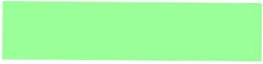


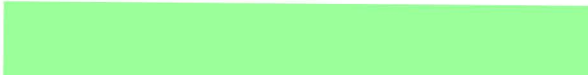



U.S. Citizenship  
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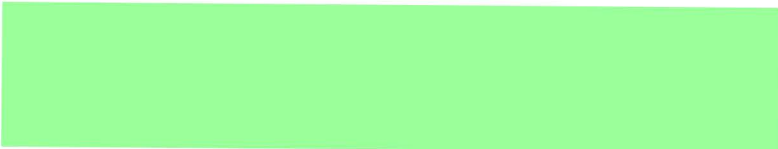


DATE: **JAN 13 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

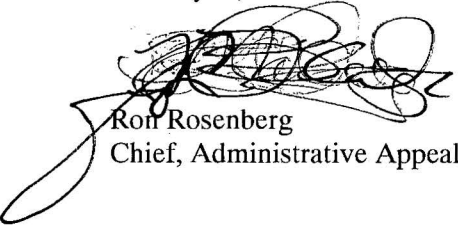


INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 4, 2013. In the Form I-129 visa petition, the petitioner describes itself as a software and information technology (IT) consulting company established in 2008. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on June 3, 2013, finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and supporting evidence.

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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

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. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for his work as required under the applicable statutory and regulatory provisions; and (2) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. For these additional reasons, the petition may not be approved. Each ground is considered as an independent and alternative basis for denial.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 petition that it is a software and IT consulting company and that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis for \$65,000 per year. In a letter dated March 28, 2013, the petitioner provided the following job description:

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Business process design, systems integration, and application design and management.
- Responsible for requirement gathering to complete blue print phase of project.
- Responsible to complete following design documents,
  - Functional Requirement Documents (FSDs)
  - Technical Design Definition Documents (TDDs)
  - Unit Test Plan Documents (UTPs)
- Responsible for development of SAP ABAP reports and Adobe Forms using ABAP programming languages.
- Responsible for testing the business solution architected.
- Responsible for documenting the test results and end user training manuals.
- Responsible for training the end user in using the business solution built.
- Responsible for gathering requirement documents and defining the scope of the project. Creating the test plan documents.
- Fixing the defects and maintenance of the existing application.
- Monitor the production servers and analyzing the logs [i]n production server to fix the [i]ssues as part of the product support.

The petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals).

The petitioner also states that "[b]ased on the nature of the responsibilities, we believe that the position of Programmer Analyst requires an individual with the minimum of a Bachelor's Degree in engineering, computer science, management or related field." With the petition, the petitioner submitted copies of the beneficiary's diploma and transcript. The documentation indicates that the beneficiary received a Master of Electrical Engineering from the [REDACTED] in May 2011.



Moreover, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analyst" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position. In the LCA, the petitioner indicated that the beneficiary would work at [REDACTED]

Furthermore, the petitioner submitted documentation in support of the petition, including the following evidence:

- An appointment letter signed by the petitioner and the beneficiary. The letter is undated, but the start date is June 15, 2011. The letter states that the position is for a "Programmer Analyst" for a salary of \$60,000 per year, and that the beneficiary will report to [REDACTED]
- An agreement between the petitioner and the beneficiary signed and dated November 4, 2011. The agreement states that the petitioner "hires [the beneficiary] to provide professional data processing services" and [the beneficiary] agrees to provide such services." The document does not define "professional data processing services," and it lacks significant details regarding the services that the beneficiary will perform. Moreover, the document indicates that "[the beneficiary] shall be paid an hourly rate between \$28-85/hr." A rate of \$28 per hour for full-time (40 hours per week) is equal to \$58,240 per year, which is less than the stated offered wage on the Form I-129 and LCA.
- A letter dated March 18, 2013 from [REDACTED] stating that the beneficiary is "currently working and will continue to work on different projects at [REDACTED] located at [REDACTED] and is on assignment through [REDACTED]. The letter does not provide any information as to the referenced "different projects" and it does not state the duration of the projects. In addition, the letter states that [REDACTED] "does not provide any client letters to vendors and wishes not to include additional documentation into further request." The letter outlines the beneficiary's job duties, which appear to be recited verbatim from the job duties provided by the petitioner in its support letter.

