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



U.S. Citizenship  
and Immigration  
Services

DATE: **MAR 12 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

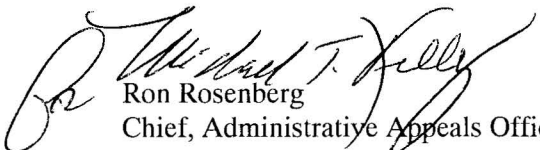
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner states that it is a "Computer Software Development & Consulting" business. The petitioner indicates that it was established in 2006, employs 39 personnel in the United States, and reported an estimated gross annual income of \$2.6 million for the last fiscal year. It seeks to employ the beneficiary as a "Business Analyst/Financial Analyst" from October 1, 2013 until August 21, 2016. Accordingly, the petitioner endeavors to classify the beneficiary 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 record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.<sup>1</sup>

The director denied the petition, determining that the record did not establish: (1) that the petitioner will be a "United States employer" having an employer-employee relationship with the beneficiary as an H-1B temporary employee; and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition. For this reason the appeal will be dismissed and the petition will remain denied.

## I. INTRODUCTORY COMMENTS

The record reflects that the proffered position's actual duties and related work would be generated by the interrelationship of four entities. Of course, one of them is the petitioner. The others are (1) [REDACTED] (identified as the end-client for whom the beneficiary would perform his services); (2) [REDACTED] identified as the entity with which [REDACTED] contracted for the provision of IT services; and (3) [REDACTED] of [REDACTED] (hereinafter referred to as [REDACTED] which the record presents as both (a) the entity with which [REDACTED] contracted for the provision of a person to perform the services required by [REDACTED] and also (b) the entity which arranged with the petitioner for the beneficiary's assignment to [REDACTED]

As will become evident in this decision, the AAO finds that the record's evidence with regard to the each of the four entities' business relationship with the beneficiary and whatever relative degree of

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

day-to-day involvement, if any, they would have with the beneficiary and his work is insufficient to substantiate the petitioner's claim of the requisite employer-employer relationship.

As will also become clear, the AAO also finds that the evidence of record fails to establish the substantive nature and related educational requirements of whatever work the beneficiary would perform during the asserted assignment to [REDACTED] that forms the basis of the specialty occupation claim. In fact, as will be discussed below, the evidence of record creates some doubt about even the general nature of the work that the beneficiary would perform and the occupational category with which such work would actually comport.

## II. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. 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.* at 375-76.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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 approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determinations in this matter were correct. Upon its 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, the AAO finds 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 the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true. Accordingly, the appeal will be dismissed and the petition will be denied.

### III. PROCEDURAL HISTORY AND RECORD DEVELOPMENT

On the Form I-129, the petitioner identified the proffered position as a full-time "Business Analyst/Financial Analyst." The petitioner listed the three-digit Dictionary of Occupational Titles (DOT) Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 5, as 030, "Occupations in Systems Analysis and Programming."<sup>2</sup> The petitioner listed its North American Industry Classification System (NAICS) Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6, as 541512, "Computer Systems Design Services."<sup>3</sup> However, the LCA that the petitioner submitted had been certified for use *not* with a job opportunity in a Systems Analysis or Programming occupation, but rather for use with a job opportunity within the "Financial Analysts" occupational category, that is, SOC (ONET/OES) Code 13-2051, and at a Level I (entry-level) wage.<sup>4</sup>

In its March 21, 2013 letter in support of the petition, filed with the Form I-129, the petitioner stated that it is "a computer consulting company" and that it is offering the beneficiary employment as what it termed a "Business Analyst/Financial Analyst" position that would require him to:

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<sup>2</sup> U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Form M-746, I-129 Dictionary of Occupational Titles (DOT) Codes, "030 Occupations in Systems Analysis and Programming," <http://www.uscis.gov/files/form/m-746.pdf>.

<sup>3</sup> U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541512 Computer Systems Design Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>4</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



- Perform detailed cost and financial analyses[.]
- Perform specific task related to rate development, including identifying, cost centers and their related expenses, and calculating recovery rates (recharge, indirect cost), prepare related reports.
- Provide technical in designing cost accounting or reporting systems and related documents.
- Perform specialized financial cash-flow analysis.
- Perform trending of financial data such as contribution analysis, head count, dashboard updates.
- Assist in reviews of financial and internal controls to determine whether such controls are adequate to meet management objectives and ensure the safeguarding of assets.
- Interact with Business Users and conducting user interviews/JAD sessions with relevant business Units and developers for the requirement clarification and brainstorming.
- Work as an Interface between the users and the different teams involving in the application development for the better understanding of the business and Business Process Analysis.

