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



U.S. Citizenship
and Immigration
Services

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[Redacted]

Date: DEC 01 2011 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2009. At that time, the petitioner indicated that it is a for-profit, computer networking and consulting service with five employees and a gross annual income of \$500,000.

Seeking to employ the beneficiary in what it designates as a systems analyst position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on several independent grounds, namely, her findings that the evidence in the record of proceeding (1) failed to establish that the petitioner is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) failed to establish that the proffered position is a specialty occupation; (3) failed to establish the Labor Condition Application (LCA) submitted with the petition properly supports the Form I-129; (4) failed to establish that the petitioner's Form I-129 attestations regarding its intent to comply with the terms and conditions of employment are credible, in light of the petitioner's past practice of non-compliance in this area; and (5) establishes that the petitioner has attempted to materially change the nature of the proffered position, by materially expanding the nature of its business beyond that stated in the petition as initially filed. As will be discussed below, the AAO finds that the director was correct in determining that the petition should be denied on each of the first four grounds.

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

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has (1) failed to establish that the petitioner is qualified to file an H-1B petition, that is, as either (a) a United States employer or (b) a U.S. agent; (2) failed to establish that the proffered position is a specialty occupation; (3) failed to establish the LCA submitted with the petition properly supports the Form I-129; (4) failed to establish that the petitioner's Form I-129 attestations regarding its intent to comply with the terms and conditions of employment are credible, in light of the petitioner's past practice of non-compliance in this area. The AAO, however, disagrees with the director's finding that there is sufficient evidence in the record of proceeding to determine that the petitioner attempted to materially change the nature of the proffered position, by materially expanding the nature of its business beyond that stated in the petition as initially filed. Accordingly, this reason for the denial will be withdrawn. However, the AAO agrees with the director regarding

the other independent reasons for the denial. Accordingly, the appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it sought the beneficiary's services as a systems analyst at an annual salary of \$52,000. The petitioner requested the beneficiary be granted H-1B status from October 1, 2009 to September 21, 2012.

The petitioner provided a letter of support dated March 24, 2009, indicating that it had extended the beneficiary a temporary employment offer. The petitioner stated "the venue, establishment and location of the beneficiary's services shall be performed in Livonia, Michigan." Although the petitioner indicated that the beneficiary would work in the city where the petitioner is located, the letter did not specifically clarify whether or not the beneficiary would be working at the petitioner's premises or at another location in Livonia, Michigan.

In the letter of support, the petitioner listed the following job duties for the proffered systems analyst position:

- Design, develop, test our own software products according to the company's specifications, technical requirements and protocols (approximately 20% of work time);
- Apply principles and theories from computer science or mathematical analysis to resolve all technical issues arising from the assigned projects approximately 15% of work time);
- Interact with customers, analyze users' requirements and design functional enhancements (approximately 15% of work time);
- Based upon the analysis of their requirements, customize computer applications and improve and enhance our existing products (approximately 15% of work time);
- Involve (sic) in installation of software, hardware, network and database (approximately 10% of work time);
- Provide technical support and consultations to customers in the US and India (approximately 10% of work time); and
- Use various tools, languages and hardware such as TCP/IP, IPX/SPX, DHCP, WINS, DNS, SNMP, FTP, IMAP, POP3, PPP, Telnet, RIP, OSPF, IGRP, EGRP, HP Blade Server, HP XW Workstation, Dell Dimension/OptiPlex, PowerEdge Server, Fast Ethernet 100 Base TX/FX, Token Ring, FDDI, ISDN, Catalyst 1900/2450 Switches, Cisco 2500/2600 Routers, LinkSys Router as needed (approximately 15% of work time).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 9, 2009. The director indicated that additional evidence was required to clarify basic information about the proposed employment and employer because the information was missing, incomplete or conflicted with other information provided in the record. The director asked the petitioner to provide documentation to clarify the

petitioner's employer-employee relationship with the beneficiary. The director also requested evidence regarding the nature and scope of the petitioner's business and projects to establish that the beneficiary would be employed to perform the duties set forth and to establish that the petitioner would be able to sustain an employee performing duties at this level. In the RFE, the director summarized the reasons for the request and outlined the evidence to be submitted by the petitioner, depending upon the specific employment circumstances. The director noted that the petitioner should provide any other documents or appendices that the petitioner believed would substantiate the qualifying employment.

