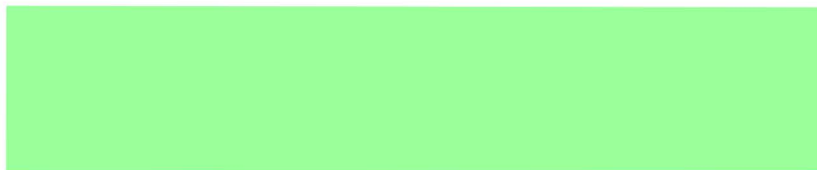




U.S. Citizenship
and Immigration
Services



DATE: **JAN 24 2014** OFFICE: VERMONT 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:

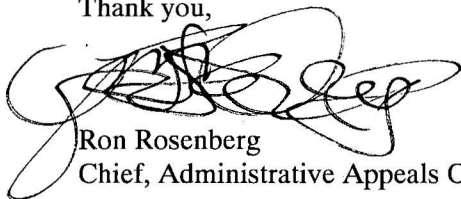


INSTRUCTIONS:

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.

On the Form I-129 visa petition, the petitioner describes itself as an employment/staffing agency established in 2003. In order to employ the beneficiary in what it designates as a healthcare quality assurance manager position, the petitioner seeks to continue 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 June 3, 2013, concluding that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary; (2) that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (3) that the Labor Condition Application (LCA) corresponds to the petition. Counsel subsequently filed an appeal. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

In the petition signed on August 9, 2012, the petitioner indicates that it is seeking the beneficiary's services as a healthcare quality assurance manager on a full-time basis at the rate of pay of \$48,500 per year. In addition, the petitioner states that the beneficiary will work at [REDACTED]

In the August 9, 2012 letter of support, the petitioner states that the beneficiary will serve "as an H-1B nonimmigrant of distinguished merit and ability."¹ Further, the petitioner claims that "the

¹ The petitioner states that the beneficiary will serve "as a person of distinguished merit and ability." However, to clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

beneficiary will work at the Company's client, [REDACTED] a rehabilitation and skilled nursing facility that has been serving the community for over 35 years, located at [REDACTED] for [a] duration of three years." In addition, the petitioner indicates that the beneficiary will be responsible for the following duties:

The primary role of the beneficiary in the position of Healthcare Quality Assurance Manager involves planning, designing, implementing, and managing quality assurance programs for the healthcare services provided by the Care Center. The beneficiary will continue to research quality assurance initiatives in the healthcare field, design quality improvement programs, and develop quality assurance programs for implementation at the Care Center. She will direct the implementation of healthcare quality assurance programs and procedures, manage the execution of quality assurance plans, and implement required changes to healthcare quality plans. The beneficiary will manage healthcare quality programs to ensure a high level of quality of clinical care, the utilization of sterile techniques to prevent infection, the implementation of advanced technologies, medical and therapy equipments [sic], the implementation of emergency medical procedures, and adherence to quality improvement guidelines. Moreover, her responsibilities will include testing healthcare quality procedures, analyzing data on current procedures, determining required changes, and modifying healthcare quality assurance programs. Further, she must ensure that all personnel are trained in healthcare quality techniques, emergency medicine procedures, advanced medical technologies, and quality assurance methodologies.

The job duties of the beneficiary will include assessing current clinical systems and quality standards, researching clinical quality care standards, planning and devising healthcare quality assurance systems and plans, establishing healthcare procedures and quality assurance policies, implementing healthcare quality assurance plans, devising systems to measure healthcare quality services, and implementing and managing healthcare quality assurance plans. Additionally, the beneficiary will conduct observations and record data on clinical care and compliance with quality standards and programs and modify healthcare quality assurance plans, as required.

In this position, the beneficiary will be responsible for managing the quality of patient care and communications, ensuring quality improvement for medical service procedures, training medical staff in quality improvement and assurance policies and procedures, and directing the continued quality improvement of healthcare programs. The beneficiary will work closely with department managers and various healthcare personnel to address quality patient care issues with a goal of implementing and maintaining quality improvement activities.

