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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: **MAY 28 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:
[REDACTED]

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 20, 2013. On the Form I-129 visa petition, the petitioner describes itself as a software solutions and services business with approximately 250 employees, established in 1998. In order to employ the beneficiary as a Systems Analyst, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that: (1) the petitioner failed to establish that the proffered position qualifies as a specialty occupation; and (2) the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary, which is essential to a petitioner's standing to file an H-1B specialty occupation petition as a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous and that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B, a brief, and supporting documentation. We have reviewed the record in its entirety before issuing this decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed.

In the petition signed on April 1, 2013, and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary as a Systems Analyst on a full-time basis at a salary of \$65,000 per year. The petitioner indicates that the beneficiary will be employed at [REDACTED] Santa Rosa, CA [REDACTED]. In the support letter dated April 1, 2013, the petitioner states that the beneficiary would be employed to perform the following duties:

- Custom program design, development and implementation of software applications and systems to meet clients' needs and specifications.
- Analyze user requirements, procedures and problems to automate processing or to improve existing computer systems.
- Confer with personnel involved to analyze current operational procedures and identify problems.
- Write detailed descriptions of user needs, program functions, and steps required to develop or modify computer programs.
- Responsible for the definition, implementation and execution of the functional, regression and acceptance test strategy on highly iterative and collaborative projects in an agile environment. Projects will typically be of medium to high complexity.

The petitioner lists the minimum requirements for the position of Systems Analyst in its support letter as a "Bachelor's Degree and relevant experience."

The petitioner submitted an LCA in support of the instant H-1B petition. We note that the job title listed on the LCA is "Systems Analyst" and that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121.00, at a Level I wage.

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Business Administration degree from the [REDACTED] awarded on December 16, 2006, and Bachelor of Engineering degree from the [REDACTED] in India awarded in 2003.

On October 9, 2013, in response to the director's RFE, the petitioner provided additional supporting evidence, including the following documentation:

- A letter with a more detailed job description.
- A second itinerary for the beneficiary.
- An organizational chart for the petitioner.
- Job listings for systems analyst positions.
- Educational documents of several individuals.
- The petitioner's position announcements for computer programmers.
- An evaluation of the beneficiary's master's and bachelor's degrees from Dr. [REDACTED] with [REDACTED] dated October 2, 2013.¹
- An employment agreement between the petitioner and the beneficiary.
- The petitioner's Performance Review Policy and Report Form.
- The petitioner's time sheet template.
- The petitioner's statement of benefits.

The petitioner also submitted an offer of employment letter dated March 19, 2013, in which the beneficiary's duties are described, as follows:

- Systems analysis, consulting with users and determining hardware, software and/or system functional specifications.
- Design, analysis, creation, development, documentation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
- Documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

¹ Dr. [REDACTED] concludes that the beneficiary's Bachelor of Engineering and Master of Business Administration degrees from India are equivalent to U.S. Bachelor of Computer Science & Engineering and Master of Business Administration degrees. In his brief on appeal, counsel states that the beneficiary has a "Master's Degree in Software Engineering." The record does not support counsel's assertion and no other evidence of the beneficiary's educational credentials was submitted.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on October 18, 2013. Counsel submitted a timely appeal of the denial of the H-1B petition.

Specialty Occupation

The first issue is whether the petitioner has established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the

position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). 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.

The petitioner asserted that the beneficiary would be employed as a systems analyst. However, 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.

Moreover, to ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline, or its equivalent. We find that the petitioner has not done so.

In its response to the RFE, the petitioner reiterated the beneficiary's duties, as follows:

- Custom program design, development and implementation of software applications and systems to meet clients' needs and specifications.
- Analyze user requirements, procedures and problems to automate processing or to improve existing computer systems.
- Confer with personnel involved to analyze current operational procedures and identify problems.
- Write detailed descriptions of user needs, program functions, and steps required to develop or modify computer programs.
- The Beneficiary will not be required to supervise other employees.