The letter also states that the beneficiary is working as a contractor and that the petitioner "shall function as his employer and shall have the following responsibilities such as: filing H1B visa and taking care of all immigration related matters; payroll, hiring, firing and controlling his work; providing all necessary insurance and any additional employee benefits according to relevant federal and/or state law, regulations or rules."

Further, the letter indicates that [REDACTED] pursuant to an agreement dated January 1, 2009 and amended/extended on April 3, 2012. It is noted that while the letter states that [REDACTED] is providing services to [REDACTED] the document is "accepted and agreed" by [REDACTED]



However, there is no evidence in the

- A letter dated February 15, 2013 from stating that "[the beneficiary] has been assigned to work on the development of an office at , starting February 15, 2012, a project that is likely to continue for the next three years." No explanation was provided as to the reason that this letter indicates that the beneficiary is assigned to "a project" whereas the letter dated March 18, 2013 indicates that the beneficiary is working on "different projects."
- A letter from dated March 4, 2013. The letter from and are virtually identical, including the same grammatical errors.
- A supplier Agreement dated January 27, 2012 between and the petitioner. The agreement states that "business is locating technical services personnel for various clients," and that the petitioner agrees to "introduce technical services personnel candidates to may submit said personnel to clients."
- A document entitled "Purchase Order Exhibit A" dated January 27, 2012 from indicating that the petitioner is contracted to perform work for beginning on February 13, 2012 for an estimated duration of 6 months (with a possible extension). The purchase order indicates that the beneficiary will work on the project in the role of SAP ABAP developer
- A document entitled "Purchase Order Exhibit A" dated March 13, 2013 from that indicates that the petitioner is contracted to perform work for beginning on February 13, 2013 for an estimated duration of 24 months. The purchase order indicates that the beneficiary will work on the project in the role of software developer.
- Copies of the beneficiary's pay statements from December 2012 to February 15, 2013.<sup>2</sup>

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 16, 2013. The director acknowledged that the petitioner had submitted various documents in support of the petition, but found that the evidence was insufficient to establish that a valid employer-employee relationship would exist for the duration of the period

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<sup>2</sup> The beneficiary's pay rate is inconsistent. For example, from December 1, 2012 to December 15, 2012, the beneficiary's gross pay was \$3,280.00 for the pay period; from December 16, 2012 to December 31, 2012, the beneficiary's gross pay was \$1,640.00; from January 1, 2013 to January 15, 2013, the beneficiary received \$2,296.00; and for the period ending on January 31, 2013, the beneficiary received \$3,608.00. The pay statements do not indicate the hours worked. No explanation was provided for the fluctuations in wages.

requested. The director outlined the types of evidence to be submitted. Furthermore, the petitioner was notified that it may submit any and all additional evidence that it believed would establish eligibility for the benefit sought.

Counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. In a letter May 17, 2013, counsel states that the beneficiary has been working with the petitioner since June 15, 2011, specifically as a programmer analyst at [REDACTED]. Counsel further added that the beneficiary has been "performing these duties by the virtue of a contract between [REDACTED] (A provider of vendor management services to [REDACTED] as the end-client; [REDACTED] as the provider of vendor management services; [REDACTED] as the prime vendor; [REDACTED] as the sub-vendor; and the petitioner as the supplier. In support of the assertion, the petitioner resubmitted several documents that had been previously provided, as well as the following additional documents:

- A Supplier Agreement dated November 12, 2010, between [REDACTED]. The document indicates that [REDACTED] is "in the business of providing Contingent Workforce Managed Services and providing Vendor Management Services to its clients." The agreement also states that [REDACTED] and its regulated utilities, [REDACTED] have each retained [REDACTED] as their provider of temporary staffing services, including without limitation, enterprise-wide contingent workforce managed services ("MSP") and vendor management services ("VMS"). It is further indicated that [REDACTED] has retained [REDACTED] "to provide staff augmentation services," including but not limited to the supply of contingent and/or temporary workers." The document is signed by [REDACTED]. The document does not provide specific information regarding the "temporary worker" such as job titles, duties, requirements, specific projects, etc.
- An e-mail printout from [REDACTED] dated April 30, 2013. The e-mail indicates that "it is not the policy at [REDACTED] to issue project verification letters to our contractors." The email states that "[the beneficiary] has been working on [REDACTED] since Feb 15, 2012 til date." [REDACTED] indicates that "[h]is services are long term, with no immediate termination date determined as of this writing." The email does not provide any information as to the beneficiary's role, job title, job duties, requirements for the position, and duration of the project. The beneficiary's email address is provided. The local-part of the email address is the username of the beneficiary, and the domain name is [REDACTED] rather than the petitioner's domain name.
- A photo identification badge stating [REDACTED] the beneficiary's name, the word "contractor," and the name [REDACTED]
- A Supplier Agreement between [REDACTED] dated August 3, 2011 and



[REDACTED] The agreement states that [REDACTED] "business is locating technical services personnel for various clients" and [REDACTED] is "in a similar business and desires to join efforts" for "the purpose of providing qualified candidates." It further indicates that [REDACTED] will introduce technical services personnel candidates to [REDACTED] [REDACTED] may submit said technical services personnel to provide their services to clients."

- Copies of the beneficiary's pay statements for February 2013 to April 2013.<sup>3</sup>
- A Form W-2, Wage and Tax Statement, for 2012, which states that the beneficiary earned \$57,993.38. The AAO notes that counsel states that the beneficiary has been working for the petitioner since June 15, 2011. According to the appointment letter, the beneficiary's salary is \$60,000. No explanation was provided.
- An organization chart. The beneficiary is listed as a programmer analyst under [REDACTED]
- A document entitled "Weekly Status Report." The document contains entries from the beneficiary to [REDACTED]. It does not appear that this individual is listed on the petitioner's organizational chart. Further, the petitioner has not established that this individual is the beneficiary's supervisor as designated on the organizational chart ([REDACTED]) or the person named in the Appointment Letter as the person the beneficiary will report to ([REDACTED]).
- An Annual Performance Evaluation, dated April 3, 2013 for the beneficiary. The job title is "SAP Developer." The date of hire is June 15, 2011.

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on June 3, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The AAO reviewed the record of proceeding in its entirety and will make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding. Notably, there are significant discrepancies in the record of proceeding with regard to the proffered position. These material conflicts, when viewed in the context of the record of proceeding, undermine the claim that the

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<sup>3</sup> Again, the beneficiary's pay appears to fluctuate. For example, from April 1 to April 15, 2013, the beneficiary's gross income was \$3,608.00; from March 16, 2013 to March 31, 2013, the beneficiary was paid \$3,280.00; from March 1, 2013 to March 15, 2013, he received \$3,608.00; from February 16, 2013 to February 28, 2013, he earned \$2,624.00; and from February 1, 2013 to February 15, 2013, the beneficiary received \$3,608.00.



petitioner has established eligibility for the benefit sought under the pertinent statutory and regulatory provisions.

As previously mentioned, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position.<sup>4</sup> Notably, the purchase order from [REDACTED] signed on January 27, 2012 indicates that the beneficiary will serve as a "SAP ABAP Developer" and the purchase order signed on March 13, 2013 indicates that the beneficiary will serve as a "Software Developer."

With respect to the LCA, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O\*NET) code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the [determiner] should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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<sup>4</sup> The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O\*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Computer Systems Analysts" as \$59,446 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Software Developers, Systems Software" is listed as \$73,258 per year and "Software Developers, Applications" is \$66,622 per year.<sup>5</sup> Thus, the prevailing wage for "Computer Systems Analysts" is significantly lower than the prevailing wage for both categories of "Software Developers." According to DOL guidance, if the proffered position is a combination of the occupations "Computer Systems Analyst" and "Software Developers," the petitioner should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lower paying occupational category for the proffered position on the LCA.<sup>6</sup>

The AAO notes that 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

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<sup>5</sup> For more information regarding the occupational category Software Developers, Applications OES/SOC Code 15-1132 see <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1132&area=41740&year=13&source=1>, and Software Developers, Systems Software OES/SOC Code 15-1133 <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1133&area=41740&year=13&source=1> (last visited January 13, 2014).