In response to the director's RFE, counsel submitted a letter dated June 17, 2009. The letter indicates, in part, that "[t]he petitioner is placing the beneficiary to develop its own in-house projects at its own location, as authorized by the LCA. Hence, he won't be placed with a client company. The petitioner's business is well-documented." The petitioner provided several documents, including the following:

- A license issued by the Michigan Department of Labor and Economic Growth indicating that the petitioner had complied with the Private Trade Schools, Business Schools and Institutes Act to offer various computer related programs of instruction.
- A profile of the petitioner that appeared on ComputerUser, Inc.'s website. The article indicates that the writer spoke with the founder of the [petitioning] company. The writer asked "What does [the petitioner] do?" The founder responded: "We are a training school that is fully committed to providing students with the highest quality training at an affordable price. We are a training facility Our class sizes are relatively small, with eight students per class session Our job placement service includes helping students with their resumes, technical interview skills, and locating available jobs."
- Two letters (both dated April 13, 2009) addressed to the petitioner from the Livingston County Michigan Works Service Center. Each letter authorizes a named participant to enroll in and attend the petitioner's computer training program from May 18, 2009 to August 1, 2010.
- A letter (dated April 23, 2009) addressed to the petitioner from Washtebaw County etc. The letter authorizes a named participant to enroll in and attend the petitioner's computer training program on May 2, 2009.
- A letter (dated October 24, 2008) addressed to the petitioner from Washtebaw County etc. The letter authorizes a named participant to enroll in and attend the petitioner's computer training programs from November 17, 2008 to June 30, 2009.

- A letter (dated March 10, 2005) to the petitioner from the Department of Veterans Affairs, stating that "your school is approved to train VA eligible persons" for specific programs.
- An agreement between the Oakland County Waterford Career Center and the petitioner ("the Training Institute") indicating that the petitioner would provide training activities and classroom instruction to eligible participants. The agreement period is from 01/14/2008 to 09/27/2008.
- The first page of the petitioner's Articles of Incorporation indicating that the company was formed for the purpose of engaging in computer training (no other purposes are listed).
- Photos that counsel indicated were of petitioner's premises.
- A thank you letter dated July 2006, from a participant in one of the petitioner's computer classes.
- Tax returns for 2007 and 2008. The tax returns indicate that the petitioner's business activity is "training" and petitioner's product/service is "computer usage."

The AAO notes that the documentation submitted indicates that the petitioner is a computer training school. No documentation was provided to indicate that the petitioner is involved in providing any other services or products. Furthermore, none of the documents provide any information regarding the employment relationship between the petitioner and the beneficiary, nor do they provide any information regarding the proffered position of systems analyst. The job duties provided by the petitioner for the proffered position do not indicate that the beneficiary will be involved in training or providing instruction. Moreover, the petitioner's RFE response includes no evidence of any in-house projects, and thus no corroboration of the petitioner's claim that the petition was filed so that the beneficiary would work on in-house projects. The petitioner did not provide any information to support a logical nexus between the work to be performed by the beneficiary and the petitioner's computer training school.

Furthermore, counsel's assertion that the beneficiary will be working on in-house projects for the petitioner is not probative evidence. In fact, this information has no evidentiary weight, as it is an assertion by counsel without supporting documentary evidence to corroborate its accuracy. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 ('Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As observed above, the director denied the petition. The director outlined her reasons for the denial and indicated that, absent additional evidence, it could not be determined from the evidence in the record that the petitioner met the statutory and regulatory requirements necessary to grant the petition.

On appeal, counsel states that the beneficiary will be located at the petitioner's office performing in-house projects. Counsel contends that the petitioner's RFE response included "numerous pieces of evidence from several governmental bodies addressing the nature of the petitioner's business. There is no 'end contract between the petitioner and the firms that ultimately define the work order of the beneficiary' because there are no client firms whatsoever." In response to the director noting that the petitioner had failed to provide documentary evidence regarding the petitioner's in house projects, counsel states "[a]ny H-1B petitioner can create a project description and submit it for H-1B processing. Petitioner went a step further than the RFE's requirements by submitting letters from at least three governmental offices regarding the petitioner's projects (Livingston, Washtenaw and Oakland Counties and the Michigan Department of Veterans Affairs)." The AAO notes that the documentation referenced by counsel relates exclusively to the petitioner's computer training programs. The documentation does not mention the petitioner providing any other services or products.