The petitioner also refers to a second itinerary for the beneficiary, which lists the duties and responsibilities of the proffered position, as follows:

- Custom program design
- Development and implementation of software applications
- Analysis of user requirements to automate processing
- Analysis of existing systems
- Identify and solve problems in current operations
- Document user requirements

In his brief on appeal, counsel lists the duties and responsibilities of the proffered position, as follows:

- Responsible for interacting with developers and the product marketing to analyze the user requirements, functional specifications to understand product and its features.
- Perform object oriented analysis, design and development of software for client server platforms using computer skills.

- Analyzing users' data, general modes of operation, existing operation procedures, and problems and devising methods and approaches to meet the users' need based upon knowledge of data processing techniques, management information, and statistical, audit, and control systems.
- The position involves extensive use of modern computer languages[.] [T]he incumbent creates new solutions and algorithms to manage and implement those solutions.
- Software Testing and Debugging.
- Approximate percentage of time:
 - Quality Assurance: 40%
 - Analyze and design software 20-40%
 - Coding 20-30%
 - Miscellaneous: approx. 10%

The description does not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. The job description fails to communicate (1) the complexity, uniqueness and/or specialization of the tasks; and/or (2) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner failed to provide sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

In its April 1, 2013 support letter, and in its October 8, 2013 letter submitted in response to the RFE, the petitioner states that it requires a minimum of a bachelor's degree for the position of Systems Analyst. The petitioner's claim that a bachelor's degree in no specific specialty is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. 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 without further specification of the field of study, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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. Although a general-purpose bachelor's degree, such as a degree in business administration, 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).²

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate

In the instant case, the petitioner has failed to describe the proffered position with sufficient detail to determine that the minimum requirements are a Bachelor's degree in a specialized field of study. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972).

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

The U.S. Department of Labor's ("DOL") *Occupational Outlook Handbook* (hereinafter the *Handbook*) is an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the occupational group "Computer Systems Analysts."

We have reviewed the information in the *Handbook* regarding the occupational category "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.⁴ The AAO notes that the *Handbook* does not support a conclusion that this occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.

⁴ For additional information regarding the occupational category "Computer Systems Analysts," *see id.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited May 15, 2014).

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master of business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

Advancement

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

Important Qualities

Analytical skills. Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to figure out how changes may affect the project.

Communication skills. Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

Creativity. Because analysts are tasked with finding innovative solutions to computer problems, an ability to "think outside the box" is important.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited May 15, 2014).

The *Handbook* does not report that, as an occupational group, "Computer Systems Analysts" normally require at least a bachelor's degree in a specific specialty. The *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field," but "many analysts have technical degrees." Also, this segment of the *Handbook's* "Computer Systems Analysts" chapter opens with the following statement that also is indicative of the fact that a particular position's inclusion within the "Computer Systems Analysts" occupational classification is not in itself sufficient to establish that position as one for which a bachelor's or higher degree, or the equivalent, in a specific specialty is a normal requirement for entry:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

When reviewing the *Handbook*, we note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.⁵ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁶ That is, in accordance with the relevant DOL explanatory information on wage

⁵ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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/NPWHC_Guidance_Revised_11_2009.pdf.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who

levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the Computer Systems Analysts occupational group. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Upon review of the totality of the evidence in the entire record of proceeding, we conclude that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, we review the record regarding the first of the two alternative prongs of 8 C.F.R.

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

Id.

§ 214.2(h)(4)(iii)(A)(2). This first alternative prong calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is 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 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 three advertisements as evidence that its degree requirement is standard among its peer organizations for parallel positions in the software solutions and services.⁷

The posting for Arrowcore Group lists a minimum requirement of a "4-year degree" with no specific field of study. The advertisement from Adecco Engineering and Technical states that a bachelor's degree in computer science is preferred, and indicates that the equivalent in related work experience is acceptable. This position also requires "3-7 years prior experience in maintaining computer systems or operating systems." The posting from Integrated Interface lists the requirement for the position as a bachelor's degree in information systems, computer science, or equivalent experience/certification, and "2-4 years of experience as a super user/Integrating enterprise applications." The job duties listed in these postings, when combined with the additional experience requirement, appear to be of a more complex nature than the petitioner's proffered position.

