



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 09 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 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 8, 2013. In the Form I-129 visa petition, the petitioner describes itself as a company providing software development for the travel industry established in 2001. In order to employ the beneficiary in what it designates as a computer software engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a Request for Evidence (RFE). Thereafter, counsel responded to the director's RFE. The director reviewed the information and found that the petitioner did not establish availability of specialty occupation work for the requested period of intended employment. The director denied the petition on October 7, 2013. On appeal, the petitioner, through counsel, asserts that the director's grounds for denial of the petition are erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting documentation; (6) our Notice of Derogatory Information/Intent to Dismiss; and (7) counsel's response and supporting documentation. We reviewed the record in its entirety before issuing our 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. The appeal will be dismissed, and the petition will be denied.

Further, we will also address additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition.¹ For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a computer software engineer to work on a full-time basis at a rate of pay of \$68,000 per year. The petitioner further indicated that the beneficiary will be employed at its location at [REDACTED] and will not work off-site. The petitioner stated that the dates of intended employment are from [REDACTED]

In a letter dated March 29, 2013, the petitioner stated the following regarding the proffered position:

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

At this time, [the petitioner] seeks to utilize the professional services of [the beneficiary] to serve as a Computer Software Engineer at our headquarters in [redacted] Colorado. In the position of Computer Software Engineer, [the beneficiary] will be responsible for conducting and coordinating software development activities throughout the project development life cycle. He will participate in key design decisions regarding the technology, infrastructure, and configuration of the system. [The beneficiary] will provide technical solutions to the team, and will also ensure that the delivered solutions follow the technical specifications and design requirements. He will be responsible for the deployment of software on test servers, and assist the users with User Acceptance Testing. Moreover, [the beneficiary] will resolve the technical queries from the Business Analysts and Quality Assurance team members. He will also provide weekly status reports to his Project Manager that highlight any risks and mitigation plans. This is a professional position within [redacted], and as such, requires at least a Bachelor's degree in Computer Science, Management, Information Systems or a related field.

With the Form I-129, the petitioner provided copies of the beneficiary's foreign academic credentials and work experience letters. The petitioner also submitted an evaluation of training, education, and experience to establish that the beneficiary attained the U.S. equivalent of a Bachelor's degree in Management Information Systems.

The record of proceeding also contains a Labor Condition Application (LCA). The LCA designation for the proffered position corresponds to the occupational category "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner listed its address as the place of employment.

II. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

A. Employer-Employee

We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss issues, beyond the decision of the director that preclude the approval of the petition. More specifically, the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . ,

who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined 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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

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

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional

master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

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

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

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).

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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).⁴

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*

³ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁴ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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).

In the instant case, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

We note that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Significantly, the petitioner provided inconsistent information regarding the beneficiary's employment. At the outset, we note that the petitioner is wholly owned by [REDACTED] located ([REDACTED] in India, which does business as [REDACTED]).⁵ In response to the RFE, counsel for the petitioner claimed that "[the beneficiary]'s professional services will be

⁵ The petitioner's corporate income tax returns from 2011 and 2012 indicate that [REDACTED] owns 100% of corporation's voting stock.

required on imminent [REDACTED] projects for at least the next three years" (emphasis in the original). However, the petitioner provided conflicting information about its relationship with [REDACTED]. For example, in the initial response to the RFE, counsel referred to [REDACTED] as its customer. Specifically, counsel claimed that the petitioner "is continuously in conversation with its customer, [REDACTED] about renewing projects and appropriate team validities" (emphasis added). Counsel also referred to a letter from [REDACTED], to state that the letter describes the business' need to transfer the beneficiary to the company office in [REDACTED] Colorado "on a project for one of the company's most important clients [REDACTED]" (emphasis added).

However, on appeal, counsel states, for the first time, that [REDACTED] is the petitioner's parent company. Specifically, counsel states that "this in-house employment will be servicing an engagement with [the petitioner]'s parent company, [REDACTED] (emphasis added). Counsel further asserts that [REDACTED] and [the petitioner] are entities within the same corporate family."

