



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **FEB 21 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

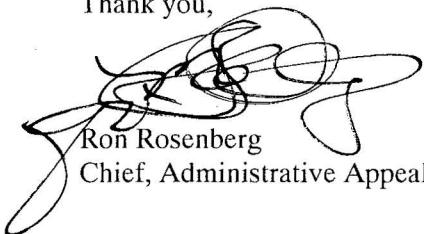
ON BEHALF OF PETITIONER:

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 her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 8, 2013 and certified the decision to the AAO for review. Specifically, the director found that (1) the petitioner submitted the H-1B petition more than six months prior to the date of actual need for the beneficiary's services; (2) the petitioner failed to establish that it will be a "United States employer" having an employer-employee relationship with the beneficiary as an H-1B temporary employee; (3) the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (4) the petitioner failed to establish that it will comply with the terms and conditions of the submitted Labor Condition Application (LCA). In response to the director's certification, the petitioner submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). Counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.²

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) the petitioner's response to the RFE; (4) the director's denial and Notice of Certification; and (5) counsel's submission to the AAO. The AAO reviewed the record in its entirety before issuing its decision.

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 After the denial of this H-1B petition, the beneficiary was issued an Employment Authorization Card (EAD) under 8 C.F.R. § 274a.12(a)(18) as the spouse of an L-1 intracompany transferee. This classification permits an individual to be employed in the United States without restrictions as to the location or type of employment as a condition of his/her admission. It appears that the EAD was granted for a two-year period. Accordingly, as the beneficiary is currently eligible to work for any employer in the United States, there does not appear to be any case in controversy here. The approval of the EAD has rendered the controversy over the H-1B petition "no longer live." See *Wong v. Napolitano*, 654 F.Supp.2d 1184, 1192 (D. Or. 2009) (holding that "a live controversy requirement is provided by a present intent by both parties to enter into an employment relationship which is being thwarted by USCIS or some other party").

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.³

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 project engineer on a full-time basis. In addition, the petitioner indicates that the beneficiary will work at its office located in [REDACTED] Michigan. No other worksites were provided. The petitioner requests that the beneficiary be granted H-1B classification from October 1, 2013 to September 12, 2016.

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

As a Project Engineer, the beneficiary's duties will include:

- Morphing and Parameterization of full vehicle CAE & CAD [Computer Aided Design and Computer Aided Engineering] models[;]
- Building finite element (FE) models and performing CAE simulation to assess vehicle performance in NVH and Durability attributes[;]
- CAE analysis to assess the NVH and Durability performance on full vehicle system, sub-system and body components[;]
- Perform Body-in-white (BIW), trimmed and full vehicle modal, frequency response and transient response analyses[;]
- Perform full vehicle structural crash and safety analysis of Frontal, side, rear and pole impact load cases[;]
- Based on analysis results and simulation, recommend design changes to cross functional teams such as Product Design, Release, Test and Validation and manufacturing[;]
- Coordination and managing projects with suppliers as appropriate[;]

³ 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).

- Structural Durability analyses on full body, chassis and closures structures[;]
- Perform Multi-Disciplinary Optimization (MDO) for best solution with maximum vehicle mass reduction[;]
- Train and/or mentor junior level analysis engineers in the skill sets described above.

CAD/CAE Software Skills

- Pre-Processors: Meshworkers/Morpher, Hyperworks software (Hypermesh, Hypergraph etc.)
- CAE Solvers: NASTRAN, ABAQUS, Optistruct, LS-DYNA
- CAD Tools: Unigraphics NX5, CATIA 5.0

While the petitioner claims that the proffered position requires various software skills, it did not state that the proffered position has any particular academic or experience requirements. The petitioner continued by describing the beneficiary's education and experience.⁴ The petitioner provided documentation regarding the beneficiary's foreign academic credentials; however, the petitioner did not submit an educational evaluation to establish that the beneficiary's foreign credentials are equivalent to a U.S. bachelor's (or higher) degree in a specific specialty.

