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



U.S. Citizenship
and Immigration
Services

DATE: **FEB 21 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). The AAO reviewed the record of proceeding in its entirety and finds that it does not establish eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in software and engineering consulting and extension that was established in 1994.¹ In order to employ the beneficiary on a full-time basis in what it designates as a project engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 2, 2013, 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. Thereafter, the director certified the decision to the AAO for review. In response to the director's certification, counsel for the petitioner submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). Counsel asserts on certification that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; (5) the director's Notice of Certification; and (6) counsel's submission to the AAO. 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's decision that the petitioner failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The decision certified to the AAO will be affirmed, and the petition will be denied.

Furthermore, later in this decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.²

I. Factual and Procedural History

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a

¹ Within the record, the petitioner provided inconsistent information regarding the year that it was established. The petitioner stated (1) on the Form I-129 that it was established in 1994; (2) in the employee handbook that its inception occurred in 2000; (3) on printouts from its website that the company has been in business since 1998; and (4) in a letter dated November 25, 2013 that the company was founded in 1998 and changed its business name in 2007. The petitioner did not further clarify or address this issue.

² The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

project engineer on a full-time basis. In addition, the petitioner indicates that the beneficiary will work at (1) the petitioner's office located at [REDACTED] and (2) off-site at [REDACTED]. The petitioner requests that the beneficiary be granted H-1B classification from October 1, 2013 to August 28, 2016.

Further, in a letter of support dated March 18, 2013, the petitioner provided the following information regarding the duties of the proffered position:

- Responsible for the creation and documentation of modeling plans to engineering team and initiation of new processes and tools[;]
- Lead the creation of full vehicle Finite Element Analysis (FEA) models for safety/crash structures, noise and vibration, Heating Ventilating Air Conditioning (HVAC), exterior aerodynamics, and internal thermal[;]
- Present developed math plan and give input related to math plan to performance integration teams, vehicle and program reviews[;]
- Coordinate cross-functionality for input related to plan development[;]
- Develop filtered parts list for global customers[;]
- Work to develop details of plan with customer depending on their discipline[;]
- Assess and document modeling processes[;]
- Develop standard modeling procedures to enhance model build quality and timing[;]
- Assist with the development of modeling strategies and additional enhancement to the software[;] [and]
- Coordinate and initiate enhancements to the modeling process and development of [t]ools[.]

In the letter of support, the petitioner did not state that the proffered position has any particular academic requirements or any other requirements. Rather, the petitioner claimed that "[t]he beneficiary is a highly trained Project Engineer CAE."³ The petitioner continued by describing the beneficiary's academic credentials and experience. The petitioner did not claim that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge

³ The test to establish a position as a specialty occupation is not the credentials or skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge and attainment of at least a baccalaureate-level degree in a specialized area or its equivalent. See section 214(i)(1)(B) of the Act.

and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act.

The petitioner indicated that the beneficiary was maintaining nonimmigrant status as an F-1 student and was employed by the petitioner pursuant to post-degree optional practical training. The H-1B submission included a copy of the beneficiary's diploma and transcript from the [REDACTED] which indicates that he was awarded a Master of Science in Mechanical Engineering in May 2011. In addition, the petitioner enclosed a copy of the beneficiary's foreign diploma and transcript.

With the H-1B petition, the petitioner submitted the following documents:

- A photocopy of an employment authorization card issued to the beneficiary with validity dates of February 2, 2012 to July 2, 2013.
- 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 "Commercial and Industrial Designers" – SOC (ONET/OES) code 27-1021 at a Level II (qualified) wage level. The beneficiary's places of employment are listed as follows:
 - [REDACTED]
 - [REDACTED]
- An itinerary. The itinerary identifies the beneficiary's job title as a project engineer. The document does not include a start date and the project end-date is designated as "TBD [to be determined]." The beneficiary's places of employment are listed as follows:
 - [REDACTED]
 - [REDACTED]
- A one-page document from the petitioner entitled "A Summary of Our Performance Review Process for All Our W-2 Employees."
- A two-page document entitled "Amendment to Secondary Supplier Agreement." The document is dated March 25, 2008. It is signed by [REDACTED] and the petitioner. The document briefly references a prior agreement "relating to the delivery of contract worker services at [REDACTED]" It also states that the section of the prior agreement regarding the terms for payment of services is amended and replaced with this document. No further information regarding the terms of the prior agreement, however, were provided.

- Several printouts from [REDACTED] (which are described in more detail below). The top of the documents contain the logo for [REDACTED]. The bottom of the printouts state "[REDACTED] All rights reserved."⁴ The printouts do not name or identify the petitioner in any capacity, including as the beneficiary's employer.