Working knowledge of requirement gathering by conducting personal interviews, developing questionnaire, brainstorming, or role playing to get a better understanding [sic]

- of [sic] client business processes and creating requirements traceability matrix for tracking the requirements[.]
- Correct the application manual according to the business workflow and analyze software requirements and specifications documents.

That support letter also asserted that "[t]o perform the above mentioned duties, a strong background in Masters of Business Administration and knowledge in computer application is required, because the personnel must understand the industrial and business systems in order to analyze the problem, should also understand the nature of the job to be performed, which is in itself complex." The petitioner asserted further: "[a] person with Masters of Business Administration can offer numerous possibilities, solutions, effective tools to help with

promotions in the profession of Business Analyst/Financial Analyst and help to shape the company's investment and business growth."

Also among the documents submitted with the Form I-129 is a March 14, 2013 letter on [REDACTED] letterhead, signed by [REDACTED] as Relationship Management Analyst, [REDACTED]. The letter referenced the beneficiary and confirmed that [REDACTED] and [REDACTED] had executed a "Systems Primary Sourcing Agreement (Sourcing Agreement)" effective April 30, 2010 for [REDACTED] to provide [REDACTED] information technology solutions and services. The letter referenced the [REDACTED]-120-1763" work order, which was described as attached to the Sourcing Agreement, and indicated that the work order is subject to annual renewal by mutual agreement. The letter also included the following statements: (1) "no [REDACTED] employees, [REDACTED] subcontractors, and/or [REDACTED] subcontractors' employees (collectively, "Associates") are parties to or listed in the Sourcing Agreement and Work Order;" (2) "[a]ll Associates working on [REDACTED] projects are directly employed either by [REDACTED] or by an subcontractor; and such [REDACTED] Associates are not [REDACTED] employees;" and "[REDACTED] or a subcontractor, as applicable, is responsible for the supervision of each [REDACTED] Associate" and for carrying out personnel actions. The letter indicated that the beneficiary in this matter had been scheduled for work placement on [REDACTED] projects pursuant to the aforementioned Work Order number [REDACTED] 120-1763.

That March 14, 2013 [REDACTED] letter also noted that the beneficiary is currently working onsite at [REDACTED] in the capacity of "Business Analyst."<sup>5</sup> [REDACTED] listed the beneficiary's responsibilities as business analyst as follows:

- This role is responsible for working individually and within a team of analysts to improve and maintain business processes with various teams across the Life-Systems Department.
- Provides subject matter expertise from a business perspective about a product or service.
- Complies with business processes and procedures of assigned area.
- Participates in a variety of activities to implement solutions which meet [REDACTED] needs:
  - Gathers information
  - Conducts research
  - Analyzes business needs
  - Develop requirements
  - Coordinates and executes the development of test cases and analysis of results
  - Coordinates the development, review, and update of procedures and training.

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<sup>5</sup> The record includes evidence that the beneficiary is authorized to work to obtain practical training (OPT) until August 17, 2013.

- Maintains an understanding of how technology can enhance and offer a range of solutions for our business partners.
- Applies fundamental knowledge of systems tools, processes, business analyst responsibilities and expectations within assigned area to perform daily activities.
- Participates in research and recommends appropriate solutions.
- Demonstrates depth or breadth of knowledge regarding Systems Department structure and processes, best practices to complete assignments and influence the directions of solutions.
- Leads and/or contributes to strategic work and influences the direction set for teams, procedures and processes[.]
- Conducts research, analyses and synthesizes information; anticipating business needs and its application to systems processes and potential solution.

Upon review submitted for adjudication, the director found the evidence insufficient to establish eligibility for the benefit sought and therefore issued an RFE.

In an undated response to the RFE, counsel submitted a copy of a January 2, 2013 Employment Agreement document executed by the petitioner and the beneficiary. That document noted that the beneficiary is currently classified as an F-1, (Student) nonimmigrant and that the petitioner has undertaken the necessary steps to assist the beneficiary in obtaining a visa allowing the beneficiary to work full-time in the United States. The employment agreement stated:

The Employee shall be employed as a Programming/Computer Specialist, responsible for providing services to [the petitioner's] Client and/or Clients, as directed and/or required by [the petitioner], involving, for example, technical assistance in design, development, implementation, programming, training, consulting, project management, and/or related data processing services.