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

- A Labor Condition Applications (LCA) in support of the instant petition. The occupational category is designated as "Commercial and Industrial Designers" – SOC (ONET/OES) code 27-1021 at a Level I (entry) wage level. Further, the petitioner indicated that the beneficiary will be employed at its facility at [REDACTED] No other worksites are provided.
- The petitioner's March 20, 2013 offer of employment letter to the beneficiary. The letter indicates that the beneficiary is being offered a position as a project engineer, starting on October 31, 2013.
- A one-page document from the petitioner entitled "A Summary of Our Performance Review Process for All Our W-2 Employees."
- An organizational chart. The chart does not indicate that it represents the petitioner, rather it is entitled "Sales and Operations" without further

⁴ 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.

explanation. The chart lists 90 employees. The chart also states "TBD-30 new hires."

- 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.
- A copy of the lease agreement for [REDACTED] effective June 1, 2012. The lease agreement is signed by [REDACTED] as landlord and as tenant. More specifically, he signed the lease on behalf of [REDACTED] as the landlord, and on behalf of the petitioner, as the tenant. The lease indicates that notice may be given to the landlord and to the tenant at the same address. The lease agreement does not provide any information as to the square footage of the property.
- A document entitled "Finalized Cube layout for new office." The layout shows approximately 25 cubicles/offices. The square footage of the space was not provided.
- Printouts from the petitioner's website, describing its products and services. It also includes a job posting for a project engineer.⁵ The petitioner did not provide any explanation for the inclusion of the job posting; however, there are several aspects, including the job duties, which differ significantly from the proffered position as described by the petitioner in its letter of support.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on July 30, 2013. The director outlined the evidence to be submitted.

The petitioner and counsel responded to the RFE and provided additional evidence in support of the H-1B petition. In a letter dated August 28, 2013, the petitioner states that it requires "[the beneficiary's] assistance with the work that we have agreed to develop at our offices in Michigan for our various clients like [REDACTED]"

The petitioner submitted additional evidence in support of the petition, including the following documents:

- A brochure for the petitioner's products and services;

⁵ In response to the director's certification, counsel states that the petitioner did not submit a job posting for a project engineer position and that the director's mention of the posting in the decision indicates that USCIS has confused the evidence submitted in support of the instant petition with another case. Upon review, the AAO observes that the petitioner's job posting was included in the submission. However, as the job duties differ from the proffered position and as it appears from counsel's statement that it was submitted by the petitioner in error, the AAO will not further address it.

- A brief financial report regarding the petitioner's business operations;
- The petitioner's 2010 and 2011 federal tax returns and its 2012 extension request;
- The following proposals by the petitioner for various projects, with related invoices and purchase orders for some of the proposals:
 - February 2012 proposal for [REDACTED] Technical Center. The proposal provides a quotation for leasing the petitioner's software licenses. The duration of the lease would be from April 2012 to March 2013.
 - June 2012 proposal for [REDACTED] The petitioner estimates that the duration of the project will be 6 to 8 months, ending in December 2012.
 - February 2013 proposal for [REDACTED] It indicates that one engineer would be needed for a 12 month project. The engineer would be co-located at the [REDACTED] Technical Center. The proposal states that all project directions and management would be [REDACTED] responsibility.
 - An undated proposal for [REDACTED] The duration of the project is expected to be 3 weeks and be completed in May 2013.
 - June 2013 proposal for [REDACTED] It indicates that two engineers would be needed to work at the [REDACTED] facility under the supervision and direction of [REDACTED] The petitioner estimates that the project will end in December 2013.
 - An undated proposal for [REDACTED] The proposal includes three engagement models and the associated costs. Without further information, it cannot be determined when the proposal was created, whether or not it was accepted, and if so, the duration of the project and whether the project has been completed.

In addition to the documentation listed above, the petitioner provided the following:

- Six purchase orders, which were placed between May 16, 2013 and July 1, 2013; and
- Invoices.⁶

⁶ The petitioner states that it submitted 30+ invoices. Upon review, the AAO notes many of the invoices refer to the same purchase order. For instance, 14 of the invoices were issued on August 1, 2013 and refer to purchase order number [REDACTED]

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 and certified the decision to the AAO on November 8, 2013.

In response to the director's certification, the petitioner and counsel submitted several documents to the AAO. Specifically, they provided the following documents:

- A letter dated November 25, 2013 from the petitioner. The letter provides information regarding the petitioner's name change in 2007.
- A letter dated November 25, 2013 from the petitioner regarding the beneficiary's intended start date.
- The petitioner's May 1, 2013 offer of employment letter to the beneficiary.
- A brief prepared by counsel.