- A document entitled "Current Assignment Edit-Summary." As noted below, the end date is September 26, 2013.⁵ Further, the document provides, in relevant part, the following information:

Worker Name: [Beneficiary]
Current Assignment Information

Organization: [REDACTED]
Division: [REDACTED]
Type: Contract – US
Job Group/Classification: Product Engineering –
CAE Lead Engineer 1
Start Date: 12/3/2012
Actual/Target End Date: 09/26/2013
Work Location: [REDACTED]

- A document entitled "View Position-Summary" for a CAE Lead Engineer 1 position. The status is "filled." The target start date is "09/23/2012" and the assignment duration is "12 months."⁶ The work location is [REDACTED].
- A document entitled "View Position-Details." The document contains the job duties (which correspond to the description provided by the petitioner in the support letter). The job title is CAE Lead Engineer 1, rather than Project Engineer as stated by the petitioner in the Form I-129. The document also provides the following:

⁴ [REDACTED] is not further defined and there is no indication that it refers to [REDACTED] or that it has been approved or endorsed by [REDACTED].

⁵ The "Actual/Target End Date" of September 26, 2013 is prior to the requested start date of October 1, 2013 for H-1B employment (as stated by the petitioner on the Form I-129).

⁶ According to this document, the duration of the project is from 09/23/2012 to 09/23/2013. Thus, this document also indicates that the assignment is scheduled to end prior to October 1, 2013 (the petitioner's requested start date on the H-1B petition).

Required Education/Training/Certificate/Licenses

- Bachelor of Science in Mechanical Engineering, Aeronautical, and Civil Engineering

Thus, according to the printout, a candidate must possess a bachelor of science in three disciplines, specifically mechanical engineering, aeronautical, *and* civil engineering. That is, the printout does not state that a degree in mechanical engineering, aeronautical, *or* civil engineering is required.

- A document entitled "Amendment." The start date is 12/11/2012 and the end date is 09/26/2013. Thus, the start date for the assignment has been modified, but the end date remains prior to October 1, 2013 (the start date requested by the petitioner on the Form I-129).
- An Internet article entitled [REDACTED] printed from [REDACTED]. The article is dated April 11, 2011 (approximately two years prior to the instant H-1B submission).
- A one-page Internet printout regarding [REDACTED].
- A letter dated March 5, 2013 from [REDACTED]. The letter is addressed to [REDACTED] human resources manager for the petitioner. The letter is not on company letterhead, does not provide contact information for either [REDACTED] and the signatory line contains electronic signatures. The letter initially references [REDACTED]" rather than [REDACTED].
- A two-page letter dated November 20, 2012 from [REDACTED] Program Manager of [REDACTED]. The letter is not on company letterhead, and [REDACTED] signatory line contains an electronic signature. The letter states that its purpose is to "clarify our company's role as a Managed Service Provider." The document does not contain any specific information regarding the relationship between [REDACTED] and/or the petitioner.
- Excerpts of a document entitled [REDACTED] Managed Contract Services Supplier Manual" by [REDACTED] dated October 10, 2011. The petitioner did not submit the entire document, just pages 1-2 and 11-15. The length of the original document cannot be determined from the submission, and no explanation was provided by the petitioner and its counsel for not submitting the entire document. The manual indicates

that it was prepared by [REDACTED] as a guide to the program operations and that it is also available as a supplement for suppliers participating in the program. It is not endorsed by [REDACTED]

- An offer letter dated March 20, 2013 from the petitioner to the beneficiary. The letter indicates that the beneficiary is being offered a position as a project engineer, starting on October 1, 2013. According to the letter, the beneficiary's position will be based at the petitioner's office in [REDACTED] Michigan.
- An organizational chart. The chart does not indicate that it represents the petitioner, rather it is entitled "Sales and Operations" without further explanation. The hierarchy of the chart indicates that 39 positions (including the beneficiary) are below [REDACTED]
- Excerpts from the petitioner's employee handbook, specifically pages 1-5, 7, 14, 28-29, and 39-41. The table of contents indicates that the handbook consists of 50 pages. No explanation was provided by the petitioner for failing to provide the entire handbook.
- Printouts from the petitioner's website, describing its products and services. It also includes a job posting for a project engineer. The petitioner did not provide any explanation for the inclusion of the job posting; however, there are several aspects, including the job duties and requirements, which differ significantly from the proffered position as described by the petitioner in its letter of support.
- A pay statement issued on February 28, 2013 to the beneficiary by [REDACTED] for the petitioner.

In the letter of support, the petitioner stated that it was providing a Form W-2, Wage and Tax Statement, issued to the beneficiary. The AAO reviewed the record in its entirety and notes that the referenced Form W-2 was not submitted by the petitioner.

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

Counsel responded to the RFE with a letter dated June 11, 2013 and copies of previously submitted documents.⁷ Counsel claims that the petitioner submitted documentation with the initial petition

⁷ With the initial petition, the petitioner submitted an excerpt of a document entitled "[REDACTED] Managed Contract Services Supplier Manual" by [REDACTED]. The petitioner did not submit the entire document, just pages 1-2 and 11-15. In response to the RFE, the petitioner added pages 16 and 48 to the document. In addition, the petitioner resubmitted the November 20, 2012 letter from [REDACTED] but the date has been changed to May 29, 2013. Again, the letter is not on company letterhead and [REDACTED] signatory line contains an electronic signature.

from [REDACTED] "[stating] that the need for the beneficiary's services will likely last for the requested validity period." Counsel further asserts that "per the [REDACTED] letter, they will require the beneficiary's services through 2015."

