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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 18 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

for Michael T. Kelly
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. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an information technology services and solutions company established in 2011. In order to employ the beneficiary in a position to which it assigned "Data Warehousing Specialist" as the job title, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner contends that the director's finding was erroneous and submits a brief and additional evidence in support of this contention.

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

Upon review of the entire record of proceeding, we find that the evidence of record as supplemented by the submissions on appeal does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states 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" 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.

Id.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be reopened or reconsidered.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. General Overview

As already noted, the service center director denied the petition because she concluded that the evidence of record did not establish the proffered position as a specialty occupation.

The petition was filed to newly employ the beneficiary on project work for [REDACTED] (to which we shall refer as [REDACTED])

According to the petition, the beneficiary would provide his services to [REDACTED] at [REDACTED] location in [REDACTED] California. However, while the petitioner would provide the beneficiary, the record of proceeding indicates that other business entities were involved in procuring the beneficiary's services for [REDACTED]

We note first that the petitioner identifies the following firms as involved in the contractual stream leading to the beneficiary's being procured for [REDACTED]

- [REDACTED] of Boston, Massachusetts. (Its August 6, 2013 letter submitted on appeal, states that [REDACTED] was formerly known as [REDACTED] until it changed its name on January 31, 2012.)
- [REDACTED] of Pittsburgh, Pennsylvania (to which we will refer as [REDACTED])

The record of proceeding presents a scenario in which the beneficiary's placement at [REDACTED] would be a partly a function of some contractual relationships not involving the petitioner.

As best as we can see, the petitioner claims that (1) [REDACTED] has contracted with [REDACTED] for performance of project-work; (2) [REDACTED] and [REDACTED] have a contractual agreement pursuant to which [REDACTED] will supply persons to fill [REDACTED] needs for computer/IT workers; (3) the petitioner will provide the beneficiary pursuant to an agreement between the petitioner and [REDACTED]. The following excerpt from the appellate brief reflects this scenario (emphasis added):

As stated in the instant H-1B application, Beneficiary will work as a Data Warehousing Specialist at [REDACTED] the end-client, in [REDACTED] California, as stated in the Labor Condition Application (LCA) that was provided with the instant H-1B application. He will be working on a project to Petitioner through [REDACTED]. Beneficiary will render the contractual project work at [REDACTED].

Petitioner was unable to get any part of the *contract between [REDACTED] Data Corporation ([REDACTED] or the contract between [REDACTED] and [REDACTED],*] as it was told that the conditions were confidential and could not be disclosed, [whether] redacted or not. . . .

Thus, the record of proceeding indicates that whatever work the beneficiary would perform would be a function of terms and conditions generated of at least three contractual relationships, namely: (1) between [REDACTED] and [REDACTED] presumably generating and defining the substantive nature of the project for which [REDACTED] would need IT and computer-related workers; (2) between [REDACTED] and [REDACTED] by which [REDACTED] presumably would secure workers for the [REDACTED] project; and (3) between [REDACTED] and the petitioner, by which the beneficiary would be made available for the [REDACTED] project work.

However, as the above-quote also reflects, the record does not contain a copy of *either* the main, [REDACTED] contract and related contractual documents¹ *or* the [REDACTED] contractual documents which would likely indicate whatever scope, terms, conditions, and limitations would apply to [REDACTED] in its procurement of a person for [REDACTED] project work.

¹ That is, e.g., statements of work, purchase orders, and other documents relating to work specifications, work-acceptance and payment-for-work requirements, scope of each of the parties' particular responsibilities and authority, timelines, terms and conditions of contract performance and contract payment, etc.

There are also indications that other agreements and entities may be involved in the contractual scenario. Of most significance is a statement, at the [REDACTED] letter presented on appeal, that the actual end-client may not even be [REDACTED]. That letter suggests that the actual client that is generating this petition's asserted project-work may actually be not [REDACTED] itself but rather a subsidiary or affiliate of [REDACTED]. The letter contains this statement: [REDACTED] currently has a contract to provide Development and Maintenance services to [REDACTED] LLC, an affiliate of [REDACTED]. Whatever [REDACTED] contractual role is in the overall scenario is not otherwise developed in the record of proceeding – and no documents are submitted from that entity.