The AAO reviewed the record of proceeding in its entirety and finds that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

II. Standard of Review

In response to the director's Notice of Certification, counsel submitted a brief.⁷ In the brief, counsel references the preponderance of the evidence standard.

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

⁷ In the brief, counsel references the volume of evidence provided by the petitioner and suggests that this factor 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.

* * *

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

III. The Petitioner Failed to File the H-1B Petition in Accordance With the Regulations

As a preliminary matter, the petition cannot be approved, because the regulations prohibit U.S. Citizenship and Immigration Services (USCIS) from approving a petition filed earlier than six months before the date of actual need for the beneficiary's services. 8 C.F.R. § 214.2(h)(9)(i)(B).

Specifically, the provision at 8 C.F.R. § 214.2(h)(9)(i)(B) states, in pertinent part, the following:

The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services and training

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).

Further, the petitioner must demonstrate eligibility in accordance with 8 C.F.R. § 103.2(b)(1), which states the following:

Demonstrating Eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

Therefore, a petitioner must establish eligibility at the time of filing the benefit request. Any evidence submitted in connection with an H-1B petition is incorporated into and considered part of the petitioner's request. If the petitioner wishes to make any material changes to the terms and conditions of the employment as provided in the H-1B submission, it may file a new petition with the required fee(s) to reflect the changes. See 8 C.F.R. § 214.2(h)(2)(E). After a decision is rendered, a petitioner may not make material changes to an H-1B submission in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In the instant case, the petitioner submitted the Form I-129 petition on April 1, 2013. With the petition, the petitioner submitted an offer of employment letter from the petitioner to the beneficiary with the terms of the agreement under which the beneficiary will provide her services. The letter is dated March 20, 2013 (just a few days prior to the submission of the H-1B petition). In the letter, the petitioner offers the beneficiary a full-time position as a project engineer, starting on October 31, 2013. Thus, despite the October 1, 2013 start date listed on the petition, the petitioner indicated that its actual need for the beneficiary's services is more than six months after the H-1B petition was filed.

Thereafter, the director denied the petition, finding as one of the grounds for denial of the petition that the petitioner filed the petition earlier than six months before the date of the actual need for the beneficiary's services. In response to the certification, the petitioner states that it made an error on the offer of employment letter. The petitioner submitted a new offer of employment letter with a change to the start date, along with additional terms (including a \$12,000 retention bonus) that were not stated in the original offer letter.⁸ The petitioner requests that the new letter be considered so that the terms of the beneficiary's employment will fall within the prescribed period set forth by the regulations.

The petitioner's attempt to remedy its error by changing the beneficiary's intended start date in the offer letter is ineffective. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Consequently, the director did not err in the decision to deny the petition on the basis that the visa petition was impermissibly filed more than six months before the date of actual need for the beneficiary's services. The regulations preclude the approval of the petition. 8 C.F.R. § 214.2(h)(9)(i)(B).

⁸ The date of the new offer of employment letter is May 1, 2013 (a month after the H-1B petition was filed) stating a start date of October 1, 2013.

IV. The Petitioner Failed to Establish a Valid Employer-Employee Relationship

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

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

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

The term "United States employer" is defined in the Code of Federal Regulations 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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). 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)). 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.⁹

⁹ 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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.¹⁰

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).¹¹

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*

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).

¹⁰ 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))).

¹¹ 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).

8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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).¹² 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.*

¹² 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)).

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.¹³ The AAO has considered this assertion within the context of the record of proceeding. However, as 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." 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). With the Form I-129 petition, the petitioner submitted 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 be placed with various clients and not necessarily remain at the petitioner's facility as claimed elsewhere in the petition. The offer of employment does not indicate an intention by the petitioner to employ the beneficiary exclusively at its 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 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

¹³ 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 conclusions. Without documentary evidence to support the claims, 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).

entitled to as an employee of this company." Upon review, most of the benefits described in the handbook are only available to full-time regular employees. The petitioner did not, however, define the term "regular employees" or clarify whether the beneficiary would be designated as a regular or temporary employee (or some other category of employee).¹⁴ Accordingly, a substantive determination cannot be made or inferred regarding these "benefits," as further information regarding them, including eligibility requirements, was not provided to USCIS.