In support of the appeal, the petitioner provided supplementary evidence, including additional documents regarding its computer courses and, for the first time, information regarding its other services. The information provided by the petitioner includes the following:

- An internet printout regarding the petitioner's web design packages. The document was printed on November 3, 2009.
- Three internet printouts, described by counsel as "samples of websites" the petitioner developed. The documents were printed on November 3, 2009. The printouts do not contain any information contributing the development of the websites to the petitioner.
- A two-page document (no date) printed on the petitioner's letterhead that counsel describes as a "company brochure detailing the Petitioner's services and IT products that it develops at its own location." The AAO notes that the document is not substantive evidence that the range of services listed is actually performed by the petitioner or that, at the time of the Form I-129 petition was filed, the petitioner had secured work for the beneficiary to perform the duties of a systems analyst for the period specified in the petition.
- A CD-ROM, which the petitioner submitted despite the admonition in the RFE that any documentary examples of the petitioner's products or services should be presented in an 8 ½ x 11 paper format. Upon review of the CD-ROM, the AAO found no evidence of any in-house project – or for that matter any project at all of the petitioner's – that required the services of a computer

systems analyst. Therefore, the CD-ROM is not probative evidence that the proffered position is a specialty occupation.

- Petitioner's class schedule along with a course description of one of the classes.
- An internet printout dated November 3, 2009 regarding the petitioner's computer training programs and exams.
- Multiple invoices. Most of the invoices only contain minimal information and do not contain any description of the services or products provided. The invoices that do contain descriptions appear to be related to the petitioner's training programs.
- Bank statements.
- The first page of a lease indicating that the petitioner entered into an agreement on July 15, 2009 to relocate from a property consisting of approximately 1,394 square feet to a property consisting of 855 square feet.

The AAO notes that the regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence first submitted on appeal that falls within the scope of the RFE.

Moreover, even if the AAO were to consider all of the documents submitted on appeal, the petitioner has failed to provide substantive evidence regarding the actual work that the beneficiary would perform and sufficient details regarding the nature and scope of the beneficiary's employment. Furthermore, the AAO notes that the petitioner's job duties for the proffered position do not indicate that that the beneficiary will be involved in web design and the petitioner has not provided any explanation of the significance of the documentation provided in connection with the beneficiary's role and duties. Also, there is little evidentiary value in the documents that do not contain information as to when they were created. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a systems analyst that, at the time of the petition's filing, was definite and nonspeculative for the entire

period of employment specified in the Form I-129. The burden of proof falls on the petitioner to demonstrate a legitimate need for an employee exists. The evidence does not establish that the petitioner would be able to sustain an employee performing the duties of a systems analyst at the level required for the H-1B petition to be granted.

Additionally, in the appeal, counsel claims that the petitioner's response to the RFE provided sufficient documentation regarding its in house projects for the beneficiary through the submission of letters from "governmental bodies addressing the nature of the petitioner's business." The AAO notes that all of the letters referenced by counsel are in connection with the petitioner's computer training program. Thus, without further information, it appears that the beneficiary will be involved in projects that are connected to the petitioner's computer training courses. However, the petitioner did not demonstrate how the beneficiary's duties are directly and predominately related to, and in furtherance of, the petitioner's business. The petitioner did not provide sufficient evidence to establish a connection between the work to be performed by the beneficiary and the petitioner's training program. Thus, without further clarification by the petitioner, it appears that the beneficiary will be employed in a lesser capacity or serving in a different position.

The record of proceeding lacks (1) evidence corroborating that the petitioner has projects that exist as an ongoing endeavor generating definite work for the beneficiary's services (e.g., documentary evidence regarding the scope, staging, time and resource requirements, supporting contract negotiations, documentation regarding the business analysis and planning to support the projects); and (2) evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

Moreover, the extent of the record of proceeding fails to establish that the petition was filed for definite and non-speculative work. 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 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. 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. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

It should be noted that, for efficiency's sake, the above discussions of this petition's material evidentiary deficiencies the AAO hereby incorporates into its analysis of each basis discussed below its dismissing the appeal.

The AAO will first address the director's determination that the petitioner failed to establish that the proffered position is a specialty occupation. The AAO agrees with the director and finds that the evidence in the record of proceeding fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof with regard to the specialty occupation issue, the petitioner must establish that the proffered position satisfies the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291

(1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To make its determination of whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner indicated that the beneficiary would be employed as a computer 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.

