



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 21 2014 OFFICE: VERMONT SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a healthcare staffing and placement company established in 2010. In order to employ the beneficiary in what it designates as a clinical coordinator position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

Upon review of the documentation, the AAO found the evidence of record insufficient to establish eligibility for the benefit sought and issued a request for evidence (RFE) on December 17, 2013. The petitioner responded to the AAO's RFE on January 13, 2014 with a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on June 28, 2012, the petitioner indicates that it is seeking the beneficiary's services as a clinical coordinator on a full-time basis at the rate of pay of \$40,000 per year. In addition, the petitioner indicates that the beneficiary will work at [REDACTED]

In the August 7, 2012 letter of support, the petitioner claims that the beneficiary will serve "as an H-1B nonimmigrant of distinguished merit and ability."¹ Further, the petitioner claims that "the beneficiary

¹ The petitioner states that the beneficiary will serve "as a person of distinguished merit and ability." However, to clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was

will work at the Company's client facility, [REDACTED]

[REDACTED] In addition, the petitioner states that it requires the services of a clinical coordinator to conduct day-to-day management and support of a clinical team of field staff. The petitioner continues by stating that the beneficiary will be responsible for the following duties:

As a Clinical Coordinator, [the beneficiary's] job duties will include researching clinical medical care programs, designing new clinical care programs, establishing uniform guidelines for all clinical practitioners, implementing clinical medical care plans, managing clinical programs and personnel, observing clinical medical practices, and modifying clinical programs, as required. In the proffered position, [the beneficiary] will be responsible for the day-to-day management and support of a clinical team of field staff, with an emphasis on the overall coordination of services utilizing and maintaining the interdisciplinary team (IDT) approach. The IDT approach uses an interdisciplinary team consisting of the patient and family, plus physicians, therapists, registered nurses and nurse care managers, possessing expertise in pain and symptom management, and social workers and psychosocial counselors proficient in bio-psychosocial care. The team collectively is responsible for coordinating and managing care across all settings and providing assessment, evaluation, planning, care delivery, follow-up, monitoring, and continuous reassessment of care.

[The beneficiary] will work closely with various medical personnel to implement clinical medical practices, ensure the coordination of clinical care, and implement quality assurance standards and programs. In this role, [the beneficiary] will not directly supervise employees of the Care Center. Rather, she will coordinate the work of medical personnel to ensure a uniformly high level of medical care to be provided by the Care Center. [The beneficiary's] role involves establishing uniform clinical programs for implementation throughout the Care Center. She will analyze, plan, design, and devise clinical programs and best practices procedures. Additionally, she will mentor clinical programs and ensure that clinical care is provided on a uniform basis at a high-level of quality clinical patient care. [The beneficiary] will implement clinical medical practices, ensure the coordination of clinical care, and implement quality assurance standards and programs. In this position, she will manage the delivery of healthcare services of the Care Center.

The clinical teams of the Care Center that will be coordinated by [the beneficiary] include nurse case managers, nurses, psychosocial counselors, medical technologists, and other medical professionals delivering healthcare services to patients and families. The Clinical Coordinator's general responsibilities will include assigning field staff to new patients at the beginning of each day, and coordinating the day-to-day activities by managing contracts from staff regarding such issues as changes in level of care,

enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

prescriptions, or transfers. [The beneficiary] will collaborate with case manager[s] and physicians to coordinate the delivery of quality patient care, manage clinical operations and assist in the hiring and training of clinical staff. [The beneficiary] also will be responsible for notifying supervising physicians and other team members when patients and/or families experience significant changes requiring a modification to the plan of care and assuring that all changes are communicated to appropriate departments for continuity of quality patient care at the end of each day. [The beneficiary] will confer with physicians and nurses with regard to laboratory, radiology and other test results and monitor and track patient care through treatment to ensure quality care is administered and responds to medical issues and/or concerns. In addition, she will be in charge of evaluating the effectiveness of care and addressing any issues that affect the desired medical outcomes. The Clinical Coordinator, skilled in nursing and medical practices, will instruct and mentor through demonstrated clinical competence.