Also, we note that the petitioner's letter of support filed with the Form I-129 references – for the only time in the petition – Infosys as a party to one of the contracts that figure in the beneficiary's assignment that is the core of this petition. The relevant part of the letter is the petitioner's statement that it was "unable to get any part of *the contract between* [REDACTED] (emphasis added).

III. Factual and Procedural History

In a letter of support dated March 30, 2013, the petitioner stated that it "provides information technology ("IT") solutions and services for a wide range of businesses, including those that develop, build, re-engineer, enhance and support enterprise applications." The petitioner further stated:

We aim to serve clients in almost every vertical and we are in the process of developing in-house expertise in the following industries: Pharmaceutical, Healthcare, Financial Services, Insurance, Telecommunications and energy. [The petitioner] will also provide services that include software application design and development, specialize in several IT areas including housing, database architecture, Java/J2EE, B2B, EAI, ERP, Microsoft .NET, etc. [The petitioner] developed and implemented for clients include, E-commerce solutions (B2B, B2C), Enterprise Application Integration (EAI), Data warehousing & Business Intelligence systems, Sales & Marketing Analysis Systems, Internet & web based applications Data security and mining applications.

The petitioner also stated that it currently had 30 employees and a projected gross annual income of \$4.25 million.

Regarding the proposed employment of the beneficiary, the petitioner explained as follows:

As a full-time basis as a Data Warehousing Specialist, beneficiary will work at [REDACTED] the end-client, in [REDACTED] California, as stated in the enclosed Labor Condition Application (LCA), but working on a project through [REDACTED]. Beneficiary will work at the [REDACTED] project which has awarded to [REDACTED] to render the contractual work at [REDACTED]. Petitioner was unable to get any part of the contract between [REDACTED] as it was told

that the provisions were confidential and could not be disclosed, redacted or not [sic]. Other than with Petitioner, no contractual relationship exists or will exist between any of the aforesaid entities and the Beneficiary, and the latter will remain at all times a full-time employee of Petitioner.

Regarding the duties of the proffered position, the petitioner stated that the various responsibilities of the beneficiary would include:

- Create/implement metadata processes and frameworks.
- Source, load, transform, extract, develop data warehousing process models[.]
- Develop supporting documentation for business processes, process flows, metadata, etc.
- Administer data extraction procedures from various systems[.]

The petitioner further claimed that the "duties of the position are very complex and can only be performed by a person with specialized knowledge gained through studies leading to a Master's degree (or equivalent) in Computer Science, Engineering, or a related field with relevant work experience." The petitioner claimed that the beneficiary met these requirements by virtue of his Master of Science degree in software engineering and bachelor of engineering degree in electrical and electronics engineering.

In addition to the above-referenced evidence, the petitioner also submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The occupational category is designated as "Computer Occupations, All Others " at a Level II (entry) wage level. We note that the LCA lists the place of employment as [REDACTED]
- Diplomas and transcripts pertaining to the beneficiary.
- A line-and-block organizational chart.
- An offer of employment letter from [REDACTED] President of the petitioner, dated March 11, 2013. In the letter, Mr. [REDACTED] states that it is offering the beneficiary "the position of Data Warehousing Specialist from October 1, 2013 or as early thereafter as possible."
- An Employment Agreement between the petitioner and the beneficiary dated March 11, 2013.
- A Performance Evaluation for the beneficiary dated January 14, 2013, covering the period from October 2012 to December 2012.
- Copies of promotional materials and invoices demonstrating the petitioner's

participation at various college job fairs.

- Copies of various corporate documents pertaining to the petitioner.
- A letter from [REDACTED] dated March 21, 2013, in support of the beneficiary's claimed assignment with [REDACTED]
- A Vendor Agreement between the petitioner and [REDACTED] dated December 12, 2012.
- Copies of pay records and Wage and Tax forms (IRS Form W-2) for the beneficiary.
- The beneficiary's resume.

The director issued an RFE on April 19, 2013, in which more information regarding the claimed specialty occupation position of the beneficiary was requested. The director requested additional evidence to demonstrate that the duties of the proffered position were those of a specialty occupation. In addition, the director noted that the petitioner omitted an itinerary for the beneficiary's services with the initial filing, and requested additional evidence establishing where and for whom the beneficiary would work throughout the duration of the requested validity period.