The AAO recognizes the U.S. 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.¹ Based upon a review of the record of proceeding, the two chapters of the *Handbook* most relevant to this proceeding are the chapter "Computer Systems Analysts" and the section on computer software engineers in the chapter "Computer Software Engineers and Computer Programmers."²

A review of the *Handbook* indicates that neither occupation comprises an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on computer systems analysts in the *Handbook* states the following:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

Education and Training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

The introduction to the "Education and Training" subsection of the chapter on computer software engineers and computer programmers in the *Handbook* states the following about computer software engineers:

¹ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

² For these chapters, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Computer Systems Analyst, on the Internet at <http://bls.gov/oco/ocos287.htm> (visited November 30, 2011) and Computer Software Engineers and Computer Programmers at <http://www.bls.gov/oco/ocos303.htm> (also visited November 30, 2011).

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

The *Handbook's* information on the educational requirements in the computer systems analyst and computer software engineer occupations indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for these occupational categories. Rather, the occupations accommodate a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. While the *Handbook* states that employers often seek individuals with at least a bachelor's degree level of education in a specific specialty for particular positions, this merely indicates a preference for a certain degree, not a normal minimum requirement.

The fact that a person may be employed in a position designated as that of a computer systems analyst or computer software engineer and may be involved in using information technology (IT) skills and knowledge to help an enterprise achieve its goals in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, 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 the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. To make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations.

The petitioner in this matter provided a general overview of the beneficiary's proposed duties. As already noted, however, the petitioner, failed to submit sufficient documentation to demonstrate the existence of any specific projects on which the beneficiary's services would be required. No evidence, such as project specifications or work orders or internal documents evidencing any in-house project and detailing the nature and duration of any projects are included in the record. Further, as previously discussed, the petitioner has not established a sufficient connection between the duties of the proffered position and the petitioner's computer training courses. The petitioner's job description for the proffered position provides a litany of generalized functions without relating how such a broad spectrum of duties would actually apply to any specific projects to which the beneficiary would be assigned, and how the performance of the duties in the course of such projects would correlate to a need for at least a bachelor's degree in a specific specialty. The evidence of record on the particular position here does not demonstrate a requirement for the theoretical and practical application of a level of highly specialized computer-related knowledge. The duties for the proffered position appear routine and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. Thus, the petitioner has not established that the beneficiary's actual duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I) indicates that contracts are one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation. As mentioned earlier, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). To allow generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to evidence establishing any actual services the beneficiary is expected to provide disguises the nature of the proffered position.

The AAO finds that the petitioner's generic description of the tasks of the proffered position do not relate any dimensions of complexity, uniqueness, and/or specialization that may or may not be inherent in the particular position proffered in this petition. The petitioner failed to provide sufficient evidence of contracts, proprietary software, or other specific products upon which the beneficiary will be working. The AAO observes that the proffered position has not been sufficiently described in connection with the petitioner's business to establish the position as a specialty occupation.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387. The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.*

Although the *Defensor* court noted that evidence of the client companies' job requirements is critical where the work is performed for entities other than the petitioner, the AAO finds that the *Defensor* holding is also applicable in this matter, since the record does not include a comprehensive description of the beneficiary's actual duties as they relate to specific project(s) for the duration of the requested employment period. Therefore, even if the beneficiary's services are exclusive to the petitioner, for the petitioner, the petition must be denied absent a

comprehensive description of the beneficiary's duties in relation to the petitioner's projects. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and a comprehensive description of the beneficiary's duties from the user of the beneficiary's services as those duties relate to specific projects, whether the ultimate user be the petitioner or an end client. In this matter, the petitioner has failed to provide such evidence. A comprehensive description of the duties as those duties relate to specific project(s) is of particular importance when petitioning for an individual as a generic systems analyst.

Furthermore, the petitioner indicated in its March 24, 2009 letter of support that "the usual minimum requirement for performance of the job is a Bachelor's degree in Computer Science/Applications, Math, System Management, Physics or any other closely related field." The petitioner further states that the requirements for the position "clearly mark such position as a specialty occupation requiring a person of distinguished merit and ability." The AAO notes that as currently applied, the term "distinguished merit and ability" originates in section 101(a)(15)(H)(i) of the Act and relates solely to fashion models.³ Thus, it appears the petitioner may misunderstand the requirements for determining whether the proffered position qualifies as a specialty occupation.