The candidate will also be responsible for assisting in the management of the planning, development, implementation, evaluation, and improvement of health programs of the Care Center. These responsibilities are focused in several core areas including education, health care delivery, patient care management, and workflow management. As Clinical Coordinator, [the beneficiary's] job duties will encompass identifying health education strategies, planning and directing member education, designing and implementing weight management programs, and directing the design and implementation of multi-disciplinary and health education programs to improve accessibility, enhance member satisfaction, improve health care outcomes, and control costs. Further, [the beneficiary] will manage programs to educate patients and their family members regarding disease processes, treatment modalities, medications, home care, and follow-up recommendations, and will supervise documentation and reporting, developing and implementing plans for meeting regulatory requirements and clinical and budgetary management functions. [The beneficiary] will concentrate her efforts on researching, identifying, and implementing best healthcare practices; developing systems to identify, achieve and manage healthcare quality and performance improvements; and evaluating programs.

[The beneficiary] will serve as a primary resource for clinical staff; direct quality improvement; perform discharge planning; apply utilization acuity criteria to monitor the appropriateness of admissions and continued stays; apply quality care criteria to ensure an appropriate level of care for inpatient status and screening for access to emergency rooms and medical clinics; assess payor [sic] criteria and issues with clinical staff; complete clinical reviews for patients managed by the Care Center; monitor patient progress and intervene to ensure that plans of care and services provided are high quality and cost effective. In addition, [the beneficiary's] job duties will consist of identifying and resolving delays and obstacles to the discharge of patients; managing discharge planning; and coordinating with healthcare team members to determine if patient education is complete prior to discharge. [The beneficiary's] job duties will consist of providing training to nursing personnel as needed through identified performance improvement studies, management requests, staff requests and new

equipment recommendations; and providing oversight, training, guidance, and direction to clinicians related to clinical skills.

Further, the petitioner states, "It is essential that the candidate for the position of Clinical Coordinator have a bachelor's degree in healthcare management, healthcare administration, or a related field, or the equivalent thereof."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from [REDACTED]. The evaluation states that the beneficiary's foreign education is equivalent to a "Bachelor of Science Degree, with a dual major in Healthcare Administration and Nursing, from an accredited college or university in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Occupational Health and Safety Specialists" – SOC (ONET/OES Code) 29-9011, at a Level I (entry level) wage. The beneficiary's place of employment is listed as [REDACTED].

Furthermore, in support of the petition, the petitioner submitted: (1) a Facility Staffing Agreement between the petitioner and [REDACTED], executed on February 22, 2012; (2) a job order, entered into on March 30, 2012; (3) an Employment Agreement between the petitioner and the beneficiary, executed on May 24, 2012; and (4) the beneficiary's pay statements from [REDACTED].

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 29, 2013.³ The director outlined the specific evidence to be submitted.

On April 18, 2013, the petitioner responded to the RFE. In a letter dated April 15, 2013, the petitioner provided additional information, including a revised description of the proffered position and the percentage of time the beneficiary would spend performing the duties of the position, as follows:

15%	research and analysis conduct research into best methods of hemodialysis and peritoneal dialysis delivery; research procedures; research requirements; analyze dialysis needs; analyze results of
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² The pay statements indicate that the beneficiary was paid a rate of \$29.00 per hour. For the instant H-1B petition, the petitioner indicated that it will pay the beneficiary \$40,000 per year (\$19.23 per hour). Thus, the beneficiary's salary will decrease by approximately \$9.77 per hour in the proffered position.

³ As previously mentioned, the petitioner stated that it is a healthcare staffing and placement company and that the beneficiary will be employed off-site at a client's facility. Although the petitioner provided a description of the duties of the proffered position, the documentation does not establish the source of the claimed duties and functions that were submitted by the petitioner. For example, there is no evidence that the client prepared, reviewed or concurred with the accuracy of the job description and requirements of the proffered position.

treatment and staff performance; determine optimal means of assisting delivery of renal-dialysis treatment at the [REDACTED] analyze procedures implemented by the [REDACTED] study existing policies and procedures to implement healthcare improvements; research, identify, and implement best healthcare practices; develop systems to identify, achieve and manage healthcare quality and performance improvements and evaluate programs; prepare statistical studies of healthcare quality services; prepare analytical reports on medical services of the [REDACTED]

30%

devise and implement plans for delivery and management of health care services

plan delivery and management of the [REDACTED] dialysis services; create plans for delivery of better services; determine the most suitable systems for providing the service; implement dialysis treatment service plans; assign new patients to field staff; coordinate day-to-day activities of dialysis treatment services including changes in type of treatment and level of care or transfers; notify physicians/team members of changes in plans of care; identify health education strategies; plan and direct staff and patient education; devise and implement clinical care and healthcare service plans and quality improvement plans; direct the design and implementation of multi-disciplinary and health education programs to improve accessibility; enhance quality satisfaction; interview personnel and patients to evaluate effectiveness of quality assurance programs; suggest improvements to dialysis outcomes; control costs; devise improvements to healthcare service delivery; revise healthcare standards and procedures; provide guidance on development, performance, and productivity issues[.]

