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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**



D2

Date: **APR 03 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

SELF REPRESENTED

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,

for Michael T. Kelly
Perry Rhew
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 Nonimmigrant Worker (Form I-129) to the California Service Center on May 7, 2010. The petitioner reported that it is a for-profit enterprise engaged in information technology (IT) consulting with 43 employees and a gross annual income of \$3 million and a net annual income of \$100,000.¹

Seeking to employ the beneficiary in what it designates as a programmer 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, finding that the petitioner: (1) failed to establish that it 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); and (2) failed to establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the director's bases for denial were erroneous and contends that it satisfied all evidentiary requirements. In support of these assertions, the petitioner submitted a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision on each of the enumerated grounds. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address three additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to properly file the Labor Condition Application (LCA), as it has not been signed by the petitioner's representative; (2) failed to submit an LCA that corresponds to the position and that is certified for the proper wage; and (3) failed to establish that the beneficiary is exempt from the six-year limitation

¹ On the Form I-129, which was submitted on May 7, 2010, the petitioner stated that it had 43 employees. In a letter of support, dated July 28, 2010, the petitioner stated that it had 90 employees.

of authorized stay in H-1B status. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.²

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a programmer analyst on a full-time basis, from May 10, 2010 to May 10, 2013. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 1, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary and to clarify the petitioner's employer-employee relationship with the beneficiary. The director outlined the specific evidence to be submitted. The petitioner was put on notice that additional evidence was required and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

In response, the petitioner provided a letter of support and stated that the beneficiary would be employed to perform the following duties:

- Responsible for all phases of development and maintenance on assigned computer applications[.]
- Communicate with business analysts to determine system requirements; research system enhancements and problems; perform analysis and design of computer applications; perform programming and testing; perform related work as assigned.
- Work directly with various levels of business and technical staff to determine sound technical solutions for business requirements.
- Design, code, test and document computer programs.³

Furthermore, in response to the director's RFE, the petitioner's submitted several documents, including the following:

- A Master Services Agreement between Clairvoyant TechnoSolutions Inc. and Sub-Contractor [the petitioner]. The agreement states that it was "made and entered into this day 7/28/2010."
- A Work Order that specified the agreement of various terms, in accordance with the "Clairvoyant TechnoSolutions Inc. and Sub-Contractor Agreement signed between the parties on 4/12/2010." The document includes the following entries:

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ The petitioner also provided a list of skillsets (reporting and monitoring) that would be required for the proffered position.

Candidate Full Name: [the beneficiary]
Description of Services: Programmer Analyst Services
Client Name: TCS/Johnson Controls
Project Start Date: Tentative start 5/10 pending background check
Project Duration: 6+ Months

The Work Order states that "unless otherwise notified," it will be extended on a month-to-month basis on the same terms and conditions until the project is completed.

- A document that the petitioner describes as "Excerpts from the company handbook." The document states that it "is intended to be a quick reference guide" and directs readers to "[c]arefully read the entire Employee Handbook to be familiar with all of [the] benefits." The document differentiates between employees (e.g., salaried employees, non-exempt employees, consultants, corporate employees) but does not provide sufficient information to determine the eligibility criteria for the various benefits.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 17, 2010. Thereafter, the petitioner submitted a timely appeal of the denial of the petition.

The AAO reviewed the record of proceeding in its entirety and agrees with the director's decision. However, before addressing the grounds for the director's denial of the petition, the AAO will first make some initial findings, beyond the decision of the director, that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., 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).

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record, the AAO notes that in the instant case, another issue precludes the approval of the H-1B petition. Specifically, an authorized official of the petitioner has not signed and dated the LCA's Declaration of Employer (section K.5 and K.6, page 4), as that

section requires in order to obtain the petitioner's attestation that (1) the statements in the LCA are true and correct; (2) the petitioner "agree[s] to comply with the Labor Condition Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the Department of Labor regulations (20 CFR part 655, Subparts H and I);" and (3) it will make the LCA, its supporting documentation, and other records available to the Department of Labor.

