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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 09 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:

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. Perry
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 September 30, 2009. The petitioner stated that it is a for-profit enterprise engaged in software development and consulting services with 80 employees.

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); (2) failed to establish that the proffered position is a specialty occupation; (3) failed to establish that there is a credible offer of employment; and (4) failed to establish the Labor Condition Application (LCA) submitted with the petition properly supports the Form I-129. On appeal, counsel asserts that the director's bases for denial were erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of these assertions, counsel 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.

The petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services in what it designates as a programmer analyst for a period of approximately three years, specifically from October 1, 2009 to September 14, 2012.

With the Form I-129 petition, the petitioner submitted a Subcontractor Agreement between the petitioner and Xavient Information Systems, Inc. (hereafter "Xavient"), dated September 15, 2009. The agreement reported that Xavient intends "to engage [the petitioner] as a Sub Contractor for the period and/or projects/assignments as defined on the Work Order or subsequently executed amendments." The petitioner also submitted a Work Order between the petitioner and Xavient, stating that the beneficiary would be employed as a PL/SQL Developer beginning September 21, 2009 for the client Dish Network and that the estimated project length would be 14 months.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 6, 2009. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary, to clarify the petitioner's employer-employee relationship with the beneficiary, and to provide evidence pertaining to the beneficiary's status. The director outlined the specific evidence to be submitted.

The petitioner provided additional supporting evidence, including the following documentation:

- An offer letter between the petitioner and the beneficiary dated May 22, 2006.
- A December 9, 2009 letter from Xavient, stating that it has an agreement with the petitioner "for the delivery of IT Services, including Application development, enhancements and maintenance, at our client EchoStar/DISH Network." The letter states that the beneficiary is the "currently-designated Consultant under the agreement" and that he will remain an employee of the petitioner.
- A December 14, 2009 letter from the petitioner with "the itinerary of services offered to the beneficiary." The letter states that the beneficiary will be employed as a programmer analyst for Dish Network in Englewood, Colorado from "September 15, 2009 - November 15, 2010 and extendable." The following are listed in the letter under "Nature of Duties":
 - Analyze, design, code, test and implement software systems;
 - Analyze, review, alter the programs and [i]mplement software systems and applications;
 - Design and develop both packaged and system software including databases;
 - Read manuals, periodicals and technical reports;
 - Design user interface, developed de-duplication module.
- A December 15, 2009 letter from DISH Network , reporting that the beneficiary is working as a contractor for EchoStar/DISH Network "for the delivery of IT Services, including Application development, enhancements and maintenance." The letter states that the beneficiary will be working on Oracle 10g/9i, SQL, PL/SQL, Oracle Forms6i and Oracle Reports6i. The letter reports that the "project involves the performance of complex duties that normally require at least a Bachelor's degree or the equivalent for adequate performance." The project is expected to last "for the foreseeable future."
- Two letters from co-workers, claiming that the beneficiary has been working as a contractor with Dish Network/EchoStar in the position of Oracle Developer. Aside from the identifying information regarding each co-worker, the letters are exactly alike.

- Several photos.
- Email printouts from the beneficiary regarding his "hours." It is noted that the local-part of the email address is the username of the beneficiary, and the domain name is "dishnetwork." The beneficiary's signature line includes the company name "DISH Network." The emails are sent from the beneficiary to an email address with the domain name "xavient." The emails are copied to accounting at "xavient" and accounts at "sunmergesystems."
- Form W-2 Wage and Tax Statements for the beneficiary, issued by the petitioner, for 2007 and 2008.
- Pay statements issued by the petitioner to the beneficiary.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on January 4, 2010. Thereafter, counsel submitted a timely appeal of the denial of the petition.

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. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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 his or her 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).

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. The petitioner's previous counsel asserted that the director's RFE "does not fall within Service guidelines."¹ The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the

¹ The Adjudicator's Field Manual (AMF) § 3.4, provides a discussion of policy and correspondence materials. Within the discussion, a list of examples of "policy materials" is provided, which includes statutes and regulations, published precedent decisions, memorandum and cables from headquarters specifically designated as policy (bearing the "P" suffix in the reference file number), et cetera. The discussion in this section of the AMF also lists examples of "correspondence," which includes letters, memoranda not bearing the "P" designation, unpublished AAO decisions, et cetera.