25%

coordinate implementation and manage clinical healthcare programs

plan, develop, implement, evaluate health programs including staff education, nursing placement services; integrate services and programs with strategic organizational goals and objectives; direct health education programs/services projects; ensure programs are carried out effectively; identify health education strategies, interventions and resource allocation; ensure active dialogue between physicians and staff to facilitate plans and programs; interview personnel to evaluate effectiveness of health programs and suggest improvements; revise health program policies and procedures; ensure coordination of clinical care; manage delivery of healthcare services and quality assurance, and ; coordinate and ensure successful implementation of dietary and nutrition plans and programs designed by dietitians to help kidney failure patients.

10%

health care quality assurance policies and procedures review quality assurance standards; establish standards for the delivery and management of health care services; interview personnel to evaluate the

effectiveness of quality assurance programs; review and determine needs of patients; identify and resolve delays and obstacles to dialysis treatment and the discharge of patients; manage discharge planning; coordinate with healthcare team members to determine if patient education is complete prior to discharge; write quality assurance policies and procedures; write reports analyzing performance and quality assurance issues[.]

10%

education and training determine personnel requirements; hire and train personnel; implement personnel training programs; train staff in health care quality assurance issues and procedures; conduct programs geared toward newer staff members and advanced classes in healthcare matters; attend seminars and conferences to facilitate the improvement of health programs; provide training to nursing personnel as needed through identified performance improvement studies, management requests, staff requests and new equipment recommendations; provide oversight, training, guidance, and direction to clinicians related to clinical skills; manage programs to provide education to patients and their family members regarding kidney disease processes, treatment modalities, medications home care, dietary and nutritional requirements, and follow-up recommendations[.]

10%

treatment review and analysis review and evaluate medical records, applying quality assurance criteria; select specific topics for review, such as problem procedures, drugs, high volume cases, high risk cases, or other factors; compile statistical data and write narrative reports summarizing quality assurance findings; review patient records, applying utilization review criteria, to determine need for further treatment; assist medical staff to design new healthcare programs and amend existing programs[.]

In response to the RFE, the petitioner also submitted: (1) a copy of the petitioner's Form 1065, U.S. Return of Partnership Income for 2012; (2) photos of the petitioner's offices; (3) a copy of the petitioner's office lease agreement; (4) an article entitled "I-Team: Patients at Some Dialysis Centers Get Fewer Kidney Transplants," which mentions the petitioner's client, [REDACTED]; (5) printouts from the Internet confirming [REDACTED] business name and address; (6) a letter from [REDACTED]; (7) printouts from the Foreign Labor Certification Data Center; (8) job vacancy announcements; (9) an H-1B approval notice for [REDACTED], along with a copy of her foreign academic credentials and pay statements; (10) an H-1B approval notice for [REDACTED] along with a copy of his foreign academic credentials and pay statements; and (11) the petitioner's internal posting for a clinical coordinator position.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish

how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on June 13, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

II. STANDARD OF PROOF

With the appeal, counsel submitted a brief. In the brief, counsel states that the "preponderance of the evidence" standard is applicable in this matter, and that "the Petitioner has provided sufficient evidence to support that the offered position of Clinical Coordinator is a specialty occupation."

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part 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" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination 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.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) examines 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. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by

regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

A. Employer-Employee Relationship with the Beneficiary

The AAO reviewed the record of proceeding in its entirety. As a preliminary matter, the AAO will discuss an issue, beyond the decision of the director that precludes the approval of the petition.⁴ More specifically, the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

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

⁴ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

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).

States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

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

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

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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

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

With the initial petition, the petitioner provided an Employment Agreement for the beneficiary that was executed on May 24, 2012. The AAO notes that it fails to adequately establish several critical aspects of the beneficiary's employment. For example, the Employment Agreement does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. Further, the Employment Agreement states that the beneficiary will be eligible for company fringe benefits. However, a substantive determination cannot be inferred regarding these "benefits" as the document does not provide any further details regarding what these benefits entail. Moreover, the petitioner did not provide the specific eligibility requirements for the benefits.

Additionally, while the Employment Agreement states that the beneficiary will work at [REDACTED] it also indicates that the beneficiary is willing to work pursuant to the applicable laws and regulations in the United States "preferably in the States of New York, New Jersey and Pennsylvania where [he] will be working." Thus, it appears that the beneficiary may work in a

location other than the work site designated on the Form I-129 and LCA.⁸ While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

When making a determination of whether the petitioner has established that it will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide information on this issue.