⁷ It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

The advertisements provided establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree in a *specific specialty* or its equivalent. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

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

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." As noted above, the evidence of record does not develop relative complexity or uniqueness as an aspect of the position.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel claims that the petitioner normally requires a degree and that the petitioner "has hired in [the] past 200+ Systems Analyst[s] with similar background[s]." The petitioner submitted degrees of eight individuals it claims are "similar employees." The record does not include evidence that any of these individuals are actually employed by the petitioner in the proffered position of Systems Analyst. 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. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner also submitted position announcements for the position of Computer Programmer. These announcements are for a position other than Systems Analyst and do not demonstrate the petitioner's history of requiring a bachelor's degree for Systems Analysts that it hires.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's

perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Thus, the record of proceeding has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or the equivalent.

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. The evidence of record does not convey either the substantive nature or any particular level of specialization and complexity of any specific duties that the beneficiary would perform, and it does not distinguish the duties of the proffered position from the generic duties generally performed in the Computer Systems Analysts occupational group, which are ones for which the *Handbook* indicates no usual association with at least a bachelor's degree in a specific specialty.

In this regard, the AAO here also incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the pertinent occupational category. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." This aspect of the petition is materially inconsistent with the relative level of specialization and complexity required to satisfy this criterion.

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

Employer-Employee Relationship

The second issue before us is whether 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 must establish that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

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

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker

(Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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.⁸

⁸ While the *Darden* court considered only the definition of "employee" under the Employee Retirement

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 318-319.⁹

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).¹⁰

Therefore, in considering whether or not one will be an "employee" in an "employer-employee

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).

⁹ 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))).

¹⁰ 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).

relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See 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."

With the petition, the petitioner submitted: (1) an "Itinerary of [beneficiary]" signed on April 1, 2013. The itinerary states that the beneficiary will be assigned to [REDACTED] Santa Rosa, CA [REDACTED] as a Systems Analyst; and (2) a "Consulting Subcontractor Agreement" dated April 30, 2009, between [REDACTED] (Consultant) and [REDACTED] (Subcontractor).¹¹ The agreement states that its terms are valid for a period of five years from the effective date. Therefore, the terms of the agreement expired on April 30, 2014.

In response to the director's RFE, the petitioner submitted a second "Itinerary of [beneficiary]" signed on October 8, 2013. This itinerary states that the beneficiary will be assigned to [REDACTED] at [REDACTED], San Jose, CA [REDACTED] as a Systems Analyst. The petitioner referred to the previously submitted employment agreement between the petitioner and the beneficiary as evidence of its control over the beneficiary as an employee. As further evidence of the employer-employee relationship between the petitioner and the beneficiary, the petitioner also submitted its organizational chart, its Performance Review Policy and Report Form, its time sheet template, and its statement of benefits.

On appeal, counsel submits the following additional evidence: (1) an invoice from the petitioner to [REDACTED] for "Contract Programming, [REDACTED] for the period 19th October – 25th October 2013" for a total of 11 hours; (2) a Master Consulting Agreement between the petitioner and [REDACTED] dated June 3, 2008; an [REDACTED] Timesheet Report dated October 30, 2013, for the period of October 19 to October 25, 2013, addressed to the petitioner, for a total of 11 hours of work for clients [REDACTED] and [REDACTED] Inc.¹²

The director noted several inconsistencies in the documentation submitted. First, the director noted that the first itinerary, as well as the LCA and the petition, listed the work location as [REDACTED] Santa Rosa, CA, but the second itinerary listed a different work location of [REDACTED] San Jose, CA. Second, the director noted that the Consulting Subcontractor Agreement was incomplete, as it did not include Exhibit A as referred to in the terms and conditions, and was inconsistent, as in the section titled "Recitals," reference is made to an agreement between [REDACTED] and [REDACTED]