The director reviewed the record of proceeding and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on July 2, 2013. Subsequently, on November 8, 2013, the director certified the decision to the AAO for review.

In response to the director's certification, counsel for the petitioner submitted a brief and additional documentation to the AAO. Specifically, counsel submitted the following documents:

- A document entitled "Secondary Supplier Agreement" (dated June 5, 2007) between [REDACTED] and the petitioner. The document begins by describing the relationship between [REDACTED] and [REDACTED] (including [REDACTED] role in retaining suppliers for [REDACTED]. The document continues by providing the terms and conditions of the agreement between [REDACTED] and the petitioner as a supplier.

The "Secondary Supplier Agreement" was created approximately six years prior to the submission of the H-1B petition filed on behalf of the beneficiary. No explanation was provided, however, as to the reason that the petitioner did not submit a copy of it to the director for review in the adjudication of the H-1B petition.

- A printout from [REDACTED] entitled "Current Assignment Edit-Summary." The document is similar to the previously submitted document with the same title; however, the "Actual/Target End Date" has been changed from 09/26/2013 to 09/26/2014. The document includes the beneficiary's name and states "Status: Active."⁸

In the brief, counsel refers to the [REDACTED] printout as a work order, and states that it was created after the petitioner submitted the H-1B petition to U.S. Citizenship and Immigration Services (USCIS).

⁸ As previously mentioned, the petitioner stated in the initial submission that the beneficiary was maintaining nonimmigrant status as an F-1 student and was employed by the petitioner pursuant to post-degree optional practical training. In support of this statement, the petitioner submitted a copy of an employment authorization card issued to the beneficiary that was valid until July 2, 2013.

In response to the director's certification, counsel submitted a document that he refers to as a work order. The start date is December 3, 2012 and the actual/target end date is September 26, 2014. The document was printed on December 5, 2013. It refers to the beneficiary's "Current Assignment" and indicates that the beneficiary's status is active. The documentation suggests that the beneficiary continued working after his employment authorization expired, thus, engaging in unauthorized employment in the United States.

II. Standard of Review

In response to the director's Notice of Certification, counsel submitted a brief.⁹ In the brief, counsel references the preponderance of the evidence standard.

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.

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; *Matter of*

⁹ In the brief, counsel suggests that the volume of evidence provided by the petitioner should establish eligibility for the benefit sought. The AAO reviewed the record in its entirety. As discussed in this decision, the evidence submitted fails to establish eligibility for the benefit sought. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. See *Matter of Chawathe*, 25 I&N Dec. 375-376.

Otiende, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. Beyond the Director's Decision – Additional Grounds for Denial of the H-1B Petition

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified several issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, the issue certified to the AAO is essentially moot. Thus, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought for the reasons discussed *infra*.

A. The Petitioner Has Not Established That It Will Pay the Beneficiary the Required Wage During Periods of Nonproductive Status

In the instant case, the petitioner has failed to establish that it will pay the beneficiary the required wage for his work in accordance with the applicable statutory and regulatory provisions. Accordingly, the petition cannot be approved.

More specifically, 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.¹⁰ 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]").

By completing and submitting the LCA, and by signing the LCA, the petitioner makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and the benefits to be provided to the beneficiary. 20 C.F.R. § 655.705(c). The petitioner reaffirms its acceptance of all of the attestation obligations by submitting the LCA to USCIS in support of the Form I-129. See 8 C.F.R. § 214.2(h)(4)(iii)(B)(2); 20 C.F.R. § 655.705(c).

If the H-1B beneficiary is not performing work and is in a nonproductive status due to a decision by the employer, then the petitioner is obligated to pay the beneficiary the required wage. Specifically, the Act requires that the petitioner pay the required wage specified in the LCA even if a beneficiary is in a nonproductive status (i.e., not performing work) due to a decision by the employer, such as

¹⁰ 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.

lack of work or some other employment-related reason. See Section 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(2)(C)(vii). Further, DOL regulations also state the following:

(7) Wage obligation(s) for H-1B nonimmigrant in nonproductive status—

(i) Circumstances where wages must be paid. If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA.

* * *

(ii) Circumstances where wages need not be paid. If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). Payment need not be made if there has been a bona fide termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

20 C.F.R. § 655.731(c)(7).

In the instant case, the petitioner submitted an LCA in support of the Form I-129 petition. On page 3 of the LCA (question 1 of Section H), the petitioner attested that it would pay the beneficiary the required wage and pay for nonproductive time. Upon review of the record of proceeding, the AAO notes, however, that the petitioner's offer letter to the beneficiary (dated March 20, 2013) contains the following statement regarding "shut down" time:

If you are later placed on a long term onsite position with one or more of [the petitioner's] clients, you will follow that client's holiday schedule. If that client practices a "shut down" time at the beginning of July or end of December, you are

expected to take your vacation days during those dates. If you do not have sufficient vacation days remaining available to you, any shut-down or holidays observed by the client site will be unpaid days for you. [The petitioner] only recognizes U.S. Federal holidays. Should you later be reassigned to a position based in-house at [the petitioner's company], you will follow [the petitioner's] holiday list.