The beneficiary will also be responsible for reviewing charts and files of Medicare patients to assure that there is proper documentation to maximize reimbursement, including performing verification checks of appropriate documentation; ensuring that

the utmost quality of care is provided; establishing recommendations to improve the quality of care standards; and reviewing visit utilization to ensure that the appropriate orders of physicians and therapists are followed and ensuring adherence to healthcare plans. The beneficiary's job duties will also consist of serving as a resource and support system to professional healthcare personnel, including nurses, therapists and support staff, in matters of patient care and other issues that require comprehensive care. Further, the job duties of the proffered position will encompass working closely with all members of interdisciplinary teams and community agencies; promoting public relations with patients, families, physicians, therapists and referring individuals and organization; and reviewing initial and recertification plans of care, therapy and rehabilitation and other documentation as required to assure that accuracy and appropriateness of care is rendered.

The beneficiary will arrange and perform annual assessments of clinical skills for all field staff, ensuring the completion of quality evaluations on an annual basis. [The beneficiary] will also oversee quality with respect to medical staff services including the credentialing of licensed medical staff and therapists to ensure compliance with regulatory agencies. In addition, she will be responsible for the Care Center's preparation for JCAHO and other accreditation processes necessary for continued compliance.

In addition, [the beneficiary] will be in charge of conferring with staff on a regularly scheduled basis to review the appropriateness of care for recertification in order to assist staff in fulfilling responsibilities and to assure that standards of care are maintained. The beneficiary will supervise the completion of documentation deficiencies and coordinate the assignment of appropriate clinicians to cases. Further, she will oversee records supervision and manage audits of charts to ensure completeness and compliance with Medicare guidelines. [The beneficiary] will also direct the orientation of new field staff; plan, implement and evaluate in-service and continuing education programs; and conduct scheduled staff meetings, in-service education programs, care conferences and care review.

Further, [the beneficiary] will manage the quality assurance program activities of the Care Center. In this role, she will provide medical and clinical expertise in the development of assessment tools; conduct on-site assessments of prepaid health plan management to assure compliance with federal and state laws and regulations and contractual standards and provisions; and implement current practices with respect to medical services delivery trends, clinical practices and standards, comparable medical practices and policies in other states, medical programs and policies of third party payers within the state and nationally, and statewide and national medical issues that may impact the Care Center and current standards and techniques for quality improvement processes.

Further, the petitioner states, "It is essential that the candidate for the proffered position of Healthcare Quality Assurance Manager have, at minimum, a Bachelor of Science Degree in Nursing or Healthcare Administration, or the equivalent thereof."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from [REDACTED]. The evaluation states that the beneficiary's foreign education is "the equivalent of a four-year Bachelor of Science Degree in Nursing Science from an accredited college or university in the United States." The petitioner claims that the beneficiary is ideally suited for the position based upon her degree in nursing.

In addition, the petitioner submitted the following documents:

- An LCA in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Occupational Health and Safety Specialists" – SOC (ONET/OES Code) 29-9011, at a Level I (entry level) wage. The beneficiary's place of employment is listed as [REDACTED].
- An Employment Contract between the petitioner and the beneficiary, effective August 28, 2012.
- Copies of pay statements issued to the beneficiary from the petitioner.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 3, 2012. The director outlined the specific evidence to be submitted.

On February 28, 2013, the petitioner responded to the RFE. In a letter dated February 18, 2013, the petitioner provided additional information regarding the proffered position, along with the percentage of time the beneficiary would spend performing the duties of the position, as follows:

- 12% research and analysis** conduct research into best methods of healthcare delivery; research and analyze products, procedures, services, quality requirements; research and analyze health care requirements; assess health care needs; analyze results of health care performance and staff performance; determine optimal means of assisting patients; analyze procedures implemented by the client-facility; study existing policies and procedures; identify and analyze problems, plan tasks, implement solutions[.]
- 25% devise and implement plans for delivery and management of health care services** develop quantitative and analytical studies of operational data to assess the success of quality assurance programs; analyze statistical data on quality control initiatives; use quantitative analyses to modify and improve

quality control programs; determine optimal plans and procedures for health care service delivery; plan delivery and management of health care services; create plans for delivery of health care services; research and analyze health care requirements, analyze health care needs, determine the most suitable means of assisting patients; implement health care service plans; provide data analysis, trending, reporting and presentation on individual and departmental statistics relating to the identification of areas requiring improvement; recommend and implement changes to improve efficiency and effectiveness of healthcare services; devise and implement healthcare services plans and quality improvement plans; participate in and organize site surveys and management assessments of managed healthcare plans; develop corrective actions plans to comply with federal requirements for the improvement of managed care systems; design and conduct focused studies to monitor outcomes of specific care or services provided by managed care plans[.]