In a response dated July 8, 2013, the petitioner responded to the director's requests. Regarding the specialty occupation position, the petitioner provided an updated description of duties along with the corresponding percentages of time that it claimed the beneficiary would devote to each such duty. Specifically, the petitioner stated as follows:

In summary, Beneficiary will be working 40 hours per week in the specialty occupation of Data Warehousing Specialist. His level of responsibility will be at the medium level. Although a description of Beneficiary's job duties has been given in the support letter submitted along with the initial H-1B visa petition, a more detailed job description is provided below. Please note that the weekly percentage of time assigned for each duty below are best-judgment estimates and these will necessarily change depending on technical difficulties faced, business exigencies, and other such unpredictable variables.

1. Design, model, or implement corporate data warehousing activities. Program and configure warehouse of database information and provide support to warehouse users – 15%
2. Design, implement, or operate comprehensive data warehouse systems to balance optimization of data access with batch loading and resource utilization factors, according to customer requirements – 10%
3. Develop data warehouse process models, including sourcing, loading, transformation, and extraction – 20%

4. Create or implement metadata processes and frameworks – 5%
5. Create plans, test files, and scripts for data warehouse testing, ranging from unit to integration testing – 10%
6. Create supporting documentation, such as metadata and diagrams of entity relationships, business processes, and process flow – 5%
7. Develop and implement warehouse database structures – 10%
8. Develop and implement data extraction procedures from other systems, such as administration, billing, or claims – 10%
9. Develop or maintain standards, such as organization, structure, or nomenclature, for the design of data warehouse elements, such as data architectures, models, tools, and databases – 5%
10. Implement business rules via stored procedures, middleware, or other technologies. Map data between source systems, data warehouses, and data marts – 10%

We note that the ten elements quoted above are largely a copy of the "Tasks" section at the O*NET Summary Report for Data Warehousing Specialists. Element 10 above is a combination of the last two Tasks in the Summary Report's list, the elements that the petitioner listed (as quoted above) change the order in which the same tasks appear in the Summary Report. Also, the petitioner's first element ("Design, model, or implement corporate data warehousing activities. Program and configure warehouse of database information and provide support to warehouse users.") does not appear among the O*NET's Tasks. The close similarities are clearly evident in comparing the petitioner's duties list, quoted above, with the O*NET "Tasks" section for Data Warehousing Specialists, which reads:

Tasks

- Design, implement, or operate comprehensive data warehouse systems to balance optimization of data access with batch loading and resource utilization factors, according to customer requirements.
- Develop data warehouse process models, including sourcing, loading, transformation, and extraction.
- Create or implement metadata processes and frameworks.
- Create plans, test files, and scripts for data warehouse testing, ranging from unit to integration testing.
- Create supporting documentation, such as metadata and diagrams of entity relationships, business processes, and process flow.
- Design and implement warehouse database structures.
- Develop and implement data extraction procedures from other systems, such as administration, billing, or claims.
- Develop or maintain standards, such as organization, structure, or nomenclature, for the design of data warehouse elements, such as data architectures, models, tools, and databases.
- Implement business rules via stored procedures, middleware, or other technologies.

- Map data between source systems, data warehouses, and data marts.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Data Warehousing Specialists, on the Internet at <http://www.onetonline.org/link/summary/15-1199.07#ToolsTechnology> (accessed June 17, 2014).

Regarding the employment of the beneficiary, the petitioner again explained that the beneficiary would be working onsite at the offices of [REDACTED] pursuant to "a project awarded to [the] petitioner through [REDACTED]. The petitioner claimed that due to confidentiality issues, it was unable to obtain any contractual documents between [REDACTED] and [REDACTED] or between [REDACTED] and [REDACTED].

However, the petitioner did submit a second letter from [REDACTED] dated July 8, 2013, which provided additional information regarding the nature of the agreement with [REDACTED]. Specifically, [REDACTED]'s CEO, [REDACTED] stated that [REDACTED] is currently providing services to [REDACTED] which was formerly known as [REDACTED]. Regarding the beneficiary's assignment, Mr. [REDACTED] stated as follows:

[The Beneficiary], a full time employee of [the petitioner], is responsible for working on the project duties related to [REDACTED] support in the wholesale division at [REDACTED]. This [project] is developed, supported and managed by [REDACTED]. [The beneficiary] brings valuable technical and analytical knowledge to the project on which he has been working since early January 2013. [The beneficiary's] worksite is [REDACTED].