Thus, the petitioner indicated in the offer letter to the beneficiary that it requires the beneficiary to take vacation days or waive his salary for shut-down periods and/or holidays observed by the client when he is employed at a client's facility.¹¹ Consequently, the petitioner has not established that it will comply with its wage obligations in accordance with the statutory and regulatory provisions.¹² See section 212(n)(1)(A) and (2)(C)(vii) of the Act; 20 C.F.R. § 655.731(c)(7). 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 for this reason.

B. The Petitioner Did Not Comply with the Itinerary Requirement

The AAO will now address another basis for denial of the petition. More specifically, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states the following:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations,

¹¹ With the H-1B petition, the petitioner submitted excerpts of its employee handbook. The table of contents of the handbook indicates that it contains a section regarding "shut down" time-off. The petitioner, however, did not submit this section of the handbook to USCIS. No explanation was provided by the petitioner for failing to submit the entire handbook to USCIS in support of the petition.

The AAO notes that the offer of employment letter states that to accept the offer, the beneficiary should return a signed copy of the letter along with "the Promissory Note." No further information regarding the promissory note was provided to USCIS.

¹² An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1).

and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.¹³

The petitioner submitted a document that it refers to as an itinerary. On the document, the petitioner indicates that the beneficiary will work at (1) the petitioner's office located in [REDACTED] Michigan; and (2) off-site in [REDACTED] Michigan.¹⁴ The petitioner did not indicate how the beneficiary's time would be allocated between the work sites or the frequency with which the beneficiary would be physically at either location. Importantly, the document does not include a start date and the project end-date is designated as "TBD [to be determined]." The petitioner did not provide the dates of the beneficiary services as required by 8 C.F.R. § 214.2(h)(2)(i)(B) and, according to the document, the duration of the beneficiary's employment had not been established.

Accordingly, the petitioner has not demonstrated compliance with the applicable regulatory provisions by submitting an itinerary with the dates and locations of the services that will be performed by the beneficiary. Thus, the petition must also be denied on this additional basis.¹⁵

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

Furthermore, beyond the decision of the director, 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)

¹³ The instructions to the Form I-129 also state that a petition for a beneficiary to perform services, labor, or training in more than one location must include an itinerary with the dates and locations where the services or training will take place. See Instructions for Form I-129, Petition for a Nonimmigrant Worker, on the Internet at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. The H-1B petition must be executed and filed in accordance with the form instructions, with the instructions being incorporated into the regulations. 8 C.F.R. § 103.2(a)(1).

¹⁴ Throughout the record (including on the Form I-129, LCA, and itinerary), the petitioner indicates that the beneficiary will work at (1) the petitioner's office located at [REDACTED] and (2) off-site at [REDACTED]

¹⁵ Furthermore, it must be noted that the itinerary does not support counsel's claim elsewhere in the record that the beneficiary will serve as a project engineer at the [REDACTED] facility in [REDACTED] Michigan for the entire H-1B period sought.

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 (emphasis added):

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.

See also 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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) (hereinafter "*C.C.N.V.*")). 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.¹⁶

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

¹⁶ 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).

"employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.¹⁷

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).¹⁸

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

¹⁷ 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))).

¹⁸ 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).

hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

The first factor to be weighed is "the hiring party's *right to control* the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323 (quoting *C.C.N.V.*, 490 U.S. at 751) (emphasis added); see also *Clackamas*, 538 U.S. at 445 (emphasis added).¹⁹ That said, the extent of control the hiring party may exercise over the details of the product is not dispositive. *C.C.N.V.*, 490 U.S. at 752. In *C.C.N.V.*, the Supreme Court rejected tests based exclusively on either the hiring party's right to control or actual control of a work product. *C.C.N.V.*, 490 U.S. at 750. Instead, the Court used the principles of the general common law of agency to determine whether the individual performing the work would be an employee or an independent contractor. *Id.* at 751.

As such, USCIS must assess and weigh the relevant factors as they exist or will exist. Moreover, unless specifically provided for by the common-law test, USCIS will not determine control exclusively based upon the employer's right to control or exercise of actual control. See *C.C.N.V.*, at 752-753 (applying the common law test to determine control). For example, while the Court in *C.C.N.V.* considered the right to assign additional projects, it weighed the actual source of the instrumentalities and tools, not who had the right to provide such tools. See *id.*

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).