Additionally, the AAO considers information regarding who will provide the instrumentalities and tools required to perform the duties of the position. In the instant case, the Facility Staffing Agreement between the petitioner and [REDACTED] states that "[a]ll property and supplies used by the professional in the performance of his or her services" will remain the property of [REDACTED]. Thus, it appears that the client will be providing the instrumentalities and tools, rather than the petitioner.

The AAO reviewed the record of proceeding with regard to the parties' discretion over when and how long the beneficiary will work. With regard to the duration of the beneficiary's employment, the Staffing Agreement indicates that the agreement may be terminated with or without cause. Although the Employment Agreement between the petitioner and beneficiary states that the hours of work and shift schedule will be determined by the petitioner, it must be noted that later in the agreement the petitioner states that certain terms and conditions of the employment (such as start and stop times, lunch hours, break time, holidays, vacation scheduling, and similar items) are governed by the client. Thus, it appears that on a day-to-day basis the client primarily has discretion over when and how long the beneficiary will work, rather than the beneficiary or petitioner.

The Staffing Agreement between the petitioner and [REDACTED] indicates that the petitioner is a professional staffing agency. According to the agreement, [REDACTED] will interview or evaluate the skills and background of each healthcare professional prior to employment. Thus, the selection of a candidate is made by [REDACTED] rather than the petitioner. Furthermore, the AAO observes that the job order identifies the beneficiary and the position of clinical coordinator, however, there is no information regarding the duties to be performed.⁹

⁸ In the Form I-129 and LCA, the petitioner states that the beneficiary will be employed off-site at a client's facility, specifically at [REDACTED]. The petitioner does not claim that the beneficiary will be employed at its own business location or at any other work sites.

⁹ With regard to the requirements for the position, the agreement states the following:

[The petitioner] represents and warrants that documentation exists for the professional(s)' qualifications:

1. A minimum of six months of actual clinical experience either in the US or abroad.
2. Holds a current and valid New York state license and permit to work in the Facility.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The petitioner did not provide any information regarding the beneficiary's supervisor (i.e., name, job title, brief description of duties, location, employer). Furthermore, the petitioner has not provided probative evidence with regard to the right to control the manner and means by which the product (or in this case, the service) is accomplished and the assignment of additional projects. Without full disclosure of all of the 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 that the petitioner exercises control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence indicates that [REDACTED] will assign the beneficiary's projects. Moreover, the day-to-day work of the beneficiary appears to be supervised and overseen by [REDACTED] with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary.

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

B. Labor Condition Application – The Required Salary

Beyond the decision of the director, the petition must also be denied due to the failure of the petitioner to establish that it would pay the beneficiary an adequate salary for his work as required under the applicable statutory and regulatory provisions.

More specifically, the AAO finds that the proffered wage of \$40,000 per year for the occupational

3. Completed a satisfactory interview and background check.

Thus, the client does not require that a candidate for the position possess any particular academic credentials. Rather, according to the agreement, the petitioner "represents and warrants that documentation exists" demonstrating that a candidate possesses six months of clinical experience, a license and permit, and completion of a satisfactory interview and background check.

category "Occupational Health and Safety Specialists" at a Level I, is lower than the prevailing wage in the area of intended employment. Specifically, the prevailing wage for "Occupational Health and Safety Specialists," at a Level I, for [REDACTED] was \$48,381 per year when the LCA was submitted to the U.S. Department of Labor (DOL) on **July 30, 2012** and certified on August 3, 2012.¹⁰

The AAO notes that the database the petitioner used to determine the prevailing wage was for 7/2011 – 6/2012 and was no longer valid at the time of filing the LCA. That is, at the time the LCA was filed, the [REDACTED] had already published the prevailing wage database for 7/2012 – 6/2013. Thus, the petitioner should have used the database for 7/2012 – 6/2013, which would have rendered a minimum prevailing wage of at least \$48,381 per year for the occupational category "Occupational Health and Safety Specialists."