- 13%** **manage healthcare quality assurance programs** implement and manage healthcare quality assurance programs; coordinate healthcare quality work of work of Health Services Manager, Clinical Coordinator, Registered Nurses, License Practical Nurses, Physical Therapists, Occupational Therapists, Dieticians and other medical professionals; record observations; prepare statistical surveys of medical/data; implement changes to healthcare quality assurance programs; ensure quality levels of healthcare[.]
- 12%** **review and analyze actions taken** interview personnel and patients to evaluate effectiveness of quality assurance programs; prepare statistical studies of healthcare quality services; conduct analyses of operational data; analyze statistical data on quality control initiatives; conduct analyses of healthcare service delivery; prepare analytical reports assessing quality of client-facility's medical services; suggest improvements to healthcare service delivery; revise health care standards and procedures; develop training and related reward systems; develop systematic approaches for assuring high quality services; provide guidance on development, performance, and productivity issues; analyze effectiveness of new healthcare assurance programs[.]
- 12%** **health care quality assurance policies and procedures** review and analyze quality assurance standards; establish and implement standards for the delivery and management of health care services; interview personnel to evaluate the effectiveness of quality assurance programs; write quality assurance policies and procedures; develop and monitor detailed continuous quality improvement and action plans for prepaid health plans; develop, monitor, plan, execute, work with plans to achieve defined action targets; direct plans in achieving set long-term and short-term Quality Goals; use CQI process and on-going frequent monitoring to achieve targeted results[.]

13% education and training determine personnel requirements; train personnel; implement personnel training programs; train staff in health care quality assurance issues and procedures; conduct programs geared to new staff members and advanced classes in quality assurance matters; attend seminars and conferences in healthcare quality assurance; keep apprised of developments in the field of quality assurance management to maintain current; work in conjunction with Education Department to develop and present training programs and resource materials for staff development, provider education, and client awareness[.]

13% manage development of specialized quality control programs research, analyze, develop healthcare quality control programs; implement healthcare quality control programs; devise and implement training and quality requires [sic] in areas of emergency medicines, sterile techniques, dialysis, new medical procedures and equipment; review and revise healthcare quality control programs and procedures; review and approve Validation Protocols and Reports; prepare annual service reviews; approve company SOPs, Master Batch Records, Stability Protocols and Reports, Test Methods and Specifications; develop Quality Process specifications and Quality Standard Reference inspection criteria[.]

In addition, the petitioner stated that "[t]he educational requirement of the subject position is a minimum of a bachelor's-level degree in Healthcare Management, Healthcare Administration, or a closely related health care discipline." Notably, the academic requirements are not the same as previously stated by the petitioner in the initial petition; however, no explanation was provided.

In response to the RFE, the petitioner also submitted: (1) job vacancy announcements; (2) an H-1B approval notice for [REDACTED] along with a copy of her foreign academic credentials and pay statements; and (3) an H-1B approval notice for [REDACTED] (4) an Internet printout from the State of New York Office of Professions; and (5) a printout from the Foreign Labor Certification Data Center.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on June 3, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief. 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.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

The first issue for consideration 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). The AAO will now 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:

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 legacy Immigration and Naturalization Service ("INS") nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa

classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

² 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).

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 318-319.³

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).

³ 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))).

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, 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*

⁴ 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).

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, the petitioner claims that it has an employer-employee relationship with the beneficiary. Specifically, in the February 18, 2013 letter, submitted in response to the director's RFE, the petitioner states that "the Company has the exclusive right to control the work of the beneficiary." In addition, the petitioner states that "[w]hile the beneficiary will be assigned to work at a client site on behalf of the Company and its client, the Company will retain sole right to hire and fire the beneficiary, evaluate her work, discipline her, and compensate her." The petitioner further states that "[t]he Company will be responsible for paying the salary of the beneficiary and paying all raises, bonuses, and other compensation to the beneficiary." The AAO has considered the assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. 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."

In support of the H-1B petition, the petitioner submitted pay statements that it issued to the beneficiary. 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.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an Employment Contract between the petitioner and the beneficiary, effective August 28, 2012. The employment agreement indicates the beneficiary's job title and salary; however, upon review of the document, the AAO notes that it does not provide any

level of specificity as to the beneficiary's duties and the requirements for the position. While an Employment Contract 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.

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; the provision of employee benefits; and the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide probative evidence on these issues.