The petitioner claims that it will have an employer-employee relationship with the beneficiary.²⁰ The AAO has considered this assertion within the context of the record of proceeding. However, as

¹⁹ The relevant H-1B regulation effectively, if not expressly, adopts the common-law approach. See 8 C.F.R. § 214.2(h)(4)(ii) (recognizing an employer-employee relationship "by the fact that [the employer] may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

²⁰ Counsel makes various assertions in the briefs submitted in response to the RFE and certification regarding the petitioner's employer-employee relationship with the beneficiary. The AAO reviewed the assertions but notes that the briefs are not endorsed by the petitioner and counsel does not provide the source of his information to demonstrate a sound factual basis for his conclusion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

will be discussed, there is insufficient probative evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."²¹ In support of the H-1B petition, the petitioner submitted a pay statement issued on February 28, 2013 to the beneficiary by [REDACTED] for the petitioner. 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 items such as wages, federal and state income tax withholdings, and other benefits are relevant factors in determining whether a hired party is an employee, 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 proper determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an offer of employment letter dated March 20, 2013. Thus, the offer of employment letter is dated just a few days prior to the submission of the Form I-129 petition. However, the letter does not support the petitioner's claims within the record of proceeding with regard to the beneficiary's employment.

More specifically, the offer of employment letter indicates that the beneficiary will be based at the petitioner's office in [REDACTED] Michigan. It continues by stating, "If you are later placed on a long term onsite position with one or more of [the petitioner's] client, you will follow that client's holiday schedule." Thus, according to the offer of employment letter, the beneficiary will be based at the petitioner's office and may eventually be placed with various clients and not necessarily on the [REDACTED] project at its facility in [REDACTED] Michigan as claimed elsewhere in the petition. The offer of employment does not indicate that the beneficiary is currently or will be assigned to the off-site project for [REDACTED] nor does the letter indicate an intention by the petitioner to employ the beneficiary at the [REDACTED] facility for the duration of the requested H-1B period.

The employment letter also states that the petitioner offers eligible employees a variety of benefits "as per the company policy." The AAO reviewed the excerpts of the petitioner's employee

²¹ Furthermore, as will be discussed, the AAO observes there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to several aspects of the beneficiary's claimed employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

handbook that were submitted to USCIS. The section entitled "Benefits" states, "This portion of the Employee Handbook contains a very general description of the benefits for which you may be entitled to as an employee of this company." Upon review, most of the benefits described in the handbook are available only to full-time regular employees, but the petitioner did not provide its definition of the term "regular employees" to USCIS.²² Accordingly, a substantive determination cannot be made or inferred regarding these "benefits," as insufficient information regarding them was provided to USCIS (including specific eligibility requirements).

Moreover, the offer of employment letter states that the beneficiary will serve as a project engineer, but does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. 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.

The petitioner submitted a document entitled "[redacted] Managed Contract Services Supplier Manual" that includes an overview and flowchart of the of the "Requisition End-to-End Process." It indicates that a [redacted] manager initiates a request, and suppliers respond by submitting candidates' profiles/resumes within a computer system. The candidates are screened by [redacted] and/or [redacted] and then [redacted] selects candidates. [redacted] is the entity that actually makes the final selection for hire, and the suppliers' role (and thus, the petitioner's role) appears to be similar to that of a staffing firm that locates possible candidates for the position.²³

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the position. In the instant case, the director specifically noted this factor in the RFE. The director provided examples of evidence in the RFE for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. Although the petitioner claimed that the beneficiary had served in the proffered position for approximately six months (at the time of the RFE response), the petitioner failed to address or clarify the source of instrumentalities and tools used by the beneficiary.

Subsequently, in response to the director's certification, counsel states that the end-client provides a work space and a computer terminal with access to proprietary software provided by the

²² It appears that the petitioner distinguishes between part-time, full-time regular, and full-time temporary employees in determining eligibility for benefits. The table of contents of the employee handbook indicates that page 15 contains information regarding the petitioner's employment categories; however, the petitioner did not provide this section of its handbook to USCIS. No explanation was provided for failing to submit this information to USCIS.

²³ Furthermore, the "[redacted] Managed Contract Services Supplier Manual" indicates that once candidates are selected by [redacted] they are instructed to log into the [redacted] system to complete their time sheets on a weekly basis.

petitioner.²⁴ Counsel did not further clarify his statement that the beneficiary has "access" to the petitioner's software. The petitioner did not provide any evidence to establish that [REDACTED] has an agreement or lease to use the petitioner's "proprietary software" on this project. Moreover, no documentation was submitted to demonstrate that the beneficiary is utilizing the petitioner's software in the performance of his duties at [REDACTED] (or on any other projects). Without further information, it appears that counsel's claim that the beneficiary has "access" to the petitioner's software is irrelevant to this proceeding. Consequently, the petitioner has not established that it provides or is the source of any of the instrumentalities and tools needed to perform the job, but rather [REDACTED] is the primary source.