In response to the AAO's RFE on this issue, counsel claims that "[t]he offered salary of **\$40,000/year** is above the Level 1 Wage set in the OFLC Online Data Center that was valid at the time the LCA request ([REDACTED]) was accepted, reviewed, and certified by the U.S. Department of Labor." The petitioner submitted printouts from the [REDACTED] – 6/2012 and 7/2012 – 6/2013 for the occupation "Occupational Health and Safety Specialists" for the area of intended employment. However, contrary to the petitioner's claim, the documentation confirms that the petitioner's offered wage was below the prevailing wage in the area of intended employment at the time of filing.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA.¹¹ See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits

¹⁰ It must be noted that the proffered wage of \$40,000 per year was \$8,381 per year below the prevailing wage at that time.

¹¹ The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. See 20 C.F.R. § 655.715.

branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition.¹² See 20 C.F.R. § 655.705(b).

Here, the petitioner has not demonstrated that it would pay the beneficiary an adequate salary for his work, as required under the statutory and regulatory provisions, if the petition were granted. Accordingly, the petition cannot be approved.

IV. REVIEW OF THE DIRECTOR'S DECISION

Specialty Occupation

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

¹² To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and DHS, a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

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

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

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

occupations that Congress contemplated when it created the H-1B visa category.

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

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, the record of proceeding lacks substantive documentation from [REDACTED] regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects.¹³ The record of proceeding does not contain probative documentation on this issue from, or endorsed by, [REDACTED] the company that will actually be utilizing the beneficiary's services (according to the petitioner) that establishes any particular academic requirements for the proffered position.

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

¹³ The Facility Staffing Agreement between the petitioner and [REDACTED] indicates that the proffered position does not have any particular academic requirements. Rather, according to the agreement, the proffered position requires six months of clinical experience, a license and permit, and completion of a satisfactory interview and background check.

Although the record of proceeding lacks documentation establishing the substantive nature of the work to be performed, the AAO will nevertheless continue its discussion with regard to whether the proffered position as described would qualify as a specialty occupation under the applicable statutory and regulatory provisions. The AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁴ As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Occupational Health and Safety Specialists." When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁵ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed

¹⁴ All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

¹⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

for accuracy; and that he would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

The AAO reviewed the chapter of the *Handbook* entitled "Occupational Health and Safety Specialists" but is not persuaded that the duties of the proffered position are encompassed by the duties of this occupational classification. The *Handbook* describes the duties of "Occupational Health and Safety Specialists" in the subsection entitled "What Occupational Health and Safety Specialists Do" and states the following about the duties of this occupation:

Occupational health and safety specialists analyze many types of work environments and work procedures. Specialists inspect workplaces for adherence to regulations on safety, health, and the environment. They also design programs to prevent disease or injury to workers and damage to the environment.

Duties

Occupational health and safety specialists typically do the following:

- Identify hazards in the workplace
- Collect samples of potentially toxic materials for analysis
- Inspect and evaluate workplace environments, equipment, and practices for compliance with corporate and government health and safety standards and regulations
- Design and implement workplace processes and procedures that help protect workers from potentially hazardous work conditions
- Investigate accidents and incidents to identify their causes and to determine how they might be prevented in the future
- Conduct training on a variety of topics such as emergency preparedness

Occupational health and safety specialists examine lighting, equipment, ventilation, and other conditions and materials in the workplace that could affect employee health, safety, comfort, and performance. Specialists seek to increase worker productivity by reducing absenteeism and equipment downtime. They also seek to save money by lowering insurance premiums and workers' compensation payments and by preventing government fines.

Some specialists develop and conduct employee safety and training programs. These programs cover a range of topics, such as how to use safety equipment correctly and how to respond in an emergency.

In addition to protecting workers, specialists also work to prevent harm to property, the environment, and the public by inspecting workplaces for chemical, physical, radiological, and biological hazards. Specialists who work for governments conduct safety inspections and can impose fines.

Occupational health and safety specialists work with engineers and physicians to control or fix potentially hazardous conditions or equipment. They also work closely with occupational health and safety technicians to collect and analyze data in the workplace.

The tasks of occupational health and safety specialists vary by industry, workplace, and types of hazards affecting employees. The following are examples of types of occupational health and safety specialists:

Ergonomists consider the design of industrial, office, and other equipment to maximize workers' comfort, safety, and productivity.

Health physicists work in locations that use radiation and radioactive material. They help to protect people and the environment from hazardous radiation exposure that may be caused by medical treatments or come from nuclear plants, among other sources.

Industrial or occupational hygienists identify workplace health hazards, such as lead, asbestos, noise, pesticides, and communicable diseases.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Occupational Health and Safety Specialists, on the Internet at <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-2> (last visited February 19, 2014).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that occupational health and safety specialists work in the following industries:

Occupational health and safety specialists held about 62,900 jobs in 2012. They work in a variety of settings, such as offices, factories, and mines. Their jobs often involve considerable fieldwork and travel.