The record contains an unsigned LCA, with a May 5, 2010 certification date. It is noted that on the first page of the LCA, the petitioner affirmatively checked the box confirming that that it "understood and agreed" to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

In addition, in the section "Signature Notification and Complaints" (Section N, page 5), the following notice is provided:

The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

(Emphasis in original.) DOL and DHS regulations require that the beneficiary's employer or a representative of the employer submit a copy of the signed, certified Form ETA 9035/ETA 9035E to USCIS in support of the Form I-129 petition.

The DOL regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

- (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are

specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

* * *

- (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c), in pertinent part, states the following:

- (2) Undertaking of the Employer. In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP. . . .
- (3) Signed Originals, Public Access, and Use of Certified LCAs. . . . For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the DOL regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this

chapter, an acceptable signature on an application or petition that is being filed with the BCIS is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

Based on DOL and DHS regulations, the LCA that is filed with USCIS in support of an H-1B petition must be certified by DOL and signed by the beneficiary's employer or a representative of the employer. Here, the petitioner filed a copy of the certified, but unsigned, Form ETA 9035 & 9035E with USCIS in support of the Form I-129 petition. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 20 C.F.R. § 655.730(c)(2) and (3). Accordingly, the petition must be denied on this basis also.

Next, the AAO will highlight an aspect of the petition that undermines the petitioner's credibility with regard to the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the occupational classification set against the contrary occupational classification conveyed on the LCA submitted in support of the petition.

In the appeal, the petitioner stated that the proffered position is a specialty occupation and claimed that the Department of Labor's *Occupational Outlook Handbook* ("*Handbook*") supported this claim. The petitioner provided several quotations from the *Handbook* for the occupational category "Computer Systems Analysts [SOC (ONET/OES) code 15-1051.00]." However, on the LCA, the petitioner reported that the proffered position fell under the occupation of "Computer Programmers" SOC (ONET/OES) code 15-1021.⁴ The petitioner did not provide an explanation for citing information from the *Handbook* regarding the occupational category "Computer Systems Analysts" rather than from the occupational category "Computer Programmers" (which is located in the chapter "Computer Software Engineers and Computer Programmers" of the *Handbook*). It appears that the petitioner may believe the proffered position is a combination of the occupational categories computer systems analysts and computer programmers. However, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification for the LCA.⁵ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET

⁴ The Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. See <http://www.bls.gov/soc/>.

⁵ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The AAO notes that the petitioner stated on the LCA that the SOC (ONET/OES) occupational title for the proffered position was computer programmers. The petitioner provided the prevailing wage that corresponds to the occupation computer programmers at a Level III, which was \$28.54 per hour (\$59,363 per year).

The AAO observes that the prevailing wage for the position "Computer Systems Analysts" at a Level III wage is significantly higher at \$32.83 per hour (\$68,286 year) than the prevailing wage for computer programmers. Thus, according to DOL guidance, if the petitioner believed its position was described as a combination of O*NET occupational categories, it should have chosen the relevant occupational code for the highest paying occupation, in this case "Computer Systems Analysts." However, the petitioner chose the occupational category "Computer Programmers" for the proffered position.

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 certified LCA that corresponds to the claimed duties of the proffered position.

As mentioned, the regulation requires that if a petitioner's proffered position "has worker requirements described in a combination of O*NET occupations," then the highest paying occupational code should be selected. Furthermore, under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to

similarly employed workers in a specific occupation in the area of intended employment.

The AAO notes that in the Form I-129 petition (page 3) and LCA, the petitioner stated that the salary for the proffered position would be \$31.95 per hour / \$66,456 per year. In the appeal, the petitioner claims that the proffered position falls under the occupational category "Computer Systems Analysts." As mentioned, the prevailing wage level for the occupational category "Computer Systems Analysts" at a Level III wage is \$32.83 per hour / \$68,286 year. Thus, the petitioner's offered wage to the beneficiary is below the prevailing wage. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Accordingly, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the position and that is certified for the proper wage.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.

It must be noted that the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. *See* 8 C.F.R. § 103.2(b)(1).

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. 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."