To demonstrate that a job requires the theoretical and practical application of a body of 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. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree in "Computer Science/Applications, Math, System Management, Physics or any other closely related field" without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The AAO notes that such an assertion, i.e., the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, implies that the proffered position is not, in fact, a specialty occupation. In other words, the petitioner requires at least a bachelor's degree or equivalent in a wide variety of fields, not in a *specific specialty*.

In addition to establishing that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also demonstrate that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the supplemental degree

³ Prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability". The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implantation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but **only** as the qualifying standard for fashion models.

requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position.

As noted above, the job description for the proffered position is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. Moreover, without project specifications that include comprehensive descriptions of the specific duties the petitioner and/or an end-user customer requires the beneficiary to perform, USCIS is unable to discern the nature of the position and the level of sophistication and complexity the job might entail.

As the *Handbook* indicates that the proffered position does not belong to an occupational classification for which there is a categorical requirement for at least a bachelor's degree in a specific specialty, and as the duties of the proffered position as described in the record of proceeding do not indicate that the proffered position in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. at 1102 (S.D.N.Y. 1989)).

As discussed previously, 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. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices. The petitioner has not provided any documentation from firms or individuals in the industry attesting that they routinely employ and recruit only degreed individuals. Furthermore, the AAO observes that without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry.

As the evidence in the record of proceeding fails to establish that a requirement of a minimum of a bachelor's degree, in a specific specialty, is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the proffered position in this petition 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.

In the instant case, the petitioner has not submitted evidence distinguishing the proffered position as more complex or unique than the range of computer systems analysts and computer software engineers for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree or its equivalent in a specific specialty. Furthermore, as related earlier in this decision's discussions regarding the lack of evidence of any projects upon which the beneficiary would actually work, the petitioner has failed to even establish the existence of computer systems analyst work, although the claim of such work is a fundamental basis for this petition. Therefore, elements of complexity or uniqueness in any work that may be assigned to the beneficiary if this petition were approved could not be ascertained at the time the petition was filed. Thus, the petitioner has not satisfied 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."

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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.⁴

⁴ 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 (5th Cir. 2000). 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.

In the instant case, the petitioner provided advertisements placed in February and March 2008 stating "DBA, system analyst, S/W engineer to customize applications using skills per project requirements. Must have MS or BS with 1-5yr exp. Travel required." The petitioner does not indicate that it requires the attainment of a bachelor's or higher degree in a specialized field of study. No further information regarding the petitioner's recruitment efforts for the position were provided. The petitioner has not provided any information or documentation to establish that it normally requires at least a bachelor's degree, or its equivalent, in a specific specialty for the position. Thus, the AAO concludes that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence in the record of proceeding does not document a recruiting and hiring history requiring for the proffered position at least a bachelor's degree, or the equivalent, in a specific specialty.

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.

In the instant case, the petitioner has not submitted evidence to indicate that the specific duties of the position are 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. The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally required. The AAO incorporates by reference and reiterates its earlier discussion that the record of proceeding fails to adequately establish the actual work that the beneficiary would perform, let alone the relative specialization and complexity of any specific duties that would be involved. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level usually associated with at least a bachelor's degree, or the equivalent, in specific specialty.

The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Without a comprehensive description of the beneficiary's actual duties in connection with the projects on which the beneficiary will work, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the AAO is precluded from determining that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Next, the AAO will now address the issue of whether the petitioner has established that it meets the regulatory definition of an intending United States employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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 regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

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).

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The critical question raised by the facts of this particular petition is whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). 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). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(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"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."⁵ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

⁵ Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-388. Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way

The Supreme Court of the United States 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)). That definition is as follows:

"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 *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (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. at 258 (1968)).⁶

would lead to an absurd result." *Id.* at 388.

⁶ 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. 1994), *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, 844-45 (1984).