About 32 percent of occupational health and safety specialists worked for federal, state, and local governments in 2012. In the federal government, specialists are employed by various agencies, including the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety & Health Administration (OSHA). Most large government agencies employ specialists to protect agency employees. In addition to working for governments, occupational health and safety specialists worked in management, scientific, and technical consulting services; education services; hospitals; and manufacturing.

Occupational health and safety specialists may be exposed to strenuous, dangerous, or stressful conditions. Specialists use gloves, helmets, respirators, and other personal protective and safety equipment to minimize illness and injury.

Handbook, 2014-15 ed., Occupational Health and Safety Specialists, on the Internet at <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-3> (last visited February 19, 2014).

In the Form I-129 petition, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561310.¹⁶ Notably, the U.S. Department of Commerce, Census Bureau website states that "561310 is not a valid 2012 NAICS code."¹⁷ See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 561310, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 19, 2014). The petitioner did not submit documentation from [REDACTED] (the entity where the petitioner claims the beneficiary will actually be employed) regarding its business operation; however, the petitioner provided printouts from the Internet indicating that [REDACTED] provides end-stage renal disease treatment.

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for occupational health and safety specialist positions. The *Handbook* indicates that the academic background for this occupation is in occupational health, safety, or a related scientific or technical field, such as engineering, biology, or chemistry. Although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO notes that the beneficiary does not possess a degree in one of the fields listed in the *Handbook* as typically needed or required for this occupation.¹⁸

¹⁶ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited February 19, 2014).

¹⁷ The NAICS code 56131 is designated for "Employment Placement Agencies and Executive Search Services." The NAICS website describes this industry as follows:

This industry comprises establishments primarily engaged in one of the following: 1) listing employment vacancies and referring or placing applicants for employment; or 2) providing executive search, recruitment, and placement services.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 56131 – Employment Placement Agencies and Executive Search Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 19, 2014).

¹⁸ Within the record of proceeding, the petitioner indicated that a degree in healthcare management, healthcare administration, or a related field is acceptable for the proffered position. Furthermore, the petitioner claims the beneficiary is qualified to serve in the proffered position because his foreign education is equivalent to a degree in healthcare administration and nursing. The narrative of the *Handbook* does not report that a degree in healthcare administration and/or nursing prepares an individual for entry into the occupational category "Occupational Health and Safety Specialists." Rather, the *Handbook* states that a degree in occupational health, safety, engineering, biology, or chemistry are typically needed for this occupational category, and that a degree in industrial hygiene, health physics, or a related subject may be required for some positions. The *Handbook* continues by stating that preparation for this occupation typically includes courses in radiation science,

In the instant case, the petitioner submitted a broad description of the proffered position, but the statements do not include information regarding the day-to-day tasks of the position and do not delineate the actual work that the beneficiary will perform within the client's business operations. Upon review of the record of proceeding and the chapter regarding "Occupational Health and Safety Specialists" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its proffered position has the same or similar duties, tasks, knowledge, work activities, requirements or other attributes that are generally associated with "Occupational Health and Safety Specialists."

For example, the petitioner does not claim that the beneficiary will identify hazards in the workplace. In addition, the petitioner does not claim that the beneficiary will collect samples of potentially toxic materials for analysis. Further, the petitioner does not assert that the beneficiary will inspect and evaluate workplace environments, equipment, and practices for compliance with corporate and government health and safety standards and regulations. The petitioner also does not report that the beneficiary will design and implement workplace processes and procedures that help protect workers from potentially hazardous work conditions. Moreover, the petitioner does not claim that the beneficiary will investigate accidents and incidents to identify their causes and to determine how they might be prevented in the future. The duties of the proffered position do not indicate that the beneficiary will examine lighting, equipment, ventilation, and other conditions and materials in the workplace that could affect employee health, safety, comfort, and performance.

The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may, at best, perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute an occupational health and safety specialist position, and not that they would require the range of specialized knowledge that characterizes this occupational category.¹⁹ As the petitioner has not demonstrated that the proffered position falls under the occupational category of "Occupational Health and Safety Specialists," the AAO will not further address this occupational category as it is not relevant to this proceeding.²⁰

hazardous material management and control, risk communications, and respiratory protection.

¹⁹ DOL provides guidance for selecting the most relevant occupational classification. The "Prevailing Wage Determination Policy Guidance" issued by DOL, states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. . . .