Further, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. In the February 18, 2013 letter, submitted in response to the RFE, the petitioner claims that "the employment of the beneficiary with the Company is required in connection with a business contract signed by the Company with its client, [REDACTED] located at [REDACTED]

The petitioner further claims that "[t]he Company has entered into a Master Agreement to provide services to its client, [REDACTED]. In addition, the petitioner states that "[t]he Company has executed a valid contract with its client [REDACTED], for the beneficiary's services, specifying the employment of the beneficiary throughout her period of employment with the Company." However, the record does not contain a written agreement between the petitioner and [REDACTED] or any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

The AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested the beneficiary be granted H-1B classification from September 9, 2012 to September 9, 2015, there is a lack of substantive documentation regarding any work 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 at [REDACTED] during the requested validity dates. There is a lack of probative evidence substantiating any 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. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The AAO observes that in the RFE, the director specifically requested that the petitioner provide

documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit an organizational chart, and a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., job title, duties, location).

In the February 18, 2013 letter, the petitioner claims that it will evaluate the beneficiary's work. However, the AAO observes that the petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, who will prepare the reports, the criteria for determining bonuses and salary adjustments, et cetera. Importantly, there is no information as to how the day-to-day work of the beneficiary will be evaluated, supervised and/or overseen.

In the instant case, the petitioner claims that the beneficiary has served in the proffered position for approximately three years. However, upon complete review of the record of proceeding, the AAO 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. 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). 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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).

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

The AAO will now address the issue of whether the petitioner's proffered position qualifies as a specialty occupation. 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

Here, the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the September 5, 2012 letter of support, the petitioner stated that "the candidate for the proffered position of Healthcare Quality Assurance Manager must have, at minimum, a Bachelor of Science Degree in Nursing or Healthcare Administration, or equivalent thereof." However, in the February 18, 2013 letter, submitted in response to the RFE, the petitioner stated that "[t]he educational requirement of the subject position is a minimum of a bachelor's-level degree in Healthcare Management, Healthcare Administration, or a closely related health care discipline." No explanation for the variance was provided. The petitioner has provided inconsistent information regarding the minimum educational requirement for the proffered position. 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). Moreover, 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 petitioner may not make material changes to a petition 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).

Furthermore, the AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client'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 INS 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 [REDACTED] regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain sufficient corroborating documentation on this issue from, or endorsed by, [REDACTED] the company that will actually be utilizing the beneficiary's services (according to the petitioner).

Moreover, the petitioner claims that the beneficiary has served in the proffered position for approximately three years. However, while the description of the proffered position provided by the petitioner contains a lengthy list of general duties, it fails to convey specific information regarding the beneficiary's actual daily duties. The duties of the position as provided by the petitioner fail to adequately describe the substantive nature of the work that the beneficiary performs within the client's business operations. It fails to provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position, so as to persuasively support the claim that the beneficiary is employed in the capacity specified in the petition. Further, the petitioner failed to submit documentary evidence to establish the actual day-to-day duties performed by the beneficiary.

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.

Nevertheless, assuming, *arguendo*, that the proffered duties as described in the record would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The AAO will now look at the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Occupational Health and Safety Specialists." When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁶ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require

⁵ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁶ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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.

limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

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

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

Duties

Occupational health and safety specialists typically do the following:

- Identify chemical, physical, radiological, and biological hazards in the workplace
- Collect samples of potentially toxic materials for analysis
- Inspect and evaluate workplace environments, equipment, and practices to ensure that safety standards and government regulations are being followed
- Recommend measures to help protect workers from potentially hazardous work conditions
- Investigate accidents to identify their causes and to determine how they might be prevented in the future

Occupational health and safety specialists, also known as occupational safety and health inspectors, examine lighting, equipment, ventilation, and other conditions that could affect employee health, safety, comfort, and performance. Workers usually are more alert and productive in environments that have specific levels of lighting or temperature.

Specialists seek to increase worker productivity by reducing absenteeism and equipment downtime. They also seek to save money by lowering insurance premiums and workers' compensation payments and by preventing government fines. Some specialists develop and conduct employee safety and training programs. These programs cover a range of topics, such as how to use safety equipment correctly and how to respond in an emergency.

Specialists work to prevent harm not only to workers but also to property, the environment, and the public by inspecting workplaces for chemical, radiological, and

biological hazards. Specialists who work for governments conduct safety inspections and can impose fines.