Moreover, the offer of employment letter states that the beneficiary will serve as a project engineer, but it 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.

In the March 26, 2013 letter of support, the petitioner states that the beneficiary is being hired to work at its office on various automotive engineering projects and that she will be assigned to projects based on availability. The petitioner continues by claiming that it is constantly working on projects for automotive clients. In response to the RFE, the petitioner asserts that it needs the beneficiary's services to assist with the work that it has taken on for its clients. The petitioner states, "Specifically, we require her assistance with the work that we have agreed to develop at our office in Michigan for our various clients like [REDACTED]." According to the petitioner, it enters into an agreement to design a solution and then uses its discretion as to the staffing of the project. In support of this assertion, the petitioner provided "recent proposals where we have outlined the proposed engineering solution . . . and the corresponding invoices for those proposals."

The petitioner submitted six proposals that it prepared between February 2012 and June 2013. The documentation does not demonstrate, however, that, at the time the H-1B petition was filed, the petitioner had work that it had taken on or agreed to develop at its office for clients that would entail the need for the beneficiary's services to perform the duties of the proffered position as described in the H-1B petition. For example, the petitioner's proposal for [REDACTED] states that the project will be executed at the client's facility using the client's workstations and computational resources. Further, the individuals provided under the proposals will be under the supervision of the client with day-to-day direction being provided by the client's engineers. Additionally, the petitioner's proposal for [REDACTED] indicates that all project directions and project management will be [REDACTED] responsibility and that the individuals provided under the proposals will be co-located at the [REDACTED] Technical Center.¹⁵

¹⁴ 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 in support of the petition.

¹⁵ Some of the proposals are for projects that ended several months prior to the requested H-1B period. Furthermore, the petitioner submitted proposals for projects located off-site at client facilities (either exclusively or co-located) under the supervision and day-to-day direction of the client(s). Moreover, the

The documentation indicates that the petitioner provides software licenses and some services to automobile companies, but the evidence does not establish a general or specific need for an individual to perform the duties of the proffered position on either an ongoing or intermittent basis at the petitioner's worksite. The record does not contain evidence such as invoices, purchase orders, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the petitioner (or any end-user) to establish that she would be employed by the petitioner in the capacity specified in the petition.

While the petitioner has established that it is engaged in various business activities, there is a lack of substantive, documentary evidence to substantiate the petitioner's claim that the duties that the beneficiary would perform for the duration of the requested H-1B classification would correspond to the information provided by the petitioner in the requested H-1B classification. In other words, the petitioner's statements are not corroborated by documentation indicating that projects exist that will generate employment for the beneficiary's services to perform the work as stated in the petition.

Moreover, although the record contains some documentation relating to the petitioner's products and/or the services of other individuals, the record is devoid of any probative evidence indicating and/or corroborating that the beneficiary would be assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested validity period at the petitioner's location. It is recognized that the documents relevant to other individuals is acceptable to show that there may eventually be some kind of work made available for the beneficiary. The issue here, however, is that the lack of such evidence relevant to the beneficiary in the context of the beneficiary's normal staffing operations leaves unanswered a number of material questions, such as whether the work would be continuous, the type and level of work to be performed, the actual duties of the position, and who would control that work. Importantly, the petitioner has not demonstrated how this would impact the circumstances of the beneficiary's relationship with the petitioner. The petitioner 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*.¹⁶

documentation provides a general description of the projects, but does not demonstrate a need for an individual to perform the duties of the proffered position as described in the petition.

¹⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. The H-1B classification is not intended to be utilized to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. 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,

In support of the petitioner's statement that the beneficiary will work at its facility, the petitioner provided a copy of its lease agreement. The lease agreement is signed by [REDACTED] as landlord and as tenant. More specifically, Mr. [REDACTED] signed the lease on behalf of [REDACTED] as the landlord, and on behalf of the petitioner, as the tenant. The address for [REDACTED] is the same as the petitioner's address. Thus, it appears that [REDACTED] shares the premises with the petitioner.