The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and the decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The

purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12).

In the instant case, with the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. In the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition. As earlier noted, with the RFE, the director put the petitioner on notice that additional evidence was required and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

With the appeal, the petitioner submits a letter dated September 1, 2010 from Johnson Controls, the end-client. The letter states that the beneficiary "consults as a BI [Business Intelligence] Systems Administrator" and provides a list of his job responsibilities. The letter reports that the "services described may be needed until December 2012." The end-client claims that the beneficiary is an employee of the petitioner. The AAO notes that this letter represents the type of information that was encompassed by the RFE request but was not submitted as part of the RFE reply. The petitioner did not fully address and/or submit the requested evidence in response to the RFE and now attempts to submit additional information on appeal. With regard to the information and evidence that was encompassed in the RFE but only submitted on appeal, the AAO notes that it is outside the scope of this appeal. The petitioner failed to fully address and/or submit all of the requested evidence, and it did not provide an explanation for failing to provide the information with the initial petition or in response to the RFE. Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In this regard, the appeal will be adjudicated based on the record of proceeding before the director. If the petitioner wishes for the additional information requested in the RFE but submitted for the first time on appeal to be considered, it may file a new petition, with fee, to USCIS.

The AAO will now address the director's determination that the petitioner has not established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question 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).

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

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

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

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

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

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

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 legacy INS nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (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.⁶

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.), *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

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 318-319.⁷

Therefore, 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

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-845 (1984).

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 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," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend 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).

⁷ 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))).

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).⁸

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

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

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

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

⁸ 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).

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."

In response to the RFE, the petitioner submitted documents to establish that the beneficiary was included on its payroll register and wage reports. The AAO acknowledges that the method of payment can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.⁹

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. In the instant case, the RFE specifically stipulated that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary, including the right to control the manner and means by which the product or services are accomplished for the duration of the requested H-1B validity period. The director provided a list of the types of evidence to submit, which included a brief description of who would supervise the beneficiary and his/her duties and an organizational chart demonstrating the beneficiary's supervisory chain and/or other similarly probative documents.

In response to the RFE, the petitioner provided a letter of support stating that the beneficiary would report to the petitioner's "in-house project management team via email and attend conference calls to discuss project progress, deadlines of the assignment and deliverables to the client with the petitioner on a weekly basis." No additional information was provided regarding who would oversee and direct the work of the beneficiary. The petitioner did not further specify who would supervise the beneficiary and his/her duties nor did the petitioner provide an organizational chart or other probative documentation. On appeal, the petitioner reported that the in-house project team is led by [REDACTED] but did not include [REDACTED] job duties or further information. The petitioner further stated that it believed the proffered position "would require very little direct supervision or control on [the petitioner's] part."

On appeal, the petitioner for the first time submitted a letter from Johnson Controls, the end-client, which stated that the petitioner "retains full and ultimate control over the beneficiary's salary, benefits, hire/fire, supervision of work, performance evaluation." The AAO notes that this is a conclusory statement and the writer does not relate any specificity or details for the bases of his opinion or how he reached the conclusion. Thus, even if the AAO were to consider the end-client

⁹ The petitioner did not submit any information as to the source of the instrumentalities and tools needed to perform the job. The petitioner indicated that the beneficiary will work at the client site.

letter submitted on appeal, the writer does not provide sufficiently substantive and analytical bases for this assertion by which one may reasonably conclude that his statement is well founded. The petitioner did not provide any further documentation regarding the supervision of the beneficiary for this project (or any other projects).

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a specialty occupation during the entire period requested in the petition. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from May 10, 2010 to May 10, 2013. The petitioner stated on the Form I-129 that the only address where the beneficiary will work is [REDACTED]. The petitioner submitted a Work Order between Clairvoyant TechnoSolutions Inc. and the petitioner, which reports that the assignment is 6+ months. On appeal, the petitioner submitted a letter from Johnson Controls, the end-client, claiming that it "anticipates the services described may be needed until December 2012." Even if the end-client letter had been submitted for the director to review prior to adjudicating the petition, it does not establish that the petition was filed on the basis of employment for the beneficiary for the entire period of employment specified on the Form I-129. None of the documentary evidence in the record of proceeding reports that the beneficiary's work would be extended to May 10, 2013, as requested on the Form I-129 petition. The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested the beneficiary be granted H-1B classification until May 10, 2013, there is no information regarding the beneficiary's proposed work after 2012. Thus, the record does demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period.