Mr. [REDACTED] further stated that the beneficiary's work at [REDACTED] has been arranged through contracts between the petitioner [REDACTED] and [REDACTED] and that Mr. [REDACTED] Delivery Manager for [REDACTED] was in charge of the project upon which the beneficiary would work. In further support of these contentions, the petitioner submitted screen shoots of the beneficiary's timesheets, which demonstrated that such records were maintained by [REDACTED] and approved by [REDACTED] the project manager for [REDACTED]. Finally, the petitioner submitted a copy of its brochure to demonstrate the nature of its relationship with its clients and the public.

The director denied the petition on July 23, 2013, finding that the petitioner failed to establish that the proffered position was a specialty occupation. Specifically, the director found that, absent a statement of duties from the end client, [REDACTED] the exact nature of the beneficiary's duties was unascertainable, thereby rendering it impossible to determine that the proffered position qualified as a specialty occupation. On appeal, the petitioner submits a brief and additional evidence, and

² We note that in the initial support letter, the petitioner stated that it was unable to obtain any contractual documents between [REDACTED] and [REDACTED]. For the first time in response to the RFE, the petitioner refers to an agreement between [REDACTED] and [REDACTED] and there is no further discussion regarding the claimed agreement between [REDACTED] and [REDACTED].

³ We note that [REDACTED] is located in Pittsburgh, Pennsylvania.

submits for the first time a letter from [REDACTED] in support of the contention that the proffered position is a specialty occupation.

IV. The Law

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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

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

V. Analysis

We note first that, as reflected in the narrative of the director's decision denying the petition, a material aspect of the RFE was the request for information from the asserted end-client, [REDACTED]. 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." As the petition identifies [REDACTED] as the ultimate source and determiner of the project work to which it is said that the beneficiary would perform his services, the RFE's interest in [REDACTED] evidence of the substantive nature of the beneficiary's project work was reasonable and necessary for establishing both the substantive nature of the proposed duties and the nature and educational or education-equivalent level of specialized knowledge that would be required to perform them.

Specifically, the director made the following request in the RFE:

- **Job Description:** Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity from the ultimate end client [REDACTED]

However, the petitioner chose to not provide evidence in response to that specific request.

It is only now, on appeal, that the petitioner has provided a submission from [REDACTED] which is in the form of an August 14, 2013 letter addressed "To whom it may concern. "

The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, the referenced regulations governing the RFE process require that any evidence within the scope of the RFE-request must be submitted as part of the RFE-request and within the time allotted for responding to the RFE. Also, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Thus, the [REDACTED] letter is not evidence within the zone of consideration of this appeal. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's direct request for such evidence. *Id.* Further, we agree with the director's determination, expressed in her denial decision, that the petitioner's choice to not provide the requested evidence left an insufficient factual foundation for finding that the proffered position is a specialty occupation.

Nevertheless, in the interests of providing a more informative and comprehensive decision for the petitioner we shall discuss why the evidence of record fails to establish the proffered position as a specialty occupation even if were to consider the [REDACTED] letter submitted on appeal.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage) is a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. *Id.* The *Defensor* court held that the legacy Immigration and Naturalization Service (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.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

At the outset, we find that the documentary evidence of record fails to establish a consistent picture of the proffered position and its constituent duties. This is evident in the variations of the descriptions and claims about the duties and general nature of the proffered position, as we shall now discuss.

Again we quote from the petitioner's RFE response which, as we have noted, largely copies the Tasks segment of the O*NET section on Data Warehousing Specialists. That response includes this description of the proposed duties and the estimated percentage of work time that they would involve:⁴

1. Design, model, or implement corporate data warehousing activities. Program and configure warehouse of database information and provide support to warehouse users – 15%
2. Design, implement, or operate comprehensive data warehouse systems to balance optimization of data access with batch loading and resource utilization factors, according to customer requirements – 10%
3. Develop data warehouse process models, including sourcing, loading, transformation, and extraction – 20%
4. Create or implement metadata processes and frameworks – 5%
5. Create plans, test files, and scripts for data warehouse testing, ranging from unit to integration testing – 10%

⁴ Data's August 6, 2013 letter, submitted on appeal, describes the proffered position in terms of basically these same duties quoted from the RFE response.

