue, because it is a binding contractual acknowledgement that tends to indicate that primary and decisive control over the beneficiary and the substantive requirements of the beneficiary's work on a day-to-day basis resides not with the petitioner, or any of its personnel, but with the "client representative," whoever he or she may be (i.e., a representative of [REDACTED])

Additionally, the AAO finds that the wording of the letters submitted from the various business entities are sufficiently similar in the language *in material sections* to strongly suggest that the ultimate source of those statements may not have been the letter's signatory but rather a person from one of the other entities that also submitted letters. This reasonable concern impacts negatively on the weight to be accorded those particular statements. In particular, we are concerned with what we italicized in the following statement in the June 18, 2013 [REDACTED] letter signed by [REDACTED] *Human Resources Systems*" which is substantially the same as paragraphs in [REDACTED] June 17, 2013 letter and in [REDACTED] letter of the same date:

At all times during the provision of services on this project, [the beneficiary] will be an employee of [the petitioner]. [REDACTED] does not have the authority to sign him to any other work location. [The beneficiary's ] employer [*the petitioner*] *will have the sole authority to control and supervise his work*, and will be responsible for payment of salary, administration of benefits, and withholding of taxes on his behalf.

Further, the AAO agrees with the director that the petitioner has not established the duration of the relationship between the parties. Again, Exhibit A of the Independent Contractor Agreement executed between the petitioner and [REDACTED] provided a start date of February 11, 2013, and provided an estimated project duration of "6 months with *possible* extension[.]" In its March 25, 2013 letter, [REDACTED] stated that "we have [the beneficiary's] contract till August 11, 2013 with *possible* extensions as [the] end date for his services." In its March 29, 2013 letter, [REDACTED] stated that "[t]his is an ongoing project and [is] expected to continue till the year end with *scope* for extension." In its May 14, 2013 letter, [REDACTED] stated that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that "we have an end date of August 11, 2013 with *possible* extensions[.]" [REDACTED] stated in its May 15, 2013 letter that the beneficiary was providing services to [REDACTED] that it had contracted his services through [REDACTED] and that "at this time we have an end date of August 11, 2013 with *possible* extensions[.]" (All emphases added.) However, "possible" extensions are not synonymous with definitive, non-speculative employment for the beneficiary.

Again, the employment start-date requested in this petition was October 1, 2013, and the evidence of record does not establish that at the time of the petition's filing the petitioner had secured definite, non-speculative work for the beneficiary that extended beyond October 1, 2013, let alone work for the entire period of requested 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. 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 for the duration of the period requested.<sup>9</sup>

## V. Specialty Occupation

Next, the AAO will generally discuss its supplemental determination that, as currently constituted, the evidence of record does not demonstrate that the proffered position is a specialty occupation. Thus, even if the AAO were to find that the evidence of record demonstrated that the petitioner would engage the beneficiary in an employer-employee relationship, which it does not, the record's failure to establish the proffered position as a specialty occupation would still preclude approval of the proffered position.

Also, for the purposes of this discussion and for the sake of argument the AAO will assume that the documentary evidence that had been submitted into the record is sufficient to establish that the beneficiary's work performed for [REDACTED] would qualify the proffered position as falling within the Computer Programmer occupational category (as asserted in the Form I-129 and by the Labor Condition Application that the petitioner submitted to support the petition).

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

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<sup>9</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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 (Jun. 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).



- (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid

this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the instant petition.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>10</sup>

As noted, the LCA submitted in support of this petition was certified for a job offer falling within the "Computer Programmers" occupational category, and the petitioner cites to the *Handbook's*

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<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.



entry for that occupational category. The AAO agrees that the majority of the duties proposed for the beneficiary fall within this occupational category.

In relevant part, the *Handbook* summarizes the duties typically performed by computer programmers as follows:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

### Duties

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Jan. 9, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Jan. 9, 2014).

As the *Handbook* specifically states that an associate's degree is adequate preparation for some positions, its findings do not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into this occupation. By the same token, the pertinent information in the *Handbook* indicates that a position's inclusion within the Computer Programmer's occupational group is not in itself sufficient to establish this particular position as one for which minimum requirement for entry into the particular position that is the subject of the instant petition.

Next, we also find that the alternative authoritative source cited by the petitioner – DOL's Occupational Information Network (O\*NET OnLine) – also does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A). O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O\*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine excerpt cited by counsel is of little evidentiary value to this issue.

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." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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 and of 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."

In addition to the fact that the record contains no information from an authoritative source establishing that performance of the duties of the proffered position requires a bachelor's degree in a specific specialty, or the equivalent, the petitioner's own statements establish further that such is not the case. As noted above, the petitioner stated in its March 28, 2013 letter that the duties of the proffered position require "a Bachelor's degree in Math, or Computer Science, or Engineering, or *Business*, or any related field." (Emphasis added.)

However, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>11</sup> Accordingly, such an assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Finally, the AAO notes that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>12</sup>

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<sup>11</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

*Id.*

<sup>12</sup> The *Prevailing Wage Determination Policy Guidance* (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) (last visited Jan. 9, 2014)) issued by DOL states the following with regard to Level I wage rates:

In conclusion, as the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds 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 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)).

As already discussed, the evidence of record has not established that the petitioner's proffered position is one for which the *Handbook* reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating 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. Nor is there any other evidence to establish

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**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 [emphasis in original].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring 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.



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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the evidence of record 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."

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform its duties. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty-descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Computer Programmers" occupational category, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The statements of record with regard to the claimed complex nature of the proffered position are acknowledged. However, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. The AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. By submission of an LCA with that wage rate, the petitioner basically attests that it believes that the beneficiary would only be required to have a basic understanding of the occupation. Moreover, that wage rate presents the position as one where the beneficiary would perform routine tasks requiring limited, if any, exercise of independent judgment; the beneficiary's work would be closely supervised and monitored; and the beneficiary would receive specific instructions on required tasks and expected results; and the beneficiary's work would be reviewed for accuracy.

The evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>13</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree in a specific specialty or its equivalent.

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 the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 therefore 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 at 387. In this pursuit, the critical element is not the title

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<sup>13</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.



of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent 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 proposed 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 its May 20, 2013 letter the petitioner claimed that it employs 69 individuals in positions similar to the one proffered here. It claimed further that of those 69 individuals, all possess at minimum a bachelor's degree and 39 possess a master's degree. However, the record contains no evidence in support of that assertion, as the list of names the petitioner submits represents a claim made by the petitioner rather than evidence to support that claim. Again, simply 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.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entries for positions falling within the "Computer Programmers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required to perform the duties of such positions (to the contrary, it indicates precisely the opposite). With regard to the specific duties of the position proffered here, the AAO finds that the record of proceeding lacks evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Finally, the AAO finds that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the beneficiary effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

**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 [emphasis in original].

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.



Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

*Id.*

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission, the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

## **VI. Prior H-1B Approvals**

Finally, the AAO turns to the following statement made by the petitioner in its March 28, 2013 letter:

We further submit that we have obtained approvals for similar positions in the past.

Copies of these allegedly approved petitions, however, were not included in the record. If a

petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. § 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the allegedly approved petitions cited by counsel.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* § 291 of the Act, 8 U.S.C. § 1361.



## VII. Conclusion

As set forth above, the AAO agrees with the director's finding that the evidence of record fails to demonstrate that the petitioner would engage the beneficiary in an employer-employee relationship. Beyond the decision of the director, the AAO finds that the evidence of record also fails to demonstrate that the proffered position is a specialty occupation.

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

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. The petition is denied.