<sup>6</sup> The petitioner classified the position in the LCA as falling under the occupational category "Computer Systems Analysts." It must be noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.



information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupation at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position and that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

The next issue that the AAO will address is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question is 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:

*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.



(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

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

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

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

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

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

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

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<sup>7</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

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



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.<sup>8</sup>

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).<sup>9</sup>

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)

<sup>8</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>9</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).



(adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

In the instant case, there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. As previously mentioned, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 591. Further, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. 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."

The petitioner is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

\* \* \*

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

Further, 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.

Here, the petitioner provided an undated appointment letter with a start date of June 15, 2011, which indicates that the position is for a "programmer analyst" at an annual salary of \$60,000 and that the beneficiary's location will be in [REDACTED]. On the Form I-129 and LCA, the petitioner indicated that the beneficiary will be employed at an annual salary of \$65,000 in [REDACTED] California.

The record also contains a document entitled "Agreement" dated November 4, 2011 between the petitioner and the beneficiary.<sup>10</sup> The "Agreement" is devoid of several critical aspects of the beneficiary's employment such as the actual position being offered and duties of the proffered position. For instance, the document states that the petitioner "hires [the beneficiary] to provide professional data processing services" and [the beneficiary] agrees to provide such services," but the document does not provide information on what "professional data processing services" actually entails.

Further, the document indicates that "[the beneficiary] shall be paid an hourly rate between \$28-85/hr." A rate of \$28 per hour for full-time (40 hours per week) is equal to \$58,240 per year, which is less than the offered wage. The document also states that the beneficiary will be permitted to schedule his own working hours directly with [the petitioner's] client or [e]nd user but always to the client's or end user's approval."<sup>11</sup> It must also be noted that the instant petition was submitted approximated April 15, 2013 (thus 22 months after the "Offer Letter" and 17 months after the "Agreement"). The "Agreement" states that it contains the entire understanding of the parties and that "[i]t may not be changed orally but only by an Agreement in writing signed by both parties." The petitioner did not provide documentation indicating that the terms of the offer and/or agreement between the petitioner and the beneficiary was ever amended or revised.

<sup>10</sup> An email printout from [REDACTED] indicates that the beneficiary began working on a project at [REDACTED] on February 15, 2012.

<sup>11</sup> Thus, it appears that the client or end user has discretion and final approval over when and how long the beneficiary will work.



A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The record of proceeding provides insufficient probative evidence on this issue. The AAO notes that the instant case has multiple vendors, and the petitioner failed to establish that it would control the work of the beneficiary for the duration of the H-1B petition.

As mentioned, counsel identifies (1) the petitioner as the supplier; (2) [REDACTED] as the provider of vendor management services; and (5) [REDACTED] as the end-client. The record contains agreements between (1) the petitioner and [REDACTED] and [REDACTED]. Within this chain, the petitioner has not submitted an agreement from the claimed end client, [REDACTED].

The petitioner submitted an e-mail from [REDACTED] dated April 30, 2013. In the e-mail, [REDACTED] stated that "it is not the policy at [REDACTED] to issue project verification letters to our contractors." The e-mail continues by stating that the beneficiary has been working on [REDACTED] since February 15, 2012 at [REDACTED]. The AAO finds that the e-mail provides insufficient information regarding the nature of the beneficiary's employment, including the actual duties and length of the project to establish that H-1B caliber work exists for the beneficiary for the duration of the requested period. Further, it must be noted that the email is addressed to the beneficiary. While the local-part of the email address is the username of the beneficiary, the domain name is "[REDACTED]" rather than the petitioner's domain name.