6. Create supporting documentation, such as metadata and diagrams of entity relationships, business processes, and process flow – 5%
7. Develop and implement warehouse database structures – 10%
8. Develop and implement data extraction procedures from other systems, such as administration, billing, or claims – 10%
9. Develop or maintain standards, such as organization, structure, or nomenclature, for the design of data warehouse elements, such as data architectures, models, tools, and databases – 5%
10. Implement business rules via stored procedures, middleware, or other technologies. Map data between source systems, data warehouses, and data marts – 10%

In contrast, the appeal attempts to associate the proffered position as basically incorporating, but exceeding also exceeding the specialization of, a position within the Database Administrators occupational group.

However, the one document submitted by the asserted end-client, [REDACTED] does not expressly endorse or adopt the petitioner's version of the proffered position and its duties. Looking to the [REDACTED] letter on appeal, we see first that [REDACTED] characterizes the proffered position differently expanding it from Data Warehousing Specialist to "Data Warehousing Specialist/ETL Informatica Developer." Although the title of a position is not decisive, when, as here, the end-client both expands the position title and matches that job title to a different statement of the constituent duties, it behooves the petitioner to resolve the resultant question of whether, in fact, the position that it described as the basis of the petition is in fact substantively the same as what the end-client claims it to be. This the petitioner has failed to do.

This significant variance between the position as described by the petitioner prior to the appeal and as described on appeal by the asserted end-client is obvious upon comparing the petitioner's above-quoted ten-point list of duties with the [REDACTED] description below:

In this role, [the beneficiary] will be performing the following work tasks:

- Perform Systems and Requirements Analysis, design and writing technical design documents and test plans
- Design and develop mappings, sessions and workflow as per the requirement and [REDACTED] standards
- Design and develop SCD Type-I, Type-II and Type III mappings in Informatica to load the data from various sources using different transformations like Source Qualifier, Lookup (connected and unconnected), Expression, Aggregate, Update Strategy, Sequence Generator, Joiner, Filter, Rank and Router and SQL Transformations
- Development and Implementations of projects in an ETL Environment
- Perform Development, Code Review, and Identify design or development Issues

- Perform Address Validation and Name Matching using Informatica Data Quality
- Connect to multiple Database Environment using Informatica and create reusable transformation and complex mappings, partitioning
- Tuning SQL and long running process mostly in Oracle
- Technical Documentation and Perform reviews, design, and data manipulation
- Production Support and resolving the issues

We next note that, while the petitioner claims that the position's performance requires at least a bachelors' degree in one of a range of fields that the petitioner names, [REDACTED] only claims that "the position of data Warehousing Specialist requires resources possessing appropriate education, experience, and skills related to Oracle, PL/SQL, Informatica, UNIX, shell Scripting, job scheduling, and data warehouse concepts and data analysis." Further, the [REDACTED] letter neither expressly endorses nor adopts the petitioner's education-requirement claims. Although not decisive, an end-client's statement of its educational requirements – and reasons therefore – are pertinent matters for consideration in the specialty occupation analysis. The absence of such evidence is significant.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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. For this reason, the petition must be denied.

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, we will nevertheless analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

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.

Next, there is the petitioner's March 30, 2013 support letter's contention - whose accuracy is not corroborated by [REDACTED] or by any reliable authoritative source - that performance of the proffered position requires at least a bachelor's degree in Computer Science, Engineering, or a related field.

Even if the record had established that [REDACTED] agreed with the petitioner's stated assessment of the educational requirements - which is not the case - such a range of acceptable degrees is not consistent with an H-1B specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

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

Again, the petitioner claims that the minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering, or a related field. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that computer science and engineering in general are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Of course, we must repeat that there is no confirmation from the end-client that the petitioner's education-requirement claim even comports with its own.

The brief on appeal claims that the proffered position is akin to that of a Database Administrator. The petitioner submits an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*), which we recognize as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, in support of this contention.