In support, counsel submitted a letter from [REDACTED] senior legal counsel and authorized signatory for [REDACTED] on [REDACTED] letterhead dated July 22, 2011. The letter states that [REDACTED] is a joint venture company, comprised of the following shareholding: [REDACTED] with 49% and [REDACTED] with 51%.⁶ However, the documents in the record of proceeding fail to substantiate the claim on appeal that [REDACTED] is the petitioner's parent company. For example, in a document entitled '[REDACTED] Corporate Presentation,' [REDACTED] is listed as one of the companies in "Strategic Partnership." In another document entitled '[REDACTED]' is listed under "Select Customers." In another document entitled "Introduction to [REDACTED]" is again listed as one of select clients. Thus, the petitioner failed to establish that [REDACTED] is its parent company, and in turn, that the beneficiary's employment would be in-house.

Further, the record of proceeding contains inconsistencies regarding the beneficiary's place of employment. As mentioned, the petitioner indicated that the beneficiary will not be employed off-site. In response to the RFE, the petitioner, or [REDACTED], submitted a letter dated August 4,

⁶ The record contains another document entitled "Shareholding Pattern of [REDACTED]" on [REDACTED] letterhead, which indicates the following:

S. No.	Name	No. of Equity Shares of Rs. 10 Each
1.	[REDACTED]	1,777,650
2.	[REDACTED]	6,022,900
3.	[REDACTED]	6,213,242
4.	[REDACTED]	3,40,800
5.	[REDACTED]	2,260,408
	Total	16,615,000

This document indicates that there are other shareholders for [REDACTED] which appears to contradict [REDACTED] claim that [REDACTED] has 51% shareholding. No explanation was provided.

2012, which states that "[the beneficiary] is employed at [the petitioner]'s headquarters in [REDACTED] Colorado" and that "at no time will be placed at any third party or customer site."⁷ However, the record of proceeding contains a letter from [REDACTED], Director of Technology Sourcing at [REDACTED] dated November 13, 2013, which states that "[the beneficiary], an employee of [the petitioner], will provide IT services to [REDACTED] located at [REDACTED]

Moreover, the petitioner has not established the duration of the relationship between the parties. Specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to August 17, 2016. In response to the RFE, counsel claimed that the beneficiary "will work implementing the Globalware v.6.10." In support, counsel submitted a Statement of Work (SOW) for Globalware-Phase 2 between [REDACTED]. Notably, the SOW is between [REDACTED], not the petitioner. Further, while the SOW names the beneficiary as one of the key personnel required for the project, the effective date for the SOW is July 1, 2013, which is scheduled to continue until completion, but not later than September 30, 2013. The record also contains documents entitled "staff augmentation services" for "Globalware Support" project, which contains attachments that name the beneficiary as one of the consultants and lists the consultants' rates. However, the latest service expiration date is "06/30/2013," which is prior to the requested start date of October 1, 2013.

Further, Mr. [REDACTED] states in his letter dated November 13, 2013, that the beneficiary will provide IT services to [REDACTED] "pursuant to the Master Services Agreement between [REDACTED]." The record of proceeding contains the "Fifth Extension Amendment to Master Services Agreement" (MSA) between [REDACTED] dated August 22, 2013. The agreement indicates that the MSA will continue until September 30, 2016. Again, the MSA is executed between [REDACTED] and [REDACTED]. Further, the MSA is not accompanied by SOWs or other documents to establish that the beneficiary will be employed in one of their projects for the requested validity period. Moreover, Mr. [REDACTED] letter states that it "anticipate[s] that [the beneficiary]'s services will be necessary for a period of two years," which does not cover the duration of the H-1B validity period as requested.

In addition, we find that the petitioner did not establish conditions and terms of the beneficiary's employment. For example, the petitioner is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. 8 C.F.R. § 214.2(h)(4)(iv)(B). The petitioner submitted two letters from [REDACTED] addressed to the beneficiary. The first letter is dated September 10, 2007, appointing the beneficiary as a senior software engineer from September 10, 2007, and the second letter is dated February 27, 2012, appointing the beneficiary as a lead software engineer. Neither of the letters is signed by the beneficiary.

⁷ A search of the petitioner's address at [REDACTED] reveals that this address is one of [REDACTED] offices in the United States. See [REDACTED] website at [http://www.\[REDACTED\]](http://www.[REDACTED]) Resources/Regions/Americas/North%20America/UNITED%20STATES (last visited September 29, 2014).