The director requested the petitioner submit agreements (or other probative documentation) between the petitioner and the end-client, which included a detailed description of the duties the beneficiary would perform and the qualifications that are required to perform the job duties. In response to the RFE, a Work Order between Clairvoyant TechnoSolutions Inc. and the petitioner was provided, which states "Description of Service: Programmer Analyst Services" and "Client Name: TCS/Johnson Controls" along with the address of the client location. The Work Order does not provide the beneficiary's job title and designated job duties. The information provided in the entry "Description of Service" is broadly stated and does not provide any details regarding the level of support and actual duties and tasks that the beneficiary would be expected to perform. The petitioner asserted in its letter of support that "[i]t is not likely that an individual would have the level of experience required for this position without at least a Bachelor's degree." The petitioner did not state that a degree in a specific specialty was required for the position, nor did the petitioner provide any documentation regarding the client's educational and/or experience requirements for the proffered position. On appeal, the petitioner claims that the beneficiary "will determine the job duties to be performed." More specifically, the petitioner asserts that "[a]s a professional in his field, as a representative of [the petitioner's] company, [the beneficiary] will determine the work to be performed." This indicates that the beneficiary's specific duties will not be established until after he begins working on the project, which may or may not result in H-1B caliber work.

As previously mentioned, a petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. Moreover, the AAO notes that the fact that a person may be employed in a position designated by a petitioner as that of a programmer analyst and may apply some computer programming analysis principles in the course of a job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. 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 computer programming analysis. In this case, the petitioner has failed to provide sufficient documentation to discern the nature of the position and the level of sophistication and complexity the job might entail.

The petitioner also provided a Master Services Agreement between Clairvoyant TechnoSolutions Inc. and the petitioner. The agreement states that it was "made and entered into this day 7/28/2010." Thus, the agreement was entered into over 2 ½ months after the filing of the H-1B petition.¹⁰ Based upon the evidence provided, it appears that the petitioner's need for the beneficiary's services, and the proffered position, were speculative in nature (undetermined, prospective employment) at the time the Form I-129 petition was submitted. The petitioner has failed to submit documentary evidence substantiating its claim that at the time it filed the H-1B petition, it had already secured H-1B caliber work for the beneficiary for the period of employment requested in the petition. 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).

The evidence of record does not establish that the petitioner would act as the beneficiary's employer under the applicable provisions. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim.

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).

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

¹⁰ As discussed, the petitioner submitted a Work Order between Clairvoyant TechnoSolutions Inc. and the petitioner. The Work Order states "[t]entative start 5/10 pending background check" and references an agreement signed by the parties on 4/12/2010. However, the 04/12/2010 agreement was not provided to USCIS. Furthermore, the Work Order is not dated.

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. Accordingly, the appeal will be dismissed and the petition will be denied on this ground.

The AAO will next 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 [(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 [(2)] 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 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) (hereinafter *Defensor*). 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), 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.

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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.* at 387-388. 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.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹ As previously noted, the evidence of record contains discrepancies regarding the petitioner's occupational classification of the proffered position. The petitioner initially asserted on the LCA that the proffered position fell under the occupational category "Computer Programmers, SOC (ONET/OES) code 15-1021" but later claimed in the appeal that it fell under "Computer Systems Analysts."

As previously discussed, 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner failed to provide sufficient documentation to establish the substantive nature of the work comprising the proffered position. However, based upon the record of proceeding, the occupational categories "Computer Systems Analysts" and "Computer Programmers" are most relevant to this proceeding.¹² A review of the *Handbook* indicates that neither computer systems analysts nor computer programmers comprise 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,

¹¹ All of the AAO's references are to the 2010-2011 edition of DOL's *Occupational Outlook Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

¹² For these chapters, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/oco/ocos287.htm> (visited March 21, 2012) and Computer Software Engineers and Computer Programmers at <http://www.bls.gov/oco/ocos303.htm> (visited March 21, 2012).