In the RFE, the director also asked the petitioner to provide information regarding the beneficiary's role in hiring and paying assistants. The petitioner and its counsel elected not to address this issue or provide any information in response to this material request for evidence. While the petitioner was given an opportunity to clarify the beneficiary's role in hiring and paying assistants, it chose not to submit any probative evidence on the issue. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, the AAO reviewed the record of proceeding with regard to the beneficiary's discretion over when and how long to work. In the letter of support dated March 18, 2013, the petitioner states that it permits [REDACTED] to schedule and prioritize the work assigned to the beneficiary.²⁵ In the offer letter, the petitioner indicates that the beneficiary will follow the client's holiday schedule, including "shut down" times, and that he will be required to take vacation or unpaid leave for holidays and shut down periods observed by the client. The [REDACTED] printouts indicate that the work location is [REDACTED] and that the preferred schedule for the position is from 7:30 to 4:00. Further, with regard to the duration of the beneficiary's employment, the Secondary Supplier Agreement dated June 5, 2007 (submitted in response to the certification) indicates that [REDACTED] may cancel an assignment for services at

²⁴ In response to the director's certification, counsel states that the petitioner works closely with automakers in Michigan "to design certain aspects and solutions for their automotive designs and concepts." Counsel then describes a program designed by the petitioner called [REDACTED]. Counsel states that the petitioner leases its software to clients, such as [REDACTED] and that "[w]hen this happens, it also places its personnel with proprietary knowledge of this advanced tool directly with those clients." Counsel asserts that the position offered to the beneficiary is located on-site at [REDACTED] as part of the petitioner's team of approximately thirty employees.

With the Form I-129 petition, the petitioner submitted printouts from its website, suggesting that it believed that the information was relevant to the adjudication of the instant H-1B petition. The AAO reviewed the printouts, as well as information on the petitioner's website at [REDACTED] (last visited February 11, 2014). The website contains information regarding the petitioner's [REDACTED] software. Under the heading [REDACTED] – Significant Major Benefits," the following information is provided: "VERY EASY TO USE: A highly intuitive GUI and simple easy-to-understand layout allows users to perform the most complex tasks very easily." Further, the website states that with [REDACTED], section changes can be "morphed very easily" and additional variants can be "morphed easily."

²⁵ The petitioner states that [REDACTED] schedules and prioritizes the work assigned to the beneficiary, suggesting that [REDACTED] provides instruction to the beneficiary as to the order and sequence to follow in the performance of the work.

any time. Thus, it appears that the end-client primarily has discretion over when and how long the beneficiary will work, rather than the beneficiary or petitioner.

In the March 18, 2013 letter of support, the petitioner states that it supervises the beneficiary's work through weekly reports that the beneficiary is required to send to the petitioner. According to the petitioner, the reports contain information regarding the beneficiary's current work, as well as what he will work on the following week. Although the beneficiary had served in the proffered position for several months, the record of proceeding does not contain evidence of any reports or correspondence from the beneficiary to the petitioner in support of this claim.

Moreover, the petitioner did not establish how such weekly reports would translate to performance standards, how they are used for assessing and evaluating the beneficiary's work, and/or the criteria for determining bonuses and salary adjustments. The record does not contain any further specific information from the petitioner regarding if and when the reports are reviewed or analyzed and, if so, by whom; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the reports; the consequences, if any, of failing to prepare the reports; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevance of its claim regarding the weekly reports to the question presented here, i.e., whether the petitioner will have the requisite employer-employee relationship with the beneficiary.

The AAO also reviewed the record to determine who will oversee and direct the beneficiary's work. However, the record of proceeding contains inconsistent information regarding who actually supervises the beneficiary. For instance, in a letter dated March 5, 2013 from [REDACTED] Services regarding the beneficiary's placement, [REDACTED] and [REDACTED] state that the terms of the beneficiary's assignment are directed, reviewed and supervised by the petitioner's human resources manager, [REDACTED]²⁶

In response to the director's certification, counsel recited a portion of the above referenced letter from [REDACTED] that indicates that the terms of the beneficiary's assignment will be directed, reviewed and supervised by the petitioner's human resources manager, [REDACTED]. Later in the brief, counsel reiterates that the beneficiary will work at the [REDACTED] facility in [REDACTED] Michigan and that "[w]hile working at [REDACTED] the beneficiary will work under the supervision of [the petitioner's] personnel who are also assigned there." Thereafter in the same brief, counsel claims that the beneficiary is counseled and supervised by the petitioner's on-site supervisor.

²⁶ The letter from [REDACTED] is not on company letterhead, does not contain contact information for either individual, and the signatory line contains electronic signatures. The letter initially references [REDACTED] rather than [REDACTED]. Furthermore, as previously mentioned, the petitioner submitted excerpts of a document entitled "Managed Contract Services Supplier Manual" by [REDACTED]. The document includes an entry entitled "[REDACTED] Program Office Structure." The document lists the names and contact information for the [REDACTED] employees in the program office as "the single point of contact for all Suppliers under this program." [REDACTED] are not listed as points of contact within the program office (or in any other capacity).

It must be noted that Ms. [REDACTED] signed the Form I-129 and supporting documents for the H-1B petition. It appears from the documentation submitted, however, that Ms. [REDACTED] works at the petitioner's office, rather than at the [REDACTED] facility in [REDACTED] Michigan.