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

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

Environmental protection officers evaluate and coordinate storing and handling hazardous waste, cleaning up contaminated soil or water, and other activities that affect the environment.

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

Health physicists work in locations that use radiation and radioactive material, helping to protect people and the environment from hazardous radiation exposure.

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

Loss prevention specialists work for insurance companies. They inspect the facilities that are insured and suggest improvements to prevent losses.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Occupational Health and Safety Specialists, on the Internet at <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-2> (last visited January 6, 2014).

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

Occupational health and safety specialists held about 58,700 jobs in 2010. They work in a variety of settings, such as offices, factories, and mines. Their jobs often involve considerable fieldwork and travel.

Thirty eight percent of occupational health and safety specialists worked for federal, state, and local governments in 2010. In the federal government, specialists are employed by various agencies, including the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor. Most large government

agencies employ specialists to protect agency employees. In addition to working for governments, occupational safety and health specialists worked in management, scientific, and technical consulting services; education services; hospitals; and chemical manufacturing.

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

Handbook, 2012-13 ed., Occupational Health and Safety Specialists, on the Internet at <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-3> (last visited January 6, 2014).

In the Form I-129 petition, the petitioner describes itself as an employment/staffing agency with 74 employees. The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561310.⁷ Notably, the U.S. Department of Commerce, Census Bureau website states that "561310 is not a valid 2012 NAICS code." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 561310, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited January 6, 2014). The petitioner did not submit documentation regarding the business operations of its client, [REDACTED] the location where the beneficiary will actually be employed.

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for occupational health and safety specialist positions. The *Handbook* indicates that the academic background for this occupation is in occupational health, safety, or a related scientific or technical field, such as engineering, biology, or chemistry. Although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO notes that the beneficiary does not possess a degree in one of the fields listed in the *Handbook* as typically needed or required for this occupation.⁸

⁷ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited January 6, 2014).

⁸ The petitioner initially indicated that a degree in nursing or healthcare administration is required for the proffered position. Thereafter, the petitioner claimed that the proffered position requires a degree in healthcare management or healthcare administration. The petitioner submitted an education evaluation indicating the beneficiary holds a bachelor of science in nursing. The narrative of the *Handbook* does not report that a degree in nursing (and/or healthcare administration or healthcare management) prepares an individual for entry into the occupational category "Occupational Health and Safety Specialists." Rather, the *Handbook* states that a degree in occupational health, safety, engineering, biology, or chemistry are typically needed for this occupational category, and that a degree in industrial hygiene, health physics, or a related

In the instant case, the petitioner submitted a broad description of the proffered position, but the statements do not include information regarding the day-to-day tasks of the position and do not delineate the actual work that the beneficiary will perform. Nevertheless, upon review of the record of proceeding and the chapter regarding "Occupational Health and Safety Specialists" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its healthcare quality assurance manager position has the same or similar duties, tasks, knowledge, work activities, requirements, etc. that are generally associated with "Occupational Health and Safety Specialists." For example, the petitioner does not claim that the beneficiary will identify chemical, physical, radiological, and biological hazards in the workplace. In addition, the petitioner does not claim that the beneficiary will collect samples of potentially toxic materials for analysis.

Further, the petitioner does not assert that the beneficiary will inspect and evaluate workplace environments, equipment, and practices to ensure that safety standards and government regulations are being followed. The record of proceeding does not establish that the beneficiary will recommend measures to help protect workers from potentially hazardous work conditions. Moreover, the petitioner does not claim that the beneficiary will investigate accidents to identify their causes and to determine how they might be prevented in the future. Additionally, the duties of the proffered position do not indicate that the beneficiary will examine lighting, equipment, ventilation, and other conditions that could affect employee health, safety, comfort, and performance. In addition, there is no evidence that the beneficiary will be employed as an environmental protection officer, ergonomist, health physicist, industrial hygienist, loss prevention specialist, occupational safety and health inspector, or a similar position.

The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may, at best, perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute an occupational health and safety specialist position, and not that the tasks would require the range of specialized knowledge that characterizes this occupational category.

Moreover, in response to the RFE, the petitioner claims that it "used the broad category of "Occupational Health and Safety Specialists." The petitioner states "the beneficiary will work as a healthcare quality assurance manager, not as an occupational health and safety specialist."