In response to the RFE, the petitioner's previous counsel references various materials in support of his assertion that the director erred in requesting additional information to establish eligibility for the benefit sought. It must be noted that if a petitioner wishes to have "correspondence" materials considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In regard to the "correspondence" materials, as the record of proceeding does not contain the correspondence (other than one unpublished AAO decision, which will be discussed below), there are no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972).

Furthermore, any suggestion that USCIS must review correspondence and possibly request and review each case file relevant to the correspondence, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain copies of the correspondence cited by counsel.

With regard to the enclosed AAO decision, upon review, the AAO does not find that it supports counsel's conclusion. It involves distinct issues from the instant H-1B petition and the petitioner's counsel does not sufficiently establish its relevancy here. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the enclosed, unpublished decision. Furthermore, it has not been designated as a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all US Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished (non-precedent) decisions are not similarly binding.

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.

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. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to fully address and/or submit the requested evidence and now counsel attempts to submit additional information on appeal. The petitioner did not provide any explanation for failing to provide the information with the initial petition or in response to the RFE. 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. 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 reviewed the record of proceeding in its entirety. 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 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 September 24, 2009 letter of support, the petitioner stated it was seeking a "Programmer Analyst who will be responsible for both systems analysis and programming." The petitioner

provided a description of the duties of the proffered position that involve computer systems analysis and computer programming. The wording for some of the duties of the proffered position are the same (virtually verbatim) as the description of duties for computer systems analysts provided at the Internet version of the *O*NET OnLine Code Connector*.²

Upon review of the record, the AAO finds that the assertion of the petitioner that the occupational category for the proffered position is a combination of the occupational categories computer systems analysts and computer programmers is contradicted by the occupational classification selected by the petitioner for the LCA. With respect to the LCA, DOL provides clear guidance for selecting the most relevant *O*NET* occupational code classification.³ 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* 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.⁴ The petitioner provided the prevailing wage that corresponds to the occupation computer programmers at a Level II, which was \$65,936 per year (\$24.87 per hour).

The AAO observes that the prevailing wage for the position "Computer Systems Analysts" at a Level II wage is significantly higher at \$70,762 per year (\$34.02 per hour) 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

² *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET Code Connector* for the occupational classification Computer Systems Analyst is accessible on the Internet at <http://www.onetcodeconnector.org>.

³ 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.

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/>.

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 (pages 3 and 13), the letter of support, and the LCA, the petitioner stated that salary for the proffered position would be \$66,000 per year. The petitioner's offered wage to the beneficiary of \$66,000 is below the prevailing wage level for the occupational classification "Computer Systems Analysts" in the area of intended employment. 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. In other words, 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.

The next issue that the AAO will address is one of the grounds for denial specified in the director's decision, namely, whether or not the petitioner qualifies as an H-1B employer or agent. To meet its burden of proof in this regard, the petitioner must establish that it meets the regulatory definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii) or agent at 8 C.F.R. § 214.2(h)(2)(i)(F).

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

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

"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.

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

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States

employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).⁵

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect

the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

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

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).

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."

The petitioner submitted copies of pay statements and Form W-2 Wage and Tax Statements (2007 and 2008) that it issued to the beneficiary. The documents are pertinent 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. Upon review of the record, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment

The petitioner is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

* * *

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

In response to the RFE, the petitioner provided an offer letter between the petitioner and the beneficiary dated May 22, 2006. The offer letter is devoid of several critical aspects of the beneficiary's employment. For example, it is extremely vague regarding the services that the beneficiary will perform, stating that the beneficiary "will provide services to assist [the petitioner's] client on any work project to Which Employee may be assigned." The letter does not state the beneficiary's job title, duties, the requirements for the position, compensation schedule, annual leave allotment, etc. The offer letter states that it will "remain in effect for a period of one year" from the

date it is signed by the petitioner and the beneficiary or until terminated. Under the termination clause, the offer letter states that the "parties recognize that the client, in its sole discretion, may cause the termination of this agreement by giving notice to [the petitioner] directly or indirectly." Thus, the client has some aspect of control of the continuity of the beneficiary's relationship with the petitioner.