The employment agreement: listed the beneficiary's compensation as \$60,000 annually; noted that the petitioner may re-appoint or re-assign the employee to other Clients; and required the employee to submit time sheets every Friday with the employee's and the employee's supervisor's signature.

Counsel also submitted copies of the beneficiary's time sheets for January 2013 to May 2013. Although the time sheets noted the time submitted was approved, the copies did not include the beneficiary's or the beneficiary's supervisor's signature.

Counsel further submitted a June 14, 2013 letter on the letterhead of [REDACTED], signed [REDACTED] which stated:

This is to certify that [the beneficiary], an employee of [the petitioner] is contracted to work for [REDACTED] through [REDACTED] in [REDACTED] [REDACTED] has acquired contract with [REDACTED] to work on [REDACTED] project.



The record of proceeding also includes the beneficiary's 2012 Internal Revenue Service (IRS) Form W-4, Employee's Withholding Allowance Certificate; the petitioner's Employee Handbook; United States Citizenship and Immigration Services (USCIS) Form I-9, Employment Eligibility Verification; the beneficiary's performance appraisal, dated April 10, 2013, signed by the beneficiary and [REDACTED] director; photographs of the petitioner's business office; the petitioner's promotional materials; a photocopy of the petitioner's 2012 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, as well as the petitioner's 2012 New Jersey tax return; and the March 14, 2013 [REDACTED] letter previously submitted.

Upon review, including the petitioner's response to the RFE, the director determined that the record did not establish that the petitioner will be a "United States employer" having an employer-employee relationship with the beneficiary as an H-1B temporary employee and that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the director failed to give proper weight and consideration to the [REDACTED] letter and the petitioner's employment agreement with the beneficiary. Counsel contends that the director failed to recognize that "US fortune 500 companies contract out many of their projects to a small number of approved vendors and these approved vendors further contract out these jobs to others thereby creating layers of contractors between the employer and the place where the job is to be performed."

On appeal, counsel also submits an August 7, 2013 letter on [REDACTED] letterhead signed by [REDACTED] Relationship Management Analyst, [REDACTED] which references the beneficiary. The August 7, 2013 letter includes the same description of duties as outlined in the [REDACTED] March 14, 2013 letter as well as the same information in relation to [REDACTED]. The August 7, 2013 letter indicates that the beneficiary has been scheduled to work on [REDACTED] projects until December 31, 2015 pursuant to Work Order number [REDACTED] 120-1763.

#### IV. LAW AND ANALYSIS

##### A. Preliminary Findings of Defects Precluding Approval of the H-1B Petition

###### 1. Material Inconsistencies Undermining the Credibility of the Petition

The "Employment Agreement" dated January 2, 2013 submitted in response to the RFE, specifically stated that the beneficiary shall be employed by the petitioner as a "Programming/Computer Specialist." This provision of the "Employee Agreement" directly contradicts the petitioner's claim in its support letter dated March 21, 2013, that it intended to employ the beneficiary in the proffered position of "Business Analyst/Financial Analyst." In addition, the petitioner's March 23, 2013 support letter provided a specific list of duties that the beneficiary would perform in the proffered position and identified the proffered position on the LCA as corresponding to the occupational classification of "Financial Analyst," SOC (ONET/OES) Code 13-2051. Also, in both letters written on [REDACTED] letterhead dated March 14, 2013 and August 7, 2013, respectively, [REDACTED] stated that the beneficiary was

employed "either by [redacted] or by an [redacted] subcontractor" and is currently working as a "Business Analyst." Moreover, [redacted] list of responsibilities for this position substantially differs from and conflicts with the duties of the proffered position described by the petitioner in its support letter dated March 21, 2013. For example, the petitioner's support letter specifically stressed the importance of financial and cost related analysis and reporting in the first six of eleven duties listed for the proffered position of "Business Analyst/Financial Analyst," but neither of the [redacted] letters stated that the beneficiary was responsible for any duty involving financial and cost related analysis and reporting in her current work at [redacted] as a "Business Analyst." Furthermore, neither the petitioner nor [redacted] included programming as part of the beneficiary's actual duties. Additionally, we note that the petitioner further identifies the proffered position on the Form I-129 H-1B Data Collection Supplement, Part A, Question 5, as 030, "Occupations in Systems Analysis and Programming."