In response to the petitioner's assertion, the AAO notes that DOL provides guidance for selecting the most relevant occupational classification. The "Prevailing Wage Determination Policy Guidance" issued by DOL, states the following:

subject may be required for some positions. The *Handbook* continues by stating that preparation for this occupation typically includes courses in radiation science, hazardous material management and control, risk communications, and respiratory protection.

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

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

Further, the Standard Occupational Classification (SOC) System is used by DOL for classifying occupations. Under the SOC system, workers are classified at four levels of aggregation: (1) major group (of which there are 23); (2) minor group (of which there are 96); (3) broad occupation (of which there are 449); and (4) detailed occupation (of which there are 821). Occupations are classified based upon work performed, skills, education, training, and credentials.

The SOC system includes residual categories within the various levels of the system to permit the reporting of occupations not identified at the detailed level. That is, if an occupation is not included as a distinct detailed occupation in the structure, it is classified in the appropriate residual occupation. Residual occupations contain all occupations within a major, minor or broad group that are not classified separately. Thus, for the less populous occupations, residual categories (that is, "All Other" categories) have been created within most levels of the SOC system. Residual categories provide a complete accounting of all workers employed within an establishment and allow aggregation and analysis of occupational employment data at various levels of detail. For instance, an example of a residual category is: "Managers, All Other" – SOC Code 11-9199. Approximately 5 percent of all employment falls under categories for which little meaningful information could be developed (i.e., "All Other" residual categories). For additional information regarding the SOC system and residual categories, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., on the Internet at <http://www.bls.gov/home.htm> (last visited January 6, 2014). Thus, if the petitioner believed that its proffered position did not fall under an occupational category identified at a distinct detailed level, it should have classified the position under the appropriate residual occupation.

In the instant case, the petitioner has not demonstrated that the proffered position falls under the occupational category of "Occupational Health and Safety Specialists." Therefore, the AAO will not further address this occupational category as it is not relevant to this proceeding.

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Registered Nurses." The *Handbook* states, in part, the following about this occupational category:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs. Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have cancer.

Handbook, 2012-13 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited January 2, 2014).

The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states, in part, the following about this occupation:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

Education

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

Handbook, 2012-13 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited January 6, 2014).

The *Handbook* does not report that, as an occupational group, "Registered Nurses" require at least a bachelor's degree in a specific specialty, or its equivalent.⁹ More specifically, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty, or its equivalent, is not normally the minimum requirement for entry.

The AAO reviewed the record of proceeding regarding the proffered position and the *Handbook* and finds that the *Handbook* does not support the proposition that the proffered position, as described in the record of proceeding, is one that meets the statutory and regulatory provisions of a specialty occupation. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue.¹⁰ 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." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO observes that in the February 18, 2013 letter, submitted in response to the RFE, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of healthcare quality assurance manager. In response to the RFE, the petitioner submitted copies of H-1B approval notices as evidence that USCIS has previously approved H-1B cases submitted by the petitioner. However, the petitioner did not submit copies of the petitions and supporting

⁹ According to the *Handbook*, some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

¹⁰ When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether the petitioner has established eligibility for the benefit sought. Upon review of the record, the petitioner has failed to meet its burden in this regard.

documents. The documentation provided by the petitioner does not contain key information regarding the referenced positions, including the job titles, day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received to make a legitimate comparison of the referenced positions to the proffered position.

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

As the record of proceeding does not contain copies of the petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain a copy of the petitions cited by the petitioner.

Nevertheless, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

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

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates

that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

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

In the Form I-129 petition, the petitioner describes itself as an employment/staffing agency established in 2003, with 74 employees. The petitioner claims that it has a gross annual income of \$5.8 million. Although requested in the Form I-129 petition, the petitioner did not state its net annual income.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may

include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

For instance, the advertisements include positions with [REDACTED] ("a world renowned organization dedicated to the progressive control and cure of cancer through programs of patient care, research, and education") and [REDACTED] ("a substance abuse treatment AND mental health milieu"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner also submitted a job posting for [REDACTED] (for which no information was provided). Consequently, the record does not contain sufficient information regarding the advertising organization to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organization is similar to it. Upon review, the AAO finds that the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner submitted a posting for a quality assurance manager with [REDACTED] which requires a degree and "five years [of] experience in quality assessment or research." The petitioner also provided a posting for a quality assurance specialist position with Phoenix House, which requires a degree and "[f]our (4) years [of] professional level experience in a medical or mental health setting or equivalent experience and abilities." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the posting for a quality assurance manager with [REDACTED] indicates that a "Bachelor's degree in a health-related field" is required. 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 specialty occupation claimed in the petition. In addition, the petitioner submitted a posting for a quality coordinator with [REDACTED] which indicates "Bachelor degree in healthcare or business administration preferred." Obviously, a *preference* for a degree in healthcare or business administration is not an indication of a minimum *requirement*. Thus, the qualifications listed in the postings do not support a finding that the advertised positions require at least a bachelor's degree in a *specific specialty*, or its equivalent.