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 *Handbook's* information on the educational requirements for computer systems analysts positions indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates 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 *Handbook* reports that employees who have degrees in non-technical areas may find employment as computer systems analysts if they also have technical skills. Furthermore, courses in computer science or related subjects, along with practical experience may be sufficient 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 programmers:

Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

The AAO notes that the *Handbook* does not report that, as an occupational group, "Computer Programmers" require at least a bachelor's degree in a specific specialty. The *Handbook* explains that many programmers require a bachelor's degree, but a two-year degree or certificate may also be adequate for some positions. Furthermore, the *Handbook* states that a degree in accounting, finance or another area of business may be sufficient, along with special courses in computer programming, for entry into the occupation. Thus, the *Handbook* does not report that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for these positions.

The fact that a person may be employed in a position designated as that of a programmer analyst 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, the petitioner must 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 of proceeding.

The petitioner is a client-oriented firm whose specific operations are determined by contracts with other entities for its IT services. In the instant case, the substantive nature (and, therefore, the educational requirements) of the work serving as the basis of the petition would be determined by the specific IT-services specified in the contracts and allied documents existing at the time the petition was filed.¹³

To establish that a specific position in the computer field is a specialty occupation, the AAO looks to the record to determine 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. The requirements of the position and a comprehensive description of the duties, as those duties relate to specific project(s) for the duration of the period requested, is of particular importance when petitioning for an individual as a generic "programmer analyst." In this matter, the petitioner has failed to meet its burden of proof in this regard.

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.*

The duties for the proffered position as stated in the record (by the end-client, as well as by the petitioner) provide a description of generalized functions without relating how the performance of the duties in the course of the project would correlate to a need for at least a bachelor's degree in a

¹³ Where, as here, the specific and substantive nature of the work to be performed is determined not by the petitioner but by the end-client, the AAO focuses on the documentary evidence the business entity generating the work has issued or endorsed about it, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples.

specific specialty.¹⁴ Moreover, as previously mentioned, the AAO reiterates and incorporates its earlier discussion regarding the petitioner's claim that the beneficiary "will determine the job duties to be performed." The AAO finds that the petitioner did not provide sufficient information and documentation regarding the duties of the proffered position to determine the beneficiary's daily responsibilities and primary job duties on the client project for the duration of the period requested.

Furthermore, the petitioner asserted in its letter of support that "[i]t is not likely that an individual would have the level of experience required for this position without at least a Bachelor's degree." The petitioner did not state that a degree in a specific specialty was required for the position, nor did the petitioner provide documentation regarding the client's educational and/or experience requirements for the proffered position.

It must be noted that the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a bachelor's degree, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹⁵

¹⁴ The AAO acknowledges that with the appeal, the petitioner submitted an end-client letter that includes a description of the beneficiary's job duties in the proffered position. The letter is dated September 1, 2010, approximately four months after the initial petition was submitted. The petitioner failed to provide any explanation as to the reason that the document submitted on appeal was not provided with the initial petition or in response to the RFE. It is noted that this type of information was encompassed by the RFE request but was not submitted as part of the RFE reply. The AAO notes that the letter does not include the requirements for the proffered position.

¹⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

In this matter, the petitioner's assertions about the education requirements indicate its assessment that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

The petitioner does not claim, nor has it provided any evidence to establish, that a bachelor's degree, in a specific specialty, is common to the industry in positions that are parallel to the proffered position and located in similar organizations. As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from industry

expedient of creating a generic (and essentially artificial) degree requirement.

Id.

professional associations attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. The petitioner did not submit any letters or affidavits from firms or individuals in the industry to meet this criterion of the regulations.