The AAO finds that the above noted differences with regard to the characterization of the proffered position as contained in the (1)"Employment Agreement," dated January 2, 2013; (2) the two letters written on [redacted] letterhead, dated March 14, 2013 and August 7, 2013 respectively; (3) the petitioner's support letter of March 21, 2013; (4) and the petitioner's identification of the proffered position as a Systems Analysis and Programming occupation are materially inconsistent. These inconsistent characterizations constitute attestations about the nature of the proffered position that are unreliable because of their materially conflicting information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id* at 591. In any event, the material inconsistencies in basic information and documentation presented in the petition in themselves fatally undermine the credibility of this petition. We also find that the inconsistencies in this record of proceeding constitute inaccuracies that require denial of the petition. *See* 8 C.F.R. § 214.2(h)(10)(ii). (The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact.)

We also find that the record does not include sufficient credible and substantive evidence to resolve the discrepancies and convey the substantive nature of whatever position it is that the beneficiary would actually perform. Accordingly, the AAO here finds that for that reason alone, and independent of the other issues on appeal, this petition may not be approved.

## 2. LCA Issue

Additionally, and beyond the director's decision, it is noted that the LCA provided in support of the instant petition lists a Level I prevailing wage level for Financial Analysts in [redacted] Illinois. This indicates that the LCA, which is certified for an entry-level position, is at odds with the petitioner's claim that the individual in the proffered position must "understand the industrial and business systems in order to analyze the problem [and] should also understand the nature of the job to be performed, which is in itself complex." Further, the [redacted]



description of duties claimed that the individual in the proffered position maintains an understanding of how technology can enhance and solve problems for its business partners, demonstrates depth and breadth of knowledge regarding Systems Department structure and processes, and will lead to strategic work and will influence the direction for teams, procedures and processes.

Referencing the DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, we observe, for example, a position requiring understanding of complex industrial and business systems and demonstrating a depth and breadth of knowledge regarding systems department structure and processes would appear to indicate at least a Level III wage level ("experienced") or more likely a Level IV position ("fully competent"). See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), which may be accessed on the Internet site [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Given the LCA's Level I wage-rate and also the inconsistencies regarding the nature of the occupational classification to which the position in question would actually belong, the record does not establish that the LCA corresponds with the petition for which it is submitted, as required by both USCIS and Department of Labor regulations. In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved, because of the apparent failure to submit an LCA that corresponds to the petition.

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, the assertions failed to submit an LCA that corresponds to the claimed Level III or IV position and that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

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



Here we address that director's decision to deny the petition for its failure to establish that common-law employer-employee relationship that is essential for a determination that a petitioner qualifies to file an H-1B petition as a United States employer.

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

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

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

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

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

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

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

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

Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." See subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." See 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." See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec.



H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>6</sup>

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." See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.<sup>7</sup>

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

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

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

<sup>7</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).



§ 214.2(h).<sup>8</sup>

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Moreover, 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

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

tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

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

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

Counsel contends that it is industry standard for Fortune 500 companies to contract out many of their projects to a small number of approved vendors who in turn further contract out these jobs to others creating layers of contractors between the employer and the place where the job will be performed. While this may occur within the petitioner's industry, USCIS must still determine by reviewing the contracts between all contractors whether the petitioner retains the right to control the beneficiary's work, retains the right to supervise and direct the beneficiary's work, and most importantly retains the right to require that the work remain within the context of the occupation that has or will be approved for H-1B classification. In this matter, the petitioner has not provided all the required contracts, work orders, or purchase orders for USCIS review.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. *See* 8 C.F.R. § 103.2(b)(2)(ii). In this matter, there is insufficient documentary evidence to corroborate what the beneficiary would do and the availability of work for the beneficiary for the entire requested period of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