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

²⁰ The Standard Occupational Classification (SOC) System is used by DOL for classifying occupations. Under the SOC system, workers are classified at four levels of aggregation: (1) major group (of which there are 23);

In response to the director's RFE, the petitioner submitted a letter by [REDACTED]. The letter is dated April 9, 2013. In the letter, [REDACTED] claims that the position of clinical coordinator is a specialty occupation, and that it requires at a minimum a "Bachelor's Degree in Healthcare Administration, Healthcare Management, or a related healthcare field."

[REDACTED] provided a summary of her qualifications, including her educational credentials and professional experience. She claims that she is qualified to comment on the position based upon her education (she references a doctorate in healthcare administration and a certificate in information technology) and professional experience. Her resume indicates that she has worked at [REDACTED] since 1996. Upon review of her credentials, it appears that most of [REDACTED] experience has been in the academic setting. [REDACTED] states that she has "professional experience in Healthcare Administration which included working with the Clinical Coordinators, Planning, and Health Management Systems." [REDACTED] does not expand upon this statement. She also states that the letter represents her own view and not that of the university.

Based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that she did not provide sufficient information regarding the basis of her claimed expertise on this particular issue. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of healthcare staffing and placement companies (as designated by the petitioner on the Form I-129) similar to the petitioner for clinical coordinator positions (or parallel positions).

[REDACTED]'s letter and curriculum vitae do not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any studies pertinent to the educational requirements for *clinical coordinators* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific

(2) minor group (of which there are 96); (3) broad occupation (of which there are 449); and (4) detailed occupation (of which there are 821). Occupations are classified based upon work performed, skills, education, training, and credentials.

There are residual categories within the various levels of the system to permit the reporting of occupations not identified at the detailed level. That is, if an occupation is not included as a distinct detailed occupation in the structure, it is classified in the appropriate residual occupation. Residual occupations contain all occupations within a major, minor or broad group that are not classified separately. Thus, for the less populous occupations, residual categories have been created within most levels of the SOC system. Residual categories provide a complete accounting of all workers employed within an establishment and allow aggregation and analysis of occupational employment data at various levels of detail. For instance, a residual category is "Managers, All Other" – SOC Code 11-9199. Approximately 5 percent of all employment falls under categories for which little meaningful information could be developed (i.e., "All Other" residual categories). For additional information regarding the SOC system and residual categories, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., on the Internet at <http://www.bls.gov/home.htm> (last visited February 19, 2014). If the petitioner believed that its proffered position did not fall under an occupational category identified at a distinct detailed level, it should have classified the position under the appropriate residual occupation.

requirements. While [REDACTED] states that the letter represents information to "the best of my knowledge and belief based on research from the National League of Nursing and the American Nurses Association," she fails to provide copies or citations of any research material used. [REDACTED] provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies).

Upon review of the letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description.²¹ Moreover, she does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply lists the tasks in bullet-point fashion with little discussion. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's (or the client's) specific business operations or how the duties of the position would actually be performed in the context of the business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of the client's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that [REDACTED] has visited the place of employment, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] provides general conclusory statements regarding clinical coordinator positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position relative to others within the occupation (as indicated by the wage-level on the LCA). It appears that [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the letter rendered by [REDACTED] is not probative evidence to establish that the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that it is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the

²¹ [REDACTED] states that she "reviewed the duties for the position of Clinical Coordinator." [REDACTED] letter does not indicate who provided the job duties to her.

reasons discussed above, the AAO finds the report as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).²²

The AAO observes that in the April 15, 2013 letter, submitted in response to the RFE, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of clinical coordinator. In response to the RFE, the petitioner submitted copies of two H-1B approval notices as evidence that USCIS has previously approved H-1B cases submitted by the petitioner for the proffered position. However, the petitioner did not submit copies of the petitions and supporting documents. 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. Part 5.

As the record of proceeding does not contain copies of the 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. 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.

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 benefit. 8 U.S.C. § 1361; *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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. Accordingly, the AAO was not required to request and/or obtain a copy of the petitions cited by the petitioner.

Nevertheless, 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. 597. 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 petition, 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).