The offer letter also reports that the beneficiary salary will be \$55,000 per annum and that he is entitled to benefits as outlined in the "salaried Employees Handbook." However, no substantive determination can be inferred regarding these "benefits" as the "salaried Employees Handbook" was not provided to USCIS. Moreover, the offer letter is dated over three years prior to the filing of the H-1B petition, but the petitioner did not provide documentation of any further written agreement between the petitioner and beneficiary to establish that the beneficiary's salary was raised to \$66,000 per year. There is no evidence that the document was amended, or that the parties created an addendum or other agreement specifying additional or different terms. Furthermore, while an offer letter may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

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 October 1, 2009 to September 14, 2012. The petition and supporting documents indicate that the beneficiary would be working at the client site in Englewood, Colorado. The petitioner submitted a Work Order between the petitioner and Xavient, stating that the beneficiary would be employed as a PL/SQL Developer beginning September 21, 2009 for the client Dish Network and that the estimated project length is 14 months. In the December 14, 2009 letter, the petitioner stated that the employment dates were September 15, 2009 to November 15, 2010. A letter from DISH Network reported that the "project is an on-going project that is expected to last for the foreseeable future." Although the petitioner claims that the project with DISH Network is "extendable," there is no documentary evidence from Xavient or from DISH Network that the project would be extended beyond November 15, 2010, and the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner has not demonstrated that it will maintain an employer-employee relationship for the duration of the three-year requested period. The AAO finds that the petitioner has failed to establish that the petition was filed for work that was reserved for the beneficiary, for the entire period requested, as of the time of the petition's filing. 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).

Throughout the record there are discrepancies as to the job title of the proffered position. For example, on the Form I-129 and LCA, the petitioner reported that the beneficiary would be employed as a programmer analyst. On the Work Order, the job title is listed as PL/SQL Developer. The letter from Xavient refers to the beneficiary as a consultant. The letters from the beneficiary's

co-workers state that the beneficiary's job title is Oracle Developer. The petitioner did not address or provide any evidence to reconcile the inconsistencies in the record of proceeding regarding this issue.

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 director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary, including a brief description of who would supervise the beneficiary and his/her duties. The AAO notes that the director's request for evidence on this issue was not overly burdensome. In response, the petitioner provided a letter from the Director of Administration of Xavient, stating that "the Consultant will remain an employee of [the petitioner]." The AAO notes that this statement is not probative as it is a conclusory statement and the Director of Administration does not relate any specificity or details for how she reached the conclusion. In reply to the RFE, counsel stated that an "employment confirmation letter issued by the immediate supervisor of the Beneficiary at the end-client location (EchoStar/Dish Network)" was enclosed to confirm the need for the beneficiary's services. A review of the document reveals that it is from the Senior IT Manager of DISH Network. The petitioner did not provide any further information regarding the supervision of the beneficiary for this project (or any other projects). Thus, the only information provided to the director on this issue indicated that the end-client's Senior IT Manager served as the beneficiary's immediate supervisor on the project and the evidence presented did not establish otherwise.

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. The AAO notes that on appeal, *for the first time*, counsel asserted that the petitioner's operations manager would supervise the beneficiary. However, no documentary evidence to support counsel's claim regarding the supervision of the beneficiary for the project was provided. Counsel also asserted that the petitioner evaluates the beneficiary's work product and that the beneficiary receives all training specifically from the petitioner. However, the petitioner also did not provide any documentation to support counsel's claim on this issue. The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Furthermore, it is not sufficient to establish eligibility in this matter for counsel to merely claim in the appeal that the petitioner will be responsible for hiring, firing, supervising, evaluating, training and controlling the employment. The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the AAO finds that the petitioner is not an agent as defined by the regulations. The definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) “an agent performing the function of an employer”; and (2) “a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary.” The petitioner has not claimed to be an agent, nor has it submitted evidence to establish that it could be considered an agent under either prong of the regulation. As a result, absent additional documentation, the petitioner cannot be considered an agent in this matter.⁶

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

The AAO 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

⁶ The petitioner's previous counsel asserted that the petitioner was not an agent and cited to the 2004-2005 Edition of the *Occupational Outlook Handbook*, as well as referenced data collected in 2002 regarding Computer Programmers, Computer Systems Analysts, Database Administrators, and Computer Scientists. Counsel did not explain the relevancy of the data to establish current industry standards. The AAO notes that this chronological element materially diminishes the evidentiary value as an indication of current practices in the industry.

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.