Within the record of proceeding, Ms. [REDACTED] job title varies slightly but is stated as "Human Resources Manager" and as "Office and Human Resources Manager." The petitioner did not submit a description of Ms. [REDACTED] duties and responsibilities, nor did it address how Ms. [REDACTED] (whose job title suggests that she is responsible for office and human resources issues) directs, reviews and supervises the beneficiary's duties as a project engineer. There is a lack of information regarding what these tasks (direct, review and supervise) actually entail.

Moreover, this issue must be considered within the context of the totality of the evidence provided. For instance, the petitioner submitted an organizational chart, which it claims depicts its staffing hierarchy. The chart does not indicate, however, that Ms. [REDACTED] supervises the beneficiary. Rather, according to the organizational chart, Ms. [REDACTED] does not have any subordinates. The organizational chart indicates that the beneficiary is supervised by [REDACTED] (however, the designation [REDACTED] is not defined).²⁷ The itinerary also indicates that the beneficiary's supervisor is [REDACTED]. On the itinerary, Mr. [REDACTED] job title is director of engineering. The AAO observes, however, that Mr. [REDACTED] endorsed a letter dated March 20, 2013 that indicates his job title is "Global Director of HR." No explanation for the variance was provided to USCIS.

Aside from the evidence listed above, the record of proceeding does not contain any documentation to establish that Ms. [REDACTED] or Mr. [REDACTED] supervised or would supervise the beneficiary or direct his work. The petitioner provided an offer letter from Ms. [REDACTED] to the beneficiary, which is the only evidence of any direct interaction between the petitioner and the beneficiary. Although the petitioner indicated that the beneficiary had been serving in the proffered position for several months, there is no evidence (aside from the offer letter) that Ms. [REDACTED] or Mr. [REDACTED] have supervised, directed, guided or even contacted the beneficiary.

In the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner provide such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner did not identify or provide specific information regarding the beneficiary's supervisor or clarify basic aspects about the supervisor's role (e.g., a brief description of the supervisor's job duties, employer, or specific work location). Furthermore, it failed to provide an explanation for the variances in the record on this

²⁷ According to the organizational chart, Mr. [REDACTED] supervises 39 people, including the assistant office manager, the business development manager, IT, as well as individuals whose job titles were not provided.

On April 1, 2013 (the same date as the instant H-1B petition was filed), the petitioner submitted an H-1B petition on behalf of a different beneficiary who the petitioner claims will work exclusively at the petitioner's facility. With the H-1B petition for this other employee, the petitioner submitted an organizational chart indicating that Mr. [REDACTED] currently supervises 60 people, and that he will be supervising 30 additional new hires. No explanation for the variance was provided.

issue. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO also reviewed the record of proceeding with regard to how the beneficiary's performance would be evaluated. In an undated letter, the petitioner claimed that it undertakes performance reviews of all employees at one year intervals. The petitioner briefly provided the steps for its review process, but it did not provide any information in the letter that is specific to the beneficiary. With regard to this general process, the petitioner stated that the manager conducts a review of the employee's performance based upon seven criteria: timely arrival, absences, performs his/her work satisfactorily, technical competency, works well with others, understands and follows direction, and any other relevant factors. According to the letter, the manager then speaks to the employee's supervisor, reviews any written materials concerning the employee, and finally speaks with the employee.

Although the petitioner provided a brief description of its performance review process, it must be noted that the letter lacks information regarding how the petitioner determines and rates an employee on these criteria, as well as whether the petitioner measures the details of how the work is performed or the end result. Further, the petitioner did not clarify the identity of the beneficiary's manager or supervisor or establish how the submission of weekly reports by the beneficiary would be incorporated into the process.

With the initial petition, the petitioner provided a letter from [REDACTED] (dated March 5, 2013) indicating that an undefined project may be extended based upon several conditions, including "successful performance evaluations." The statement suggests that the managed service provider or client conducts performance evaluations, rather than the petitioner.

In response to the director's certification, counsel references the employee handbook as stating that the petitioner will conduct performance reviews. The AAO reviewed the table of contents and excerpts of the employee handbook that were provided to USCIS. The table of contents indicates that page 18 provides information regarding the petitioner's policy on performance reviews; however, this section was not submitted to USCIS in support of the petition. While counsel claims this portion of the employee handbook is relevant here, neither the petitioner nor counsel provided an explanation as to the reason it was not provided to USCIS in support of this petition.

The AAO notes that there are inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to August 28, 2016. With the petition, the petitioner submitted [REDACTED] printouts regarding the assignment.²⁸ The "Actual/Target End Date" is September 26, 2013, which is prior to the requested start date on the Form I-129. On the itinerary, the petitioner did not provide the dates of the assignments or projects, and the petitioner indicated that the end-date had not been determined.

²⁸ The petitioner is not identified as the beneficiary's employer on the [REDACTED] printouts.