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *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 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (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 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 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).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

While the petitioner's letter of support, dated March 24, 2009, demonstrates the petitioner's intent to engage the beneficiary to work in the United States, no specific employment agreement or contract was submitted demonstrating an employer-employee relationship between the petitioner and the beneficiary. The letter of support states that the petitioner will be responsible for paying, hiring, firing, supervising and controlling the employment. However, no further information or documentation was provided regarding the employment relationship between the petitioner and beneficiary. The minimum information contained in the letter of support is insufficient to show that a valid employment agreement or credible offer of employment exists between the petitioner and the beneficiary at the time the petition was filed. No evidence was provided to show that the beneficiary had accepted the offer of employment for the proffered position. The petitioner did not submit any documentation signed by the beneficiary and the petitioner that described the terms of employment, duties to be performed and the beneficiary's claimed employment relationship with the petitioner.

In response to the RFE, the petitioner provided advertisements placed in February and March 2008 stating "DBA, system analyst, S/W engineer to customize applications using skills per project requirements. Must have MS or BS with 1-5yr exp. Travel required." In these ads, the petitioner indicated that travel is required for the position of systems analyst (as well as for the other positions listed). However, the petitioner did not include any further information regarding a travel requirement for the proffered position in the Form I-129 petition and supporting documentation, in its response to the RFE or in the appeal. This information is relevant to the adjudication of the H-1B petition and should have been provided by the petitioner.

Moreover, it should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has established that it has actually offered the beneficiary a position shown to definitely involve the type of work claimed in the petition, here computer systems analysis. Here such employment has not been established. As previously discussed, the petitioner has failed to provide sufficient evidence to establish that it has ongoing and definite work for the beneficiary's services and that the proffered position actually would require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty. It is not sufficient to establish eligibility in this matter by merely claiming in its letter of support that the petitioner will be responsible for paying, hiring, firing, supervising and controlling the employment. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim.

Thus, the petitioner has not established that it has engaged the beneficiary to work in the United States nor has it 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).

Furthermore, the AAO finds that the petitioner is not an agent as defined by the regulations. The definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent

involving multiple employers as the representative of both the employers and the beneficiary.” The petitioner has not claimed to be an agent, nor has it submitted evidence to establish that it could be considered an agent under either prong of the regulation. As a result, absent additional documentation, the petitioner cannot be considered an agent in this matter.

In sum, based upon its complete review of the record of proceeding, the AAO finds that the petitioner has failed to demonstrate that it is a United States employer or an agent.

The AAO now turns to the third reason for the director's denial. As will be discussed below, the AAO finds that the director was correct in her determination that the petitioner failed to establish that it submitted a valid LCA, that is, one that corresponds to the Form I-129, and that was certified for the proper occupational classification and work location, at the time of filing.

The petitioner indicated on the Form I-129 and supporting documentation that it sought the beneficiary's services as a systems analyst at an annual salary of \$52,000. The LCA provided in support of the instant petition indicated that the work location for the beneficiary would be Livonia, Michigan. No other work locations were provided.

The petitioner listed a prevailing wage of \$51,251 per year for the position based upon the OES Online Wage Library. The AAO reviewed the 7/2008 – 6/2009 database and did not find any occupation related to proffered position indicates a prevailing wage of \$51,251 per year for the area covering Lavonia, Michigan.

Given that the LCA submitted in support of the petition provides a prevailing wage that is apparently for an occupational classification and/or work location selected by the petitioner that is not in accord with the proffered job duties and/or place of employment, it must therefore be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the petitioner overcame the other independent reasons for the director's denial, the petition could still not be approved due to the petitioner's failure to submit an LCA that is certified for the proper job classification and work location.

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA corresponding to the Form I-129 petition that reflects the proper prevailing wage for the occupational classification and work location. Thus, the petition must be denied for this additional reason.

The AAO now will address the director's determination that the petitioner failed to provide credible and sufficient documentation to establish that it has complied with the terms and conditions of employment.

In the RFE, the director indicated that basic information about the proposed employment and employer in Part 5 of the Form I-129 was missing, incomplete or conflicted with other information provided in the record. The director requested the petitioner submit (1) signed copies of the petitioner's tax returns for 2006, 2007 and 2008; and (2) quarterly wage reports (listing the names, social security numbers and number of weeks worked for all employees) for the last three quarters that were accepted by the state where they were filed. The director stated that the documentation was being requested in order to clearly substantiate the information concerning the annual income, number of employees and type of business the petitioner listed on the Form I-129.