Upon review of the record, the AAO notes that the petitioner has not established that the petitioner has H-1B caliber work for the beneficiary for the duration of the requested validity dates of the H-1B petition, specifically from October 1, 2013 to August 31, 2016. The record of proceeding contains a letter from [REDACTED] dated March 4, 2013, which states that the beneficiary has been assigned to work on a project "starting February 15, 2012, a project that is likely to continue for the next three years." The petitioner also submitted a document entitled "Purchase Order Exhibit A" (dated March 13, 2013, thus several days after the letter) from [REDACTED] that indicates that the petitioner is contracted to perform work beginning on February 13, 2013 for an estimated duration of 24 months. The petitioner did not provide probative evidence of specific additional projects or work for the beneficiary that would continue until the requested validity date of August 31, 2016.

There is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed that the beneficiary would be working on a project for [REDACTED] for the requested period. However, the petitioner did not submit probative evidence substantiating specific work for the beneficiary. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility



or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Furthermore, the documents that were provided by the petitioner do not establish key aspects of the beneficiary's employment. For example, the beneficiary's job title changes throughout the record. On the Form I-129 and its supporting documents, the petitioner stated that the proffered position is a "Programmer Analyst." In the [REDACTED] purchase orders the beneficiary's role is initially described as a "SAP ABAP Developer," and thereafter as a "Software Developer." The [REDACTED] Partners letters (dated February 15, 2013 and March 4, 2013) describe the beneficiary as an "IT Consultant."

The AAO acknowledges that several documents convey the duties of the position, and the duties are recited verbatim from the petitioner's letter dated March 28, 2013. However, the record of proceeding lacks probative evidence from Sempra Energy to establish the duties of the proffered position, the requirements for the position, and the nature of the project. On appeal, counsel claims that the letter submitted by [REDACTED] dated March 18, 2013 is "accepted and agreed by Mr.

[REDACTED] a regulated utility of [REDACTED]" The AAO finds that the document from [REDACTED]

[REDACTED] identifies its clients as [REDACTED] and its regulated utilities [REDACTED]

[REDACTED] However, there is no independent documentary evidence in the record to verify that [REDACTED] are

related entities and/or that an employee of [REDACTED] has the authority to accept and agree to a document regarding [REDACTED]

In fact, [REDACTED] website has a disclaimer on its front page which states [REDACTED]

[REDACTED] are not the same company as the California utilities, [REDACTED]

and [REDACTED] are not regulated by the [REDACTED]<sup>12</sup>

The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The letter from [REDACTED] "does not provide any client letters to vendors and wishes not to include additional documentation into further request." While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit.<sup>13</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the

<sup>12</sup> For more information about [REDACTED] (last visited January 13, 2014).

<sup>13</sup> Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977). Notably, any 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). 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)).

In support of the H-1B petition, the petitioner submitted copies of pay statements and a Form W-2, Wage and Tax Statement, for 2012 that it issued to the beneficiary. As noted earlier, the earning statements show that the beneficiary's salary fluctuates from pay period-to-pay-period. Further, the total compensation for 2012 paid to the beneficiary was less than offered salary per the "Offer Letter." No explanation was provided by the petitioner.

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

In the agreement with the beneficiary dated November 4, 2011, the petitioner indicated that "a full day shall be those hours as set forth by [the petitioner]'s client or end user at which Employee provides services." Further, it states "[i]f the Client or End User at which Employee is providing services fails or refuses to pay an invoice for work provided by Employee claiming unsatisfactory work or performance on the part of Employee, [the petitioner] shall be permitted to withhold payment for unsatisfactory work or performance." Moreover, in the letter dated February 15, 2013, [redacted] states that as the beneficiary "is based at the client [redacted] office[,] he is expected to follow the client's standard workspace policies and his day to day project deliverables are reviewed by the client Project Manager, to ensure that it [conforms] to all quality and acceptance standards." It follows that "he remains under the control and overall supervision of his own employer." While the letter asserts that the petitioner will retain control of the beneficiary, it appears that it is the client or end user that will oversee the daily functions performed by the beneficiary, determine the number of hours worked, and review and evaluate whether the beneficiary's work and performance is satisfactory.

The petitioner submitted an Annual Performance Evaluation, dated April 3, 2013 for the beneficiary. The job title is "SAP Developer" and the date of hire is June 15, 2011. The name of the supervisor is illegible. Upon review, the document lacks sufficient information regarding how work and performance standards were established, the methods for assessing and evaluating the beneficiary's performance, who prepared the report, the criteria for determining bonuses and salary adjustments, et cetera. Importantly, there is a lack of information as to how the day-to-day work of the beneficiary has been and will be supervised and overseen.