²² For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding [REDACTED] report into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

The AAO acknowledges that the record of proceeding contains a letter from I [REDACTED]. However, as previously discussed in detail, the AAO finds that the letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In response to the director's RFE, the petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as a healthcare staffing and placement company established in 2010, with 15 employees. The petitioner claims that it has a gross annual income of \$800,000. Although requested in the Form I-129 petition, the petitioner did not state its net annual income.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and

the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the petitioner submitted an advertisement for [REDACTED] "one of the fastest growing providers of scientific and clinical research services in the United States." The job posting indicates that the advertising employer's client is "a large Health Plan." Upon review, the advertising employer does not appear to be similar to the petitioner, and the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Furthermore, the petitioner submitted a job posting placed by [REDACTED] (for a position that appears to be with the Board of County Commissioners for [REDACTED]) and a posting for [REDACTED]. However, for these advertisement, little or no information regarding the employers was provided. Consequently, the record lacks sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it. Again, the petitioner must demonstrate the degree requirement is common to the industry in parallel position among similar organizations.

Additionally, the petitioner has not established that all of the advertisements are for parallel positions. The job postings include positions for a health care policy coordinator, clinical project manager, and quality clinical manager. Notably, the duties of some of the advertised positions are described in brief, general terms. Thus, it is not possible to determine important aspects of jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the documentation does not establish that the duties and responsibilities of these positions are the same or parallel to the proffered position.

Moreover, some of the advertised positions appear to be for more senior positions. For example, the petitioner provided a job posting for a health care policy coordinator position with A [REDACTED] Talent [REDACTED], which requires a degree and "experience in planning or policy development in the health care delivery field with at least two (2) years [of] experience in a management or responsible

administration capacity." The AAO reiterates its earlier comments and findings regarding the implications of the designation of the proffered position in the LCA as a Level I (entry level) position. After reviewing the job postings, the AAO notes that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of all of the advertised positions are parallel to the proffered position.

Furthermore, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted postings in which a general degree is acceptable and/or a degree in a wide variety of disciplines is acceptable. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.²³ Moreover, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).²⁴ Thus, upon review, the advertisements do not indicate that a bachelor's degree

²³ 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.

²⁴ In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they

in a *specific specialty* that is directly related to the duties of the position is required.

The AAO reviewed all of the advertisements submitted in support of the petition.²⁵ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's or client's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

²⁵ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

More specifically, the petitioner did not demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a clinical coordinator position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."²⁶

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at

²⁶ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. USCIS usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

As previously noted, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of clinical coordinator. However, the petitioner did not submit copies of the prior

H-1B petitions and the respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petitions were not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act; see e.g., *Matter of Otiende*, 26 I&N Dec. at 128.

In response to the director's RFE, the petitioner submitted a posting notice regarding an LCA for the position of clinical coordinator ["Notice of Filing of the LCA"]. The "Notice of Filing of the LCA" is a statement to the petitioner's workers that it has a job opportunity available, that a foreign worker may be placed in the position and that interested parties may read the notice and provide comments to DOL. Its primary purpose is not intended to be a form of recruitment. The document, which was posted in connection with the LCA on behalf of the beneficiary, is not sufficient to establish a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

In the April 15, 2013 letter, submitted in response to the RFE, the petitioner states that "the Company has employed several individuals at a time as Clinical Coordinators to handle responsibilities similar to those required in the proffered position." The petitioner further states that "all prior Clinical Coordinators of the Company have possessed at least a bachelor's-level degree in Healthcare Management, Healthcare Administration, or a closely related field." In support of this assertion, the petitioner submitted the foreign academic credentials and pay statements of [REDACTED]

Upon review, the documentation regarding the individuals' foreign academic credentials indicates that they were granted degrees in nursing. Without more, the documentation does not establish that the individuals possess degrees in healthcare management, healthcare administration, or a related field.

Furthermore, the pay statements indicate that [REDACTED] was paid at the rate of \$28.00 per hour, and [REDACTED] was paid at the rate of \$30.00 per hour. The wages are significantly higher than the offered salary to the beneficiary of \$40,000 for full-time employment, which equates to \$19.23 per hour. Based upon the rate of pay, it appears that these individuals are employed in more senior or different positions. The petitioner did not provide the job duties and day-to-day responsibilities for these individuals. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the petitioner has not established that the duties and responsibilities of these individuals are the same or similar to the proffered position.

The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *two individuals* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the documentation regarding these two individuals is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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

The petitioner asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. While the petitioner submitted job descriptions of the proffered position, it must be noted that the petitioner failed to adequately describe the substantive nature of the work that the beneficiary will perform within the client's business operations on a day-to-day basis. Moreover, there is a lack of evidence substantiating the petitioner's assertions. For instance, the record of proceeding lacks probative documentation from the client confirming the duties of the position.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Occupational Health and Safety Specialists." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

V. CONCLUSION AND ORDER

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

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.²⁷ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.

²⁷ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.