We accord no weight to counsel's claim that "Data Warehousing" is "a position" that "is built on the position of Data Administrator but is at least one or two levels higher." Likewise, we accord no weight to counsel's statements in support of the claim. Counsel cites no documentary evidence in support of his stance, and there is no such evidence within the record of proceeding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, utilizing the Wage Search Wizard at the Department of Labor's Foreign Labor Certification Center's OnLine Wage Library on the Internet at <http://www.flcdatcenter.com/oeswizardstart.aspx>, on June 17, 2014, for the SOC Code 15-1141.00 (Database Administrators) for the timeframe and location indicated in the LCA submitted into this record, we found that the Level II prevailing wage was higher (\$68,245 per year) than the Level II wage for Data Warehouse Specialists (under Computer Occupations, All Other) (\$65,437 per year). This matter of public record appears to effectively refute counsel's contention that the proffered position is "one or two levels higher" than a position within the Database Administrators occupational category. In any event, we find no evidentiary foundation for accepting counsel's claim as accurate.

Further, if in fact the proffered position were a combination of positions, such as a Data Warehousing Specialists position and a Database Administrators position, then the petitioner would have been required (1) to file the petition for the position with the higher prevailing-wage obligation and (2) to file the petition with an LCA certified for a position in the occupational category with the higher prevailing-wage obligation.

When the duties of the proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant Occupation Information Network (O*NET)

occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Thus, where, as counsel's assertions indicate may be the case here, the petitioner believed its position was described as a combination of O*NET occupations, then according to DOL guidance, the petitioner should have chosen the relevant occupational code for the highest paying occupation. Notably, and as discussed above, the occupational category "Database Administrators" - SOC (ONET/OES) code 15-1141.00 - has a higher prevailing wage than the "Data Warehousing Specialists" occupational category identified in the LCA filed with this petition. The Level II prevailing wage was higher (\$68,245 per year) than the Level II wage for Data Warehousing Specialists (\$65,437 per year) for the area and time period specified in the LCA.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, to the extent that the petitioner claims that the proffered position exceeds the specialization and requirements of a position within the Database Administrators occupational group, the petitioner has failed to submit a valid LCA that has been certified for the higher paying occupational classification, and the petition would have to be denied for that additional reason.

In addition, the petitioner should bear in mind that, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. On appeal, the petitioner claims in its brief that the proffered position is akin to that of a database administrator. The petitioner submits an excerpt from the *Handbook*, which we recognize as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, in support of this contention.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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).

As noted above, the petitioner claims on appeal that the proffered position is akin to that of a database administrator, and submits an excerpt from the *Handbook* in support of this contention. As previously discussed, the vague description of duties and the lack of sufficient documentation verifying the actual duties to be performed by the beneficiary renders it impossible for us to determine the appropriate classification for the proffered position, since the record lacks a definite statement of duties pursuant to a contractual agreement or statement of work from the ultimate end client.⁵ On appeal, the petitioner

The petitioner asserts on appeal that the proffered position is close to a database administrator but more specialized. In the event that the record contained sufficient evidence to analyze the duties of the proffered position and ultimately determine that it was akin to this occupational classification, the petition would be denied because the certified LCA in the record would not correspond to the petition. The LCA submitted by the petitioner is certified for the job title of "Data Warehouse Specialist," and the SOC (ONET/OES) code 15-1199, which corresponds to the occupation title of "Computer Specialists, All Other." (It is noted that the SOC (ONET/OES) code stated on the LCA is "15-1799," which appears to be a typographical error). Moreover, the job title of "Data Warehouse Specialist" is specifically listed under subsection 15-1199.7 of this classification. The occupational classification of Database Administrators, however, is classified under SOC (ONET/OES) code 15-1141.

If the proffered position were determined to be that of a database administrator, it would be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be

relies on *Unico American Corp. v. Watson* -F. Supp.-. CV No. 896958 (C.D. Cal. Mar. 19, 1991), the unpublished decision of a federal district court in California, to state that USCIS should give deference to the employer's view and should not rely simply on standardized government classification systems such as the *Handbook*. The petitioner, however, has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on us outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value. In any event, here on appeal, we are weighing all of the evidence in accordance with the preponderance of the evidence standard referenced at the start of this decision. As previously noted, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145.

In conclusion, we find that, even if even if an accurate description of the duties of the proffered position had been provided, the range of acceptable degrees referenced by the petitioner weighs against a finding that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that is, by establishing that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

That all being said, we shall now directly apply the 8 C.F.R. § 214.2(h)(4)(iii)(A) criteria to the proffered position as the Data Warehousing Specialists position described in the record of proceeding that was before the director.