Further, the petitioner has provided inconsistent information as to who will supervise the beneficiary. The Offer Letter indicates that the beneficiary will report to [REDACTED]. However, the petitioner's provided an organizational chart depicting its staffing hierarchy that shows that the beneficiary reports to [REDACTED]. However, there is no evidence that [REDACTED] have had any contacts with the beneficiary.<sup>14</sup> Further, as mentioned, the beneficiary submits status reports to [REDACTED] but it does not appear that this individual is listed on the petitioner's organizational chart. Upon review, the petitioner has not established the identity of the beneficiary's supervisor. Further, the petitioner did not submit a description of the supervisor's job duties, the work location and/or other probative evidence on the issue.<sup>15</sup>

The petitioner provided a photo identification badge stating "[REDACTED] the beneficiary's name, the word "contractor," and [REDACTED]. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced, for what purpose, or by whom. It does not contain any information connecting the beneficiary to the petitioner.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the position and the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide any information on these issues.

The AAO reviewed the record in its entirety and finds that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. It is not sufficient to establish eligibility in this matter for the petitioner to merely claim that it will be responsible for the beneficiary's employment. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). It appears that the petitioner's role is likely limited to invoicing and proper payment for the hours when it is reported by the beneficiary. With the petitioner's role

<sup>14</sup> The AAO notes that based upon the LCA wage-level selected by the petitioner for the proffered position, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Moreover, he will receive specific instructions on required tasks and expected results.

<sup>15</sup> Notably, the petitioner's office is located approximately 460 miles from the beneficiary's worksite.

limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client or end-client. *See Defensor v. Meissner*, 201 F.3d at 388.

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

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;



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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the

ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

To ascertain the intent of a petitioner, USCIS must look 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."

In the instant case, the petitioner states that the academic requirement for the proffered position is a bachelor's degree or higher in engineering, computer science, management or a related field. Such an assertion, i.e., the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., engineering, computer science or management) suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

To begin with, the petitioner claims that a degree in one of several disciplines (i.e., engineering, computer science, or management) is sufficient for the proffered position. 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" 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," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes



how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in "engineering, computer science, management or [a] related field." Absent evidence to the contrary, the fields of engineering, computer science and management are not closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Furthermore, the petitioner claims that a degree in engineering is acceptable for the proffered position. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent (1) that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science and management (i.e., that engineering, computer science and management are closely related fields); or (2) that any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

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

In the instant case, the record of proceeding is devoid of substantive information from the end-client regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the end-client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain documentation on this issue from, or endorsed by, the actual end-client, the company that has been

or will be utilizing the beneficiary's services as a programmer analyst (as stated by the petitioner). Furthermore, the petitioner designated the proffered position under the occupational category "Computer System Analysts" in the LCA. However, as previously discussed, the petitioner has not established that the description for this occupational category corresponds to the duties that the beneficiary will in fact be performing.<sup>16</sup>

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

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

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<sup>16</sup> As reflected in the petitioner's description of the proffered position, the petitioner states the proposed duties in terms that fail to convey the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be "responsible" for various functions. The petitioner does not include information regarding the day-to-day tasks of the position, and the term "responsible" does not delineate the actual work that the beneficiary will perform. This is again illustrated by the petitioner's statement that the beneficiary will be "[f]ixing the defects and maintenance of the existing application." The petitioner does not explain the beneficiary's specific role with respect to "fixing the defects" and does not provide details regarding the "existing application." Further, the petitioner's statement does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. Additionally, the petitioner claims that the beneficiary will "[m]onitor the production servers and analyz[e] the logs In production server to fix the [i]ssues as part of product support." The petitioner fails to sufficiently define how this task translates to the need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job description does not persuasively support the claim that the position's day-to-day job responsibilities and duties would meet the statutory and regulatory provisions for establishing eligibility for the benefit sought.



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

**ORDER:** The appeal is dismissed. The petition is denied.