The petitioner also submitted a letter dated March 5, 2013 from [REDACTED] and [REDACTED] from [REDACTED]. The letter states that the "project is expected to last through 2015 subject to continuing business necessity, successful performance evaluations and continuation of the terms and conditions of Supplier Agreement between [the petitioner] and [REDACTED]." In response to the RFE, counsel claims that a letter from [REDACTED] Services that was submitted with the initial petition "states that the need for the beneficiary's services will likely last for the requested validity period." Counsel further asserts that "per the [REDACTED] letter, they will require the beneficiary's services through 2015."²⁹

Contrary to counsel's claim, the letter from [REDACTED] does not cover the period of employment requested in the Form I-129, i.e., October 1, 2013 to August 28, 2016. Rather it indicates that an undefined project may last for an undetermined amount of time (possibly sometime in 2015), *subject to several conditions*, specifically: (1) continuing business necessity, (2) successful performance evaluations, and (3) the continuation of the terms and conditions of the agreement between the petitioner and the managed service provider. The letter does not provide any information regarding when the project began and whether or not the project has been extended in the past. While the letter discusses the possible extension of a *project*, it does not provide any information regarding the duration of the beneficiary's *assignment* on the project and whether or not the need for his services would continue.

Moreover, while the letter indicates that a project is expected to last through 2015 subject to several conditions, the letter does not relate this conclusion to specific, concrete aspects of [REDACTED] business operations to demonstrate a sound factual basis for the conclusion. The letter provides the signatories' job titles, but it does not indicate their role (if any) in determining the length of this or other [REDACTED] projects or their authority (if any) to make such a declaration about the duration of a project. It is not supported by independent, objective evidence demonstrating the manner in which the conclusion was reached. For instance, the statement is not corroborated by documentation indicating that an ongoing project exists that will generate employment for the beneficiary's services (e.g., documentary evidence regarding the project scope, staging, or time and resource requirements; supporting contract negotiations; documentation regarding the business analysis and planning for specific work; statement of work; or work order). Without further

²⁹ The petitioner requested that the petition be approved with validity dates of October 1, 2013 to August 28, 2016. The petitioner submitted a document indicating that the target end date for the beneficiary's assignment was September 26, 2013. Nevertheless, in response to the RFE, counsel claims that "[REDACTED] states that] the need for the beneficiary's services will likely last the for the requested validity period."

Thereafter, in response to the certification, counsel claims that the parties prepare work orders just prior to the "expiration date so that the parties can better evaluate the status of the assignment and what more is needed and they will base the renewal on that information." Counsel claims that the decision to renew a work order is typically made within weeks of the end-date. Thus, counsel initially claims that the assignment is long term, but thereafter states that an evaluation of the assignment will be made shortly before the expiration of the work order.

clarification, the petitioner has not demonstrated the basis for the signatories' assessment regarding the (possible) duration of the project.

In response to the certification, the petitioner submitted a new printout from [REDACTED] entitled "current work assignment" which indicates that the beneficiary's assignment will now last until September 26, 2014. Counsel claims that "work orders are rarely issued months in advance and are typically renewed within weeks of the end-date." He continues by stating that "no employer knows with certainty how long they will need the services of a particular employee."

The AAO finds that, while the petitioner may be able to eventually locate some work for the beneficiary, it has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*.³⁰ There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

³⁰ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

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

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

The AAO assessed and weighed the relevant factors as they exist or will exist and the evidence does not support the petitioner's assertion that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The petitioner claims that the beneficiary will be employed at the [REDACTED] facility, and the evidence indicates that [REDACTED] or possibly some other future client will have discretion over when and how long the beneficiary will work, as well as assigning projects to the beneficiary. He will use the tools and instrumentalities of the client. There is a lack of evidence establishing the petitioner's right to control or actual control in the instant case, as well as the beneficiary's role (if any) in hiring and paying assistants. Furthermore, as discussed, a substantive determination cannot be made or inferred with regard to the provision of benefits. The petitioner failed to establish such aspects of the employment, such as who will oversee the day-to-day work of the beneficiary and who will be responsible for his performance evaluations. In the instant case, it appears that the petitioner's role is likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner is limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client. *See Defensor v. Meissner*, 201 F.3d at 388. Even if the factors were favorable for the petitioner (which they are not), the petitioner did not establish, at the time of filing the petition, that it had work for the beneficiary for the period of employment requested in the H-1B petition.

Upon review of the record of proceeding, the AAO therefore cannot conclude 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). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

IV. Lack of a Credible Offer of Employment in a Specialty Occupation

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS therefore 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.

Moreover, when determining whether a position is a specialty occupation, USCIS must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

When determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner has (1) provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

Here, as previously discussed, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit sufficient, probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s), work order(s), and/or statement(s) of work for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where

the beneficiary would work, and the availability of work for the beneficiary for the requested period of employment. 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. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1).

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described more likely than not constitutes a specialty occupation. The petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the director's decision must be affirmed and the petition denied on this basis.

V. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 145 (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 petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.