We will first explain our determination that the evidence of record about this proffered position within the Data Warehousing Specialists occupational group does not satisfy criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). That is, the evidence does not establish the proffered position as a particular position for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry.

We here incorporate our comments and findings above about the countervailing impact of the range of acceptable degrees referenced by the petitioner, to the effect that such a range of disparate degrees is

approved due to the petitioner's failure to submit an LCA that corresponds to the position and that is certified for the proper wage classification.

not reflective of a need for at least a bachelor's degree level of knowledge in a specific specialty.

As stated in the Form I-129 and in the LCA, the petition was filed for a position within the Data Warehousing Specialists occupational group.

The *Handbook* contains no information about this occupational group. The O*NET indicates that the occupational group is under study. As we shall see, the O*NET does not yet provide any information about requirements for entry into the occupational group.

The relevant O*NET Summary Report opens as follows:

Summary Report for:

15-1199.07 - Data Warehousing Specialists

Design, model, or implement corporate data warehousing activities. Program and configure warehouses of database information and provide support to warehouse users.

This title represents an occupation for which data collection is currently underway.

Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Data Warehousing Specialists, on the Internet at <http://www.onetonline.org/link/summary/15-1199.07>, (accessed June 17, 2014.)

We find, however, that, notwithstanding the petitioner's unsupported claim that the nature of the proffered position exceeds the specialization and the educational requirements for entry into Database Administrators positions, the evidence of record simply does not establish this petition's particular position as one for which at least a bachelor's degree, or the equivalent, in a specific specialty is normally the minimum entry requirement. Thus, the petitioner has not satisfied the criterion regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a requirement for a bachelor's degree, in a specific specialty is common to positions that are (1) in the petitioner's industry, (2) parallel to the proffered position; and also (3) 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the evidence of record has not established the proffered position as one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. 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 support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of eight advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the IT services industry.

As we shall now discuss, the submitted job advertisements are not probative evidence towards satisfying this criterion.

One major deficiency with these as with most such job-vacancy announcements is that they do not in themselves establish how representative they are of the pertinent recruiting and hiring practices of even the firms that placed them. After all, we have no information from those firms as to the educational credentials of whomever they may have eventually hired for the advertised position. There is no basis for us to presume that the firms pursued no other recruiting avenues for the positions advertised, or that the firms recruited only for the credentials noted in these advertisements. As they are candidate solicitations only and not necessarily the only ones issued for the jobs, the advertisements do not establish either (1) that the firms that issued them restricted their recruiting efforts only to the criteria specified in those advertisements, or (2) that those firms actually hired for the positions only persons that strictly satisfied the criteria stated in the advertisements.

Also, it is the petitioner's burden to establish that the advertised positions are parallel to the one for which this petition was filed. We observe that, while the advertised positions may share a "Data Warehouse Specialists" job title, at least in part, the details of the job descriptions do not match those that appear in the record of proceeding. Further, as noted in our earlier comments, the variations in duty descriptions within this record of proceeding renders even the duties of the proffered position uncertain and therefore not amenable to reliable comparison with those of other jobs. In this regard, too, we also find that the record of proceeding presents no basis for us to assume that all Data Warehousing Specialist positions are interchangeable in substantive work and in minimum educational requirements. As the petitioner has not persuasively explained why we should regard the advertised positions as parallel to the one before us on appeal, this criterion's "parallel positions" element of proof also has not been satisfied.

Likewise, we find that the content of the advertisements do not establish the organizational similarity required to satisfy this criterion.

That all being said, we also find that the variation of educational requirements specified in the advertisements do not reflect a common degree-requirement. The [REDACTED] advertisement, for instance, indicates that degrees in such disparate fields as business administration and health care

informatics is acceptable for entry – a disparity not reflective of a need for a degree in a specific specialty. Three of the postings - by [REDACTED] and an unknown recruiter offering placement at [REDACTED] or an [REDACTED] client site - merely require a bachelor's degree without designating a specific specialty. The posting by [REDACTED] simply requires experience in SQL server 2008, and states no educational requirements. The posting by [REDACTED] states, "Will accept any suitable combination of education, experience or training." The posting by [REDACTED] though requiring a degree in Computer Science, Management Information Systems, or a related field, obviously does not accord with the credential requirements stated in other submitted advertisements.