The AAO reviewed all of the advertisements submitted in support of the petition.¹¹ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

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

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

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

In the instant case, the AAO acknowledges that the petitioner may believe that the duties of the proffered position are complex or unique. However, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a

¹¹ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹²

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

¹² For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of

the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

As previously noted, the petitioner claims that USCIS has previously approved H-1B cases for the petitioner for the same or similar position. However, the petitioner did not submit copies of the prior H-1B petitions and the respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same or similar positions, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petitions were not warranted. Again, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

In response to the director's RFE, the petitioner states that "the Company consistently has hired Healthcare Quality Assurance Managers with the minimum educational prerequisite of a bachelor's degree in Healthcare Administration, Healthcare Management, or a related field." In support of this assertion, the petitioner submitted the foreign academic credentials and pay statements of [REDACTED]

Ms. [REDACTED] foreign diploma indicates that she was granted a degree in nursing.¹⁴ Notably, the petitioner did not submit the academic credential evaluation for Ms. [REDACTED] to establish that her foreign education is equivalent to a U.S. bachelor's degree in a specific specialty.

Further, the AAO observes that the pay statements indicate that Ms. [REDACTED] is being paid at the rate of \$32.00 per hour (\$66,560 per year). The rate of pay for Ms. [REDACTED] is significantly higher than the offered salary to the beneficiary of \$48,500 per year. Based upon the rate of pay, it appears that Ms. [REDACTED] is employed in a more senior or different position. The petitioner failed to provide the job duties and day-to-day responsibilities of the Ms. [REDACTED] position. Further, the petitioner did not submit information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear

¹³ The petitioner also provided an H-1B approval notice for [REDACTED]. However, the petitioner did not submit documentation to establish her employment with the petitioner (such as pay records and/or Form W-2s) and her credentials (e.g., copies of transcripts, diplomas).

¹⁴ In response to the RFE, the petitioner claimed that "the subject position of Healthcare Quality Assurance Manager cannot be satisfied by a licensed Registered Nurse without a bachelor's degree in healthcare administration or healthcare management." The evidence provided indicates that Ms. [REDACTED] possesses a degree in nursing. No explanation was provided by the petitioner or its counsel.

whether the duties and responsibilities of this individual are the same or similar to the proffered position.

Moreover, the petitioner stated in the Form I-129 petition that it has 74 employees and that it was established in 2003 (approximately nine years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *one or two individuals over a nine year period* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of *the educational credentials of one individual* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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

The petitioner asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is a lack of evidence substantiating the petitioner's assertions.

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

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

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

Furthermore, the AAO will briefly address the director's determination that the petitioner failed to provide a certified LCA that corresponds to the petition. Specifically, although the job title on the LCA submitted with the petition reads "Healthcare Quality Assurance Manager," it was certified under the occupational category "Occupational Health and Safety Specialists."

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

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 occupational category and wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. In the instant case, as previously discussed, the petitioner has not established the substantive nature of the proffered position. Therefore it cannot be determined that the proffered position falls under the occupational category "Occupational Health and Safety Specialists."

Beyond the decision of the director, the AAO will note that it 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. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Nevertheless, the AAO notes that in response to the RFE, the petitioner claims that the beneficiary

possesses a "Bachelor of Science Degree, with a dual major in Healthcare Administration and Nursing." The academic evaluation provided by the petitioner, however, does not support this assertion. More specifically, the evaluation from [REDACTED] indicates that the beneficiary was granted the educational equivalent of a bachelor of science degree in nursing science. Notably, in response to the RFE, the petitioner claimed that a registered nurse without a bachelor's degree in healthcare management or healthcare administration would be unable to perform the job duties required for the proffered position. Based upon the evidence provided, the beneficiary does not appear to meet the petitioner's requirements for the proffered position (as stated in response to the RFE).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.¹⁵ 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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹⁵ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.