Upon review of the letters, we find that the letters do not provide any level of specificity as to the beneficiary's duties and the requirements for the position. For example, the letters state that the beneficiary's compensation and other benefits will be as specified in "Annexure 'A,'" but this document was not attached to the submitted letters. Further, the letters state "[y]our responsibilities and duties will be shared with you [up]on you[] joining the company and you would be expected to discharge your duties accordingly," and no other details are provided. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

Moreover, there is a lack of consistent information in the letters as to how the day-to-day work of the beneficiary will be supervised and overseen. Both letters indicate that the beneficiary "will report to Practice Head and/or such other person as may be notified." The petitioner did not submit a description of the beneficiary's supervisor's job duties and/or other probative evidence on the issue. We acknowledge that Mr. [REDACTED] from [REDACTED] indicates in his letter that "[the petitioner] will be fully responsible for directing, supervising and controlling [the beneficiary]'s employment activities" and further, that the letter from [REDACTED] states that "[the beneficiary] will report to an [petitioner's] project Manager." However, there is no further information provided that establishes how the petitioner supervises the beneficiary on a day-to-day basis or who would supervise the beneficiary. We also note that the petitioner submitted photographs of its alleged office space including cafeteria, cubicles, conference room and a sign that says "[REDACTED] Managers." However, the photographs do not establish where [REDACTED] managers are located or who they are and how they supervise the employees, including the beneficiary. Therefore, the record contains insufficient probative evidence to demonstrate that the petitioner will be overseeing and directing the work of the beneficiary.

On appeal, counsel also submits documents from [REDACTED] entitled "Relocation Policy USA," "Reimbursement Policy USA," "Professional Certification Assistance Policy US," and "Medical Insurance Policy USA." However, the documents appear to be general documents provided to employees working in the United States, and do 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." 8 C.F.R. § 214.2(h)(4)(ii).

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter.

Based on the evidence in the record of proceeding, we find that there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment, as well as who would directly supervise the beneficiary. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future

eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will more likely than not exist between the petitioner and the beneficiary.

The evidence of record 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 beneficiary is the petitioner's employee and that the petitioner supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the petition will be denied on this additional basis.

B. Specialty Occupation

Beyond the decision of the director, we will now address whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

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

requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

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

In the instant matter, the record of proceeding contains the letter from Mr. [REDACTED] that outlines the duties of the proffered position. As mentioned, the petitioner provided inconsistent information about its relationship with [REDACTED]. Further, we note that the job description provided by Mr. [REDACTED] differs from the job description provided by the petitioner.⁸ Mr. [REDACTED] states that the job duties are as follows:

⁸ The petitioner also provided a job description in response to the RFE, which differs from its job description provided in the support letter. Further, the letter is dated August 4, 2012, 8 months prior to filing

- Analyze the critical defects, prepare Solution/Technical Approach, code critical pieces of module, unit testing, integration testing, code reviews, and implement the solution immediately to minimize the impact to the online system.
- Ensure that the solutions prepared for the defects adhere to the existing product specification and doesn't deviate the current system.
- Plan, coordinate and prioritize assignments for off shore team members based on the severity and criticality of defects.
- Need to communicate with the client on a daily basis to resolve the queries and issues immediately, this will improve the overall efficiency of the maintenance project and reduce the time to implement things. It also gets better communication with the client and able to get better understanding of the system.
- Perform changes in system as per the requirement specification given by the client. These specifications would be used to prepare designs and user test cases. This will [ensure] better integrated software product[.]
- Analyze existing application to incorporate new requirements and enhancements and create Software Requirement Specification.
- Analyze the impact of any new implementation on the existing running system.
- Feasibility of requirements given by client. This would be done in conjunction with the client to understand any gaps, which may exists [sic].
- Participate in discussing the pertaining [sic] to Architectural changes related to major enhancement with the onshore product teams.

Further, while the letter from Mr. [REDACTED] provided job duties to be performed by the beneficiary, it did not provide information regarding educational requirements for the persons to be assigned to its projects.

We find that the petitioner's failure to provide a consistent, detailed description of the duties to be performed by the beneficiary preclude approval of the petition. That is the petitioner has failed to establish the substantive nature of the work to be performed by the beneficiary, thus the petitioner has not satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

this petition. No explanation was provided for the discrepancies.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, we turn next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. We recognize the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

We reviewed the *Handbook* regarding the occupational category "Computer Systems Analysts." However, the *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analysts" states, in pertinent part, the following about this occupation:

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 also are 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 computer systems 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.