With the lease, the petitioner submitted a document illustrating its floor plan. The layout shows approximately 25 cubicles/offices, and indicates that 15+ of the cubicles/offices are occupied. Notably, the petitioner submitted approximately 30 H-1B petitions on April 1, 2013 for alien beneficiaries (including the beneficiary in the instant case) who, according to the petitioner, will be employed at this facility beginning in October 2013. The AAO reviewed the lease and floor plan and notes that it appears that the office has approximately 10 unoccupied cubicles; however, the petitioner has not specifically addressed how it would accommodate an additional 30 employees if all of the petitions were approved.¹⁷

Furthermore, the record of proceeding contains inconsistent information with regard to who will oversee and direct the beneficiary's work. In the letter of support dated March 26, 2013, the petitioner claims that the beneficiary will be supervised by [REDACTED] Director of Engineering. The AAO observes that the offer of employment letter dated March 20, 2013 (six days earlier) is endorsed by [REDACTED] Global Director of HR. The petitioner provided an organizational chart, which it claims depicts its staffing hierarchy. The organizational chart indicates that the beneficiary is supervised by [REDACTED] (the designation [REDACTED] is not defined). The petitioner did not provide an explanation for the variation in Mr. [REDACTED] job titles.

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).

¹⁷ In the RFE, the director asked the petitioner to clarify where the beneficiary would be employed. The petitioner and its counsel responded by referencing the previously submitted lease and floor plan. The petitioner and counsel claimed that the lease and floor plan are relevant to this issue and they did not provide any further documentation on the matter.

The petitioner's organizational chart lists 90 individuals and indicates that the petitioner intends to add 30 new hires. The organizational chart does not state which of the individuals work at the petitioner's office in [REDACTED] Michigan (either continuously or intermittently) and which individuals work at other locations. Nevertheless, the documentation submitted by the petitioner does not sufficiently address how it will accommodate the individuals that it claims will work at its facility.

According to the organizational chart, Mr. [REDACTED] currently supervises 60 people, including the assistant office manager, the business development manager, as well as individuals whose job titles were not provided. Moreover, the organizational chart indicates that Mr. [REDACTED] will supervise 30 additional new hires.¹⁸ Although the petitioner claims that Mr. [REDACTED] will supervise the beneficiary, there is a lack of information regarding what this task will actually entail.

In the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The petitioner did not clarify basic aspects about the supervisor's role (e.g., the supervisor's job title, 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 with regard to Mr. [REDACTED] job title and the number of subordinates that would report to him. 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.

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 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

¹⁸ On April 1, 2013 (the same date as the instant petition was filed), the petitioner submitted a petition on behalf of a different beneficiary. The petitioner claims that that beneficiary will be employed both at its facility and off-site. The petitioner included an organizational chart for this other petition, indicating that Mr. [REDACTED] supervises 39 people. That chart does not indicate that there will be 30 new hires. No explanation for the variance was provided.

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).

The petitioner claims that it will pay the beneficiary's salary. While payment of wages, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Even though certain factors appear to weigh in favor of a finding that the petitioner would be the beneficiary's employer and that it would maintain the requisite employer-employee relationship with the beneficiary, some factors have not been shown and among those that have been asserted, there remains insufficient evidence to support the claims made or contrary evidence exists in the record which draws into doubt their veracity.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the beneficiary is the petitioner's employee and that the beneficiary will work at the petitioner's office on in-house projects does not establish that the petitioner exercises or will exercise the requisite control over the beneficiary and the substantive work that she would perform.¹⁹ Without documentary evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

V. The Petitioner Has Not Established that It Requires a Bachelor's or Higher Degree in a Specific Specialty (or Its Equivalent) for the Proffered Position

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

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

¹⁹ The petitioner indicated on the Form I-129 and LCA that the beneficiary would be working exclusively at the petitioner's office in [REDACTED] Michigan for the duration of the H-1B employment period. As discussed *supra*, upon review of the totality of the evidence, the AAO finds that there is insufficient documentary evidence to demonstrate that the beneficiary will more likely than not to work in-house for the petitioner performing the duties as described for the duration of the requested validity period. Thus, the AAO will briefly note that it cannot be determined that the LCA submitted in support of the petition accurately reflects the occupational category, place of employment, wage information, etc. Without further evidence, the petitioner has not met its burden of proof in this regard.

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.