The petitioner failed to submit any documentation to establish that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position and (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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 is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

As previously discussed, the petitioner has not sufficiently established the actual duties of the proffered position, including the tasks the beneficiary will be responsible for or perform on a day-to-day basis. Moreover, even reviewing both the petitioner's and end-client's job descriptions in the record of proceeding, it must be noted that the duties as described do not identify any specific duties that are so complex or unique that only a specifically degreed individual could perform them.

Further, as evident in this decision's earlier quotations of the proposed duties, they are described in generalized and generic terms that are not indicative of a position more complex or unique than computer programmer or programmer analyst positions that can be performed by a person without at least a bachelor's degree, or the equivalent, in a specific specialty.

Moreover, the petitioner has not submitted any documentation from the end-client that any particular educational requirements are necessary to perform the duties of the position; and the totality of the relevant evidence in the record of proceeding does not establish that the requisite knowledge for the position could not be attained from job experience alone, from junior college or community college courses, from training provided by vocational programs or by vendors, from a bachelor's degree in a general or unrelated specialty, or by some combination thereof.

Additionally, 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 any particular duties of the proffered position. While a few related courses may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty are required to perform the duties of the particular position here.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 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 a petitioner demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The AAO 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 contain documentary evidence demonstrating that there is a history of requiring the degree, or degree equivalency, in a specific specialty in prior recruiting and hiring for the position (in this case, for the end-client). Further, it should be noted that the record must establish that an 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.¹⁶

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's (or a client'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 there was an artificially created 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 384. In other words, if a degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who have previously held the position. The petitioner also did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position.

¹⁶ 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 record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record contains no documentary evidence to establish that there is a history of normally requiring an employee possess at least a bachelor's degree, or the equivalent, in a specific specialty for the 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, or the equivalent, in a specific specialty.

Upon review of the record, the petitioner has failed to establish the specialization and complexity of specific duties that are necessary to satisfy this particular criterion.¹⁷ The descriptions of the duties of the proffered position do not specifically identify any tasks that are manifestly so specialized or complex as to be usually associated with the knowledge required by this criterion. No evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge than would normally be required of employees who engage in some computer programming analysis duties, but not at a level requiring the application of theoretical and practical knowledge that is usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Accordingly, the petitioner failed to meet its burden of proof to establish 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. 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).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Without documentary evidence to establish the beneficiary's actual duties and the requirements of the position in connection with the client's project, 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

¹⁷ The AAO incorporates and references its earlier discussion regarding the deficiencies in the evidence of the record of proceeding with regard to the duties and requirements of the proffered position.

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 (or client) 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.

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 also be dismissed and the petition denied for this reason.

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that the beneficiary is exempt from the six-year limitation of authorized stay in H-1B status. An H-1B nonimmigrant may be admitted for a period of up to three years. This time period may be extended, but generally cannot go beyond a total of six years, though some exceptions do apply under sections 104(c) and 106(a) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Moreover, the regulation at 8 C.F.R. 214.2(h)(13)(i) provides that when an alien has reached the maximum period of admission, a new petition may be approved only if the alien has remained outside the United States for one year.

In the instant case, the petitioner was asked to provide the dates of all of the time the beneficiary has spent in the United States in H or L classification. The following information was provided:

From:	To:
03/12/2004	01/26/2006
02/26/2006	02/01/2008
03/03/2008	[left blank by the petitioner]
06/23/2009	Present

The petitioner submitted the Form I-129 petition on behalf of the beneficiary on May 7, 2010 and requested he be granted H-1B classification until May 10, 2013. Based upon the information provided by the petitioner and USCIS records, it appears that the beneficiary has been in H-1B status since March 12, 2004. The petitioner did not submit any documentation to corroborate time that the beneficiary spent outside the United States, nor did the petitioner submit documentation to establish that a labor certification application or immigrant petition had been filed on behalf of the beneficiary at the time the Form I-129 petition was submitted. There is no evidence in the record of proceeding to establish that the beneficiary is exempt from the six-year limitation of authorized stay in H-1B

status. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this regard, the petitioner has failed to meet its burden of proof to establish that the beneficiary is eligible for the benefit requested. Thus, for this reason as well, the petition must be denied.

It must be noted that 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed 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.