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited September 25, 2014).

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 this occupation. While the *Handbook's* narrative indicates that a bachelor's degree in computer or information science field is common, it states that it is not always a requirement. The *Handbook* reports that some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming. The *Handbook* continues by stating that many computer systems analysts have technical degrees (it does not specify the level of such degrees, i.e., associate's, baccalaureate, master's), but the *Handbook* does not report that it is normally the minimum requirement for entry.¹⁰ According to the *Handbook*, many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

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

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

¹⁰ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmers possess a bachelor's degree, it could be said that "most" of these employees have such a degree. It cannot be found, therefore, that a statement that "most" employees in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act. Moreover, as previously mentioned, the proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation.

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

Here and as already discussed, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted a letter from Mr. [REDACTED]

[REDACTED] Senior Vice President of Government Relations at [REDACTED]. Upon review of the letter, we note that Mr. [REDACTED] failed to provide sufficient information regarding his expertise on this particular issue. Mr. [REDACTED] claims that his organization "represents fifty of the nation's leading information and communications technology companies" and is "the voice of the high tech community." However, there is no other documentary evidence to substantiate his claims or his recognition by other professional organizations that he or his organization is an authority on these specific requirements.

In the letter, Mr. [REDACTED] lists a number of positions including "computer systems analyst/engineer/architect" and "software engineer" to state that these positions, "with rare exceptions, require a bachelor's degree or equivalent in a related field as minimum educational requirement." However, to establish that the proffered position is a specialty occupation position, the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Thus, we find that Mr. [REDACTED] letter lacks the requisite specificity and detail and his claims are not supported by independent, objective evidence demonstrating the manner in which he reached the conclusions stated in the letter.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains job announcements, including internal job postings. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documentation, the petitioner indicates that it is a software development company for the travel industry established in 2001, with 30 employees. The petitioner reported its gross annual income as approximately \$18 million, and its net annual income as \$1.7 million. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541519 – "Other Computer Related Services."¹¹ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services). Establishments providing computer disaster recovery services or software installation services are included in this industry.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541519 – Other Computer Related Services on the Internet at <https://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 25, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The petitioner failed to establish that the advertising employers are similar to the petitioner. The petitioner provided job postings as follows:

- [REDACTED] (technology company with the largest search advertising network);
- [REDACTED] (provides tactical data hardware and software to the U.S. navy and its Allies, design and manufacture adapters, systems and accessories);
- [REDACTED] (design, build and implement analytic tools); and
- [REDACTED] (logistics management service provider).

The petitioner did not supplement the record with further information to establish which characteristics, if any, it shares with the advertising organizations. The petitioner also provided job

¹¹ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited September 25, 2014).

advertisements from companies that do not contain any information about the employers such as [REDACTED]. Based on the information provided, we are unable to determine if the employers are similar to the petitioner.

Further, some of the advertisements do not appear to be for parallel positions. For example, [REDACTED] requires at least five years of experience in PHP, Python, C#, Java or Ruby, and also in JavaScript. Similarly, [REDACTED] requires 3+ years coding experience, and [REDACTED] also requires 3+ years of experience with architecture and development of consumer experience. As previously discussed, the petitioner designated the proffered position on the LCA as a Level I (entry level) position. These advertised positions appear to be for more senior positions than the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, [REDACTED] states a Bachelor's degree is minimum, but does not state that a specific specialty is required.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹²

¹² According to the *Handbook's* detailed statistics, there were approximately 520,600 persons employed as computer systems analysts in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm> (last visited September 25, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry, for positions parallel to the proffered position, commonly require at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just these postings (which appear to

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).

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

In support of the H-1B petition, the petitioner and its counsel submitted documentation regarding the petitioner's business operations including informational printouts about its parent company, [REDACTED] and the petitioner's financial documents. Upon review of the record of proceeding, however, the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Further, we hereby incorporate into this analysis the earlier comments and findings regarding the information and evidence provided with regard to the proposed duties and requirements and the position that they are said to comprise

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage.¹³ The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the

have been consciously selected) could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

¹³ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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

occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, the petitioner has not established that its proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

The petitioner has indicated that the beneficiary's credentials will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus not established the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner 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 its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation

as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 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.