While the record contains the two letters from [REDACTED] and the brief statement from [REDACTED] dated June 14, 2013, the record does not include the "Sourcing Agreement" between [REDACTED] and [REDACTED] and does not include a copy of the [REDACTED] 120-1763" work order detailing the duties [REDACTED] has agreed to provide to [REDACTED]. As the record does not include this evidence, the key element in this matter, which is who exercises actual control over the beneficiary and her work, was not substantiated. Moreover, the record does not include a description of the work that [REDACTED] agreed to provide to [REDACTED] in Word Order "[REDACTED] 120-1763." Thus, without the "Sourcing Agreement" between [REDACTED] and [REDACTED] and the Work Order, key pieces of evidence, the AAO finds specifically that (1) the record of proceeding does not establish that both [REDACTED] and [REDACTED] agree regarding the status of the personnel who



perform work pursuant to Work Order number [REDACTED] 120-1763, and (2) the petitioner has failed to establish that it exerts any substantial control over the beneficiary and the work she would perform while on assignment to [REDACTED]. Similarly, the record is devoid of any agreement between [REDACTED] and [REDACTED] or the petitioner and [REDACTED] detailing who will supervise the beneficiary, who will assign the beneficiary work, who will provide the instrumentalities and tools for the beneficiary to perform the work, who will provide the actual duties of the beneficiary's work, and who will control the beneficiary's day-to-day work at [REDACTED].

Upon further review of the duties the beneficiary will perform as outlined by [REDACTED] in its two letters, the AAO finds that the duties listed appear to indicate that it is [REDACTED] – and not the petitioner – who will exercise the most immediate and substantial control over the beneficiary, the beneficiary's day-to-day work, and will dictate the substantive nature of the beneficiary's daily work. That is the beneficiary will comply with business processes and procedures of the assigned area, will participate in a variety of activities to implement solutions for [REDACTED] needs, as well as offering a range of solutions for [REDACTED] business partners. Materially significant is the absence of any mention by [REDACTED] representative of any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED].

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. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. In this matter, the record lacks substantive evidence establishing that it is the petitioner who will direct and control the beneficiary's day-to-day work. The record does not include evidence of the beneficiary's direct supervisor(s) or manager(s) and although the petitioner has provided a performance evaluation of the beneficiary's work, the evaluation does not identify for whom the performance appraiser works. Moreover, the time sheets submitted do not include the beneficiary's direct supervisor's name, signature, or location. Again, the record does not establish that it is the petitioner who exercises control over the beneficiary or otherwise directs her day-to-day work. Accordingly, the petitioner has not substantiated the employer-employee relationship.

### C. The Specialty Occupation Issue

The next issue in this matter is whether the director correctly determined that the petitioner failed to establish that the proffered position is a specialty occupation.

To meet its burden of proof on this issue, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements. Section



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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily

sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner, supra.* To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

As determined above, the petitioner has provided materially inconsistent and conflicting titles, characterizations, and duties regarding the proffered position. Thus, the record of proceeding does not support the petitioner's assertion that the proffered position is 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.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, location of employment, proffered wage, et cetera. In this matter, the petitioner has identified the proffered position as a programming/computer analyst (employment agreement), a financial analyst/business analyst (Form I-129 and the March 21, 2013 letter in support of the petition), an occupation in systems analysis and programming (DOT Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 5), a Financial Analyst (the certified LCA), and a Business Analyst (letters). As these occupational titles require the performance of significantly different duties, the petitioner has not identified with specificity the actual occupation it will require the beneficiary to perform. In addition, when examining the



duties which the petitioner claims the beneficiary will be required to perform, the petitioner submitted two significantly different descriptions of duties. Accordingly, as the record does not include sufficient probative evidence establishing the actual nature of the proffered position, the AAO is unable to review the position duties to determine whether the proffered position is a specialty occupation.

Moreover, the petitioner does not specify that the performance of either version of the duties provided will require a bachelor's degree in a specific discipline. The petitioner asserted that: "a strong background in Masters of Business Administration and knowledge in computer application is required, because the personnel must understand the industrial and business systems in order to analyze the problem, should also understand the nature of the job to be performed, which is in itself complex." However, the requirement of a background in business administration whether at the bachelor's or master's degree level is not the same as a requirement of a degree in business administration.<sup>9</sup> Although the petitioner asserted that a person with a Master's Degree in Business Administration would be helpful to perform the duties of the proffered position, it is not the beneficiary's qualifications that determine whether a particular job is a specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

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

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position

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<sup>9</sup> Moreover, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

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

#### V. CONCLUSION

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

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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