For all of the above reasons, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the petitioner also has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied by the petitioner showing that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We observe that the petitioner has indicated that the beneficiary's educational background and experience in the industry as a data warehousing specialist/database administrator will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

The evidence of record does not explain or clarify how the proposed duties and/or any aspect of the proffered position makes the position so complex or unique as to require a person with at least a bachelor's degree or the equivalent in a specific specialty. We make this finding after due consideration of counsel's unpersuasive contention that the proffered position exceeds the requirements of Database Administrator positions. 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In sum, then, the petitioner has thus failed to establish the proffered position as satisfying either alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We now turn to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a bachelor's or higher degree in a specific specialty or its equivalent for the position.

To satisfy this criterion, the record must establish 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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 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.*

The petitioner provides no evidence regarding its hiring history, and does not claim to previously have employed only specialty-degreed individuals in the proffered position. Accordingly, there is no evidentiary foundation for a favorable finding under this criterion.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

In the first place, we repeat our finding that the differences in duty descriptions presented by the petitioner and [REDACTED] preclude our determining what exactly the beneficiary would in fact do if this petition were approved. Aside from that, though, the record of proceeding provides no objective measure or reliable documentation establishing that the nature of the proposed duties is so specialized and complex that their performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

The evidence of record does not develop relative specialization and complexity as an aspect of the proposed duties, let alone as being at the requisite level to establish the need for the knowledge that is required to satisfy this criterion.

In sum, then, the evidence of record does not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Moreover, as previously discussed, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The appeal will be dismissed and the petition denied for these reasons.

VI. Beyond the Decision of the Director

Beyond the decision of the director, we find that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

(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.

As discussed early in this decision's general overview section, the record of proceeding indicates that the petitioner itself has no direct contractual relationship with either (1) the end-client entity that has generated the scope and general performance requirements of the project in which the beneficiary would be involved or (2) the business entity with whom that end-client has directly contracted for the provision of services to support the project work that the petitioner claims as the core of this petition. As also earlier mentioned, the record raises the unresolved questions as to whether the end-client is actually [REDACTED] or that affiliate of [REDACTED] known as [REDACTED]. Further, as reflected in this decision's previous analyses, the record indicates at least two business entities whose involvement with the claimed [REDACTED] project work intervenes between the petitioner and the end-client.

Yet, the record of proceeding provides little substantive information with regard to the practical details to which the contracting parties intervening between the petitioner and the end-client have agreed that have a material bearing upon the employer-employee question. In this regard, we also find that the specific content of the common-law factors that must be weighed to determine the employer-employee question in this case reside largely in the specific terms and conditions of the contractual documents at play in this particular case. While the petitioner may not be required to produce copies of all of the contractual documents pertaining to the employer-employee question, it has the burden to provide explanations and corroboration – in whatever form – that are sufficiently detailed to provide a sufficiently comprehensive foundation for USCIS to consider, weigh, and balance enough common-law employer-employee factors to reasonably determine whether it is more likely than not that the petitioner and the beneficiary have the requisite relationship. This, however, the petitioner has not done.

By way of just a small number of relevant employer-employee factors not documented in this record are the related parties' abilities to assign, schedule, modify, and evaluate the beneficiary's work on a day-to-day basis; to terminate the beneficiary's assignment; to determine if the beneficiary's performance merits payment by the end-client or intermediate vendors; what instrumentalities, if any, the parties would provide; conditions on the parties' abilities to accept or reject the beneficiary for the project work; whether the petitioner retained an ability to unilaterally assign the beneficiary away from the project work; the weight, if any, that the end-client was required to give the petitioner's evaluations; and the deference, if any, that the petitioner would be required to give to the performance evaluations conducted by the end-client and/or the business entities with which the end-client has contracted for the project work.

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

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

"United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in

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 318-319.⁸

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁹

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated

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).

⁸ 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))).

⁹ 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).

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 at 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

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

On appeal, the petitioner reiterates that that the beneficiary is employed by the petitioner and that the petitioner controls the beneficiary's salary and conditions of employment.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the

alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence from the end client, the petitioner failed to submit such evidence prior to adjudication. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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). For this additional reason, the petition may not be approved.

VII. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that we conduct appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; 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.