In his brief on appeal, counsel denies that there is any agreement between the petitioner and [REDACTED]. Counsel further asserts that the address in San Jose as listed on the second itinerary was a typographical error and that the work location remains in Santa Rosa. Counsel also lists several documents that he claims were submitted in response to the director's RFE, including "relevant contracts, copy of wo[r]k order," "documents from end client location, etc.," "contracts, work order, email, itinerary, timesheets, brochure, ...," "pay stubs of beneficiary," and "monthly status reports." The record does not include any company brochure, emails, work orders, status reports, documents from the end client location, pay stubs issued by the petitioner, or contracts beyond those mentioned above. The petitioner did not submit any

¹¹ On the signature page of the agreement, the petitioner's name and address is handwritten below the typed name of [REDACTED]

¹² The Timesheet Report lists the tasks billed as "business analyst" and "EB tax functional consultant." The Timesheet Report does not include any reference to the beneficiary or the proffered position of Systems Analyst.

document which outlined in detail the nature and scope of the beneficiary's employment from the end client, Intelenex.

The petitioner has failed to present any evidence to address the reference to [REDACTED] in the Consulting Subcontractor Agreement. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record is devoid of any contractual documentation, signed by both the petitioner and its client, [REDACTED] regarding the relationship between the petitioner and [REDACTED] and between [REDACTED] and the beneficiary. Also, the record is devoid of any documentation from [REDACTED] confirming, at a minimum, the beneficiary's assignment, duration of the assignment, job duties, educational requirements for the position, and the measure of control over the beneficiary and her work. As noted above, we acknowledge that the petitioner submitted a document entitled "Itinerary of [beneficiary]," signed by the petitioner. However, the contents of the document do not indicate that it was accepted and signed by the client, [REDACTED]

We find materially significant the absence of any documentation from the client, [REDACTED] regarding 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, in his brief on appeal, counsel for the petitioner states that "the ultimate control, supervision, hir[ing] and fir[ing] is done by the petitioner," there is no evidence from the client, [REDACTED] confirming counsel's or the petitioner's assertions.

The record of proceeding does not indicate whether Intelenex has endorsed the information provided by the petitioner regarding the nature of the beneficiary's work for [REDACTED] 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 asserted assignment to its client, [REDACTED]. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

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 such as a letter from the end client, the petitioner failed to submit such evidence. 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).

In addition, upon review of the record, we note that the petitioner has not established the duration of the relationship between the parties. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

The "Itinerary" document, submitted with the petition, indicates that the duration of the assignment is "[t]o be determined." Moreover, the record does not contain a written agreement between the petitioner and Intelenex, or any other organization, establishing that any work, let alone H-1B caliber work, exists for the beneficiary for the duration of the requested period.¹³

The petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 15, 2016, there is a lack of substantive documentation regarding any work for the duration of the requested period. As previously noted, there is no documentary evidence from [REDACTED] establishing the duration of the project. Further, the [REDACTED] invoice and Timesheet Report indicate only 11 hours of total work for the period October 19 to October 25, 2013. None of the work listed indicates that the 11 hours of work was for a Systems Analyst. 5 of the hours claimed on the Timesheet Report are for a "Business Analyst," and 6 of the hours claimed on the Timesheet Report are for an "EB Tax Functional Consultant." The Timesheet Report does not list the duties of either position. Thus, the record does not demonstrate that the petitioner would be maintaining an employer-employee relationship with the beneficiary for the duration of the validity of the requested period; nor does the record demonstrate that the petitioner intends to temporarily employ the beneficiary on a full-time basis. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 ('Reg. Comm'r 1978).

For the reasons discussed above, the AAO finds that 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). This material aspect of the evidentiary record precludes approval of the petition.

¹³ As noted herein, the Consulting Subcontractor Agreement between [REDACTED] and the petitioner expired on April 30, 2014. No evidence that this agreement was extended was submitted.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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