Although the petitioner makes a general claim that the proffered position qualifies as a specialty occupation (stating a "Project Engineer is an H-1B specialty occupation"), the record of proceeding does not support the petitioner's assertion. 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, 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. It must be emphasized that determining whether a proffered position qualifies as a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.

Again, the petitioner did not state that the proffered position has any particular academic or experience requirements.²⁰ The petitioner did not claim that the proffered position requires the

²⁰ In the March 26, 2013 letter of support, the petitioner provided the following information regarding the software skills for the proffered position:

CAD/CAE Software Skills

- Pre-Processors: [REDACTED]
[REDACTED] etc.)
- CAE Solvers: [REDACTED]
- CAD Tools: Unigraphics NX5, CATIA 5.0

theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act. The director's decision must therefore be affirmed and the petition denied on this basis alone.

The AAO notes that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO cannot find, however, that a position qualifies as a specialty occupation based upon the petitioner's assertions alone. Instead, USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, as discussed, the petitioner does not state that there are any specific academic or experience requirements for the proffered position. The petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's proffered position requires a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner did not submit any further information regarding these skills. The petitioner does not claim and did not provide probative evidence establishing that software skills in pre-processors, CAE solvers, and CAD tools (as stated in the letter of support) would be equivalent to a U.S. bachelor's degree or higher in a specific specialty.

In response to the director's certification, counsel states that the "Service's assumption that one specific degree is required in order for [an] occupation to be a 'specialty occupation' is too narrow an interpretation of the relevant statute for an H-1B." Counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge." Counsel asserts that "[t]he [d]irector's insistence that an H-1B beneficiary may only qualify for inclusion in a specialty occupation by holding a highly specific degree in a field that uniformly requires that degree constitutes the application of an improper standard of law, and as such, an abuse of discretion."

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

In the instant case, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.²¹ Furthermore, the petitioner failed to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties of the proffered position. For instance, the petitioner does not state that the proffered position has any particular academic and/or experience requirements. Accordingly, counsel's reliance on this United States district court's decision is misplaced.

Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

²¹ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and the description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

The fact that a person may be employed in a position designated by an employer as that of a project engineer and may apply some related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation.²² Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Furthermore, even assuming *arguendo* that the petitioner had stated a degree requirement (which it did not), the petitioner has not satisfied the statutory and regulatory provisions to establish that the proffered position qualifies as 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).

²² 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."

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.

VI. 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 issues certified to the AAO are 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 additional 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 her 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.²³ 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 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

²³ 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.

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 letters to the beneficiary (dated March 20, 2013 and May 1, 2013) contain 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.

Although the petitioner claims that the beneficiary will be placed at its office, the petitioner has also indicated (in both offer letters) that the beneficiary may later be placed at a client facility. Further, the petitioner indicated that, when the beneficiary is placed at a client facility, the petitioner requires the beneficiary to take vacation days or waive her salary for shut-down periods and/or holidays observed by a client.²⁴ Consequently, the petitioner has not established that it will comply with its

²⁴ 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 for onsite workers. 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 to review.

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.

wage obligations in accordance with the statutory and regulatory provisions.²⁵ 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 her work, as required under the statutory and regulatory provisions, if the petition were granted. Accordingly, the petition cannot be approved for this additional reason.

B. The Petitioner Did Not Present Evidence that the Beneficiary Has at Least a United States Bachelor's Degree in a Specific Specialty or its Equivalent

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an academic evaluation of the beneficiary's foreign degrees or sufficient evidence to establish that her degree is the equivalent of a U.S. bachelor's degree in a specific specialty.²⁶ As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

VII. 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

²⁵ 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).

²⁶ A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm'r 1977). In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) requires the petitioner to submit documentation such as an evaluation of the beneficiary's education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. Here, the petitioner did not submit evidence to satisfy the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to (4). The petitioner submitted a copy of the beneficiary's diplomas (awarded in 2002 and 2004) and an academic transcript (which corresponds to the degree awarded in 2004). The transcript indicates that the beneficiary completed four semesters of courses. The petitioner did not submit the beneficiary's transcript for the degree awarded in June 2002 or other probative evidence regarding the length of the program and courses completed. Moreover, the petitioner has not established the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) as required for USCIS to make a determination that the beneficiary possesses the equivalent of at least a U.S. bachelor's degree in a specific specialty.

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.