The petitioner stated in the Form I-129 petition that it has 30 employees and that it was established in 2001. In response to the RFE, counsel submitted copies of petitioner's internal job postings for various positions. However, the petitioner did not establish that the advertised positions are similar to the proffered position. For example, the technical lead position "is responsible for conducting, leading and coordinating software development activities throughout the project development life cycle, including key design decisions for the technology, structure and configuration of the system." Further, the position requires three years of experience in any related technical position. As previously noted, the petitioner designated the proffered position at a Level I on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. Similarly, lead software engineer position requires 6+ years of IT experience and experience in leading a team of at least 5 people. Since these postings appear to be for more senior positions, it is not probative evidence that a degree is normally required for the proffered position. The petitioner also provided partial postings for performance engg (lead/architect), systems administrator, senior/lead java developer, and sales director positions. However, the postings are cut off and do not provide sufficient information regarding responsibilities and the requirements for the positions for our review.

Counsel also provided a list that consists of names, employee ID, qualification or degrees, the petitioner's name as the company name, and dates. Counsel claimed that "[the petitioner] has, since 2004, a record of hiring persons with a baccalaureate degree, or higher." However, the petitioner did not provide the individuals' job duties and day-to-day responsibilities to establish that the duties and responsibilities for these individual are the same or are related to the proffered position. It must be noted that the educational level of employees who hold positions that are not the proffered position (or parallel to that position) is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation. Further, the petitioner did not submit probative evidence to establish the individuals' current or past employment with the petitioner (e.g., pay statements, Form W-2 Wage and Tax Statements) and copies of their diplomas to establish that they possess a bachelor's degree in a specific specialty.

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

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

In the instant case, the petitioner submitted a description of the proffered position, along with documentation regarding its business operations. Upon review of the record of the proceeding, we find that the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Further, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

C. Corporate Status

Beyond the decision of the director, we note that the record of proceeding in the instant case does not establish that the petitioner was a corporation in good standing in the State of Colorado at the time of filing. In our notice of derogatory information and intent to dismiss, we noted that according to the Colorado Secretary of State website, the petitioner's business was in "delinquent" status.

In response, counsel for the petitioner indicated that the petitioner maintains an active and valid corporate status and is currently in good standing. In support of this assertion, counsel submitted documents which include:

- A certificate dated August 4, 2014 from the office of the secretary of state of the state of Colorado that the petitioner has complied with all applicable requirements and is in good standing; and
- A printout dated August 13, 2014 from the website of Colorado Secretary of State. Business search results indicate that the petitioner became delinquent on July 1, 2012. It further indicates that the petitioner submitted a statement curing delinquency, but does not indicate the date of cure.

While it appears that the petitioner has recently cured its delinquency status and is currently in good standing, the petitioner did not establish that it was in good standing on April 8, 2013, the date of filing of this petition. We note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Therefore, for this additional reason, the petition will be dismissed.

III. THE DIRECTOR'S DECISION

The director determined that the petitioner had not demonstrated that a reasonable and credible offer of employment exists. The director based her decision on the lack of evidence in the record demonstrating the specific duties the beneficiary would perform under contract for the petitioner's

clients and the lack of evidence establishing availability of specialty work to be performed by the beneficiary for the requested period of intended employment. For the reasons we discussed above, we agree with the director's conclusion.

The petitioner's proffer of employment must be reviewed within the context of the nature of the work and whether the petitioner has offered the beneficiary a position that is a specialty occupation position. For H-1B approval, the petitioner must demonstrate that a need for an H-1B employee exists when the petition is filed and must substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is to say, it is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

As we observed above, the petitioner has not provided a detailed and consistent description of the duties the beneficiary will be expected to perform. The lack of evidence regarding the beneficiary's specific duties precludes a determination that the petitioner offered the beneficiary employment in a specialty occupation. The record is simply deficient in this regard. Moreover, the petitioner requested that the beneficiary be granted H-1B classification from [REDACTED]

[REDACTED] However, the petitioner did not submit sufficient credible documentary evidence that it had specialty occupation work available for the beneficiary for the duration of the requested time period.¹⁴

¹⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

To reiterate, a position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative specialty occupation work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. As stated above, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, *supra*.

For these reasons, we find that the petitioner has not provided a credible offer of employment for specialty occupation work. Accordingly, we affirm the director's determination on this issue.

IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143 (noting that we conduct appellate review on a *de novo* basis).

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

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