In response to the director's request for clarification on this issue, counsel stated that USCIS should keep in mind when reviewing the supporting evidence that "any employees who may appear 'underpaid' either joined the company in the middle of a payroll period, left, or took extended vacations." The petitioner provided 2007 and 2008 tax returns and wage report *summaries* printed from the internet. The wage report summaries indicated that the petitioner employed four people but did not provide all of the requested information, including the social security numbers and number of weeks that employees worked. The AAO notes that the petitioner failed to provide all of requested information, including the requested 2006 tax return and quarterly wage reports. No explanation for failing to provide the requested information was provided.

On appeal, counsel reiterates the above statement and further states that to provide any information "beyond this brief statement (i.e. actually producing evidence of date of joining) would consume much time and resources There is nothing that prevents USCIS from checking its own records"

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO concurs with the director's finding on this issue and agrees that there were inconsistencies in the information provided and that the petitioner failed to adequately explain or reconcile the inconsistencies in the record by independent objective evidence.

The petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the response to the RFE, the petitioner did not provide a valid explanation for failing to provide all of the requested evidence and the AAO notes that the director's request for evidence on this issue was not overly burdensome. The petitioner failed to clarify the basic information about the proposed employment and employer that was missing, incomplete or conflicted with other information provided in the record.

Therefore, the AAO finds that the director was correct in her determination that the petitioner failed to provide credible and sufficient documentation to establish that it has complied with the terms and conditions of employment.

Finally, the director found that the petitioner had attempted to materially change the nature of the proffered position, by materially expanding the nature of its business beyond that stated in the petition as initially filed.⁷ The AAO finds that there is not enough information in the record of proceeding for the director to deny the petition for this reason. Thus, this reason for the denial will be withdrawn.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary is qualified to serve in a specialty occupation position. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

⁷ The North American Industry Classification System (NAICS) was developed under the direction and guidance of the Office of Management and Budget (OMB) as the standard for use by Federal statistical agencies in classifying business establishments for the collection, tabulation, presentation, and analysis of statistical data describing the U.S. economy. There is no central government agency with the role of assigning, monitoring, or approving NAICS codes for establishments. The NAICS website can be accessed at: <http://www.census.gov/eos/www/naics/>. Counsel asserts that the petitioner's business is best described by the NAICS code 541511 - Custom Computer Programming Services. The definition for this code states "[t]his U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." A review of the documentation provided by the petitioner indicates that the NAICS code 611420 - Computer Training may better describe the petitioner's business.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In the present matter, the petitioner submitted an evaluation from [REDACTED] who indicated that he is an Associate Professor in the Department of Decision, Operations, and Information Technologies at the [REDACTED]

[REDACTED] asserts that the beneficiary attained the equivalent of a Bachelor's degree in Computer Information Systems from an accredited institution of higher education in the United States based upon the beneficiary's education and over seven years of "work experience and professional training in Computer Information Systems, and related areas."

[REDACTED] claims to "have the authority to grant college level credit for experience, training and/or courses taken at other U.S. or international universities." However, there is no documentation to support [REDACTED] claim. The petitioner does not provide independent evidence from The University of Maryland to support this assertion and verify that [REDACTED] has and continues to have this authority, nor was evidence submitted that The University of Maryland has a program for granting credit based on an individual's training and/or work experience. Furthermore, The University of Maryland website includes a section "Frequently Asked Questions" regarding transfer credit. To the question "Can I receive credit . . . for work experience?" the response is the following:

The University of Maryland does not award credit for non-traditional or experiential learning not supervised by our own faculty. Examples include internships, externships, practicum, or co-op work. Nor will we transfer credits awarded at other institutions for such work. In some instances, we may recommend sitting for a departmental exam or attempting to earn credit through the College-Level Examination Program.

The AAO therefore finds that without further information, the petitioner has not satisfied the requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Aside from the decisive fact that the evidence of record does not establish [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate the beneficiary's experience, the AAO finds that the content of his evaluation of the beneficiary's experience would merit no weight even if he were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The evaluation on record is not supported by evidence to support [REDACTED] claim regarding the beneficiary's professional experience. The petitioner provided three letters regarding the beneficiary's work experience. The letters are skeletal and do not provide sufficient information to make a substantive basis for the conclusion of [REDACTED] evaluation. The letters do not contain sufficient details regarding his employment (such as the beneficiary's job duties and responsibilities, the number of hours worked per week, etc.). Thus, the evaluation would have no probative value even if it were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

For the reasons discussed above, the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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