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

The AAO notes that in response to the RFE, counsel asserted that the proffered position qualified as a specialty occupation under the first criterion [8 C.F.R. § 214.2(h)(4)(iii)(A)(1)], that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. On appeal, the petitioner's new counsel asserts that the position is a specialty occupation under the fourth criterion [8 C.F.R. § 214.2(h)(4)(iii)(A)(4)], claiming that 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. No explanation was provided for the change in the bases for the petitioner's assertion that the position qualifies as a specialty occupation. However, upon a complete review of the record of proceeding, the AAO finds that 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 AAO will now discuss each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ The petitioner asserts that the proffered position entails computer systems analysis and computer programming duties. Thus, the chapters of the *Handbook* regarding the occupational categories "Computer Systems Analysts" and "Computer Programmers" are most relevant to this proceeding.⁸ A review of the *Handbook* indicates that neither computer systems analysts nor

⁷ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁸ For these chapters, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook*

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, 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, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. To make this determination, the AAO turns to the record 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.⁹

⁹ 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.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. 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*

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 the instant case, the petitioner submitted a letter from the Sr. IT Manager of DISH Network stating that the beneficiary would be "working . . . for the delivery of IT Services, including Application development, enhancements and maintenance."¹⁰ The letter further states that the beneficiary will be working on "Oracle 10g/9i, SQL, PL/SQL, Oracle Forms6i, Oracle Reports6i."

The duties for the proffered position as stated in the record (by the end-client, as well as by the petitioner and counsel) 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 specific specialty. The evidence of record on the particular position here does

court held that legacy Immigration and Naturalization Service (INS) had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

¹⁰ The AAO acknowledges that the petitioner submitted a more lengthy description of the proffered position with the Form I-129 petition and another brief description of the duties in its December 14, 2009 letter (submitted with the RFE).

Furthermore, in the appeal, counsel provided a new list of duties for the proffered position as well as a description of the project. However, the petitioner and counsel failed to provide any explanation as to the reason that this information 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. Furthermore, no explanation was provided for submitting multiple job descriptions.

The AAO notes that the petitioner claims that the beneficiary will serve on a Xavient-DISH Network project. Thus, the source of the job descriptions submitted by the petitioner and counsel is unclear as there is no evidence in the record establishing that these descriptions were prepared by or endorsed by the end-client, DISH Network, and that the descriptions accurately reflect the beneficiary's expected work on the project. It is noted, the petitioner's descriptions appear to reflect general duties for programmer analysts, rather than specific duties that the beneficiary would perform in connection with the Xavient-DISH Network project. Moreover, the duty descriptions are not supplemented by any documentation establishing that, as practiced in actual performance in the proffered position, they would require at least a bachelor's degree or its equivalent in a specific specialty.

not demonstrate a requirement for the theoretical and practical application of a level of highly specialized computer-related knowledge. The duties for the proffered position appear routine and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. Thus, the petitioner has not established that the beneficiary's actual duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

In the letter from DISH Network, the Sr. IT Manager stated that a bachelor's degree or the equivalent is required for adequate performance of the duties of the position.¹¹ 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).¹²

¹¹ The petitioner stated that the "skills [for the proffered position] can be acquired through successful pursuit of at least a Bachelors degree in Computer Science, a relevant field of Engineering, or the equivalent in education and experience. In the appeal, counsel reported that the "duties can be performed by an individual with at least a Bachelor degree in Computer Science, Computer Information Systems, Engineering or any closely related field." No explanation for the variance was provided. However, the AAO observes that notably, the end-client for the project reported that the proffered position does not require at least a bachelor's degree, or the equivalent, in a *specific specialty* to perform the duties of the position.

¹² 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 expedient of creating a generic (and essentially artificial) degree requirement.

Id.

In this matter, 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.

In response to the RFE, counsel asserted that the proffered position programmer analyst is a specialty occupation. In support of this assertion counsel cited a memorandum for center adjudication officers dated December 22, 2000 from Terry Way, Nebraska Service Center (NSC) Director. "*Guidance Memorandum on H1B Computer Related Positions*," from Terry Way, NSC Director, to Center Adjudication's Officers (Nebraska Service Center December 22, 2000).

The AAO finds that counsel's reliance on this December 22, 2000 memorandum is misplaced as the memorandum is irrelevant to this proceeding. By its very terms, the memorandum was issued by the then Director of the NSC as an attempt to "clarify" an aspect of NSC policy; and, framed as it was, as a memorandum to NSC "Adjudication's Officers," it was addressed exclusively to NSC personnel. As such, it has no force and effect upon the present matter, which has been adjudicated by the California Service Center. Accordingly, the AAO need not, and will not, further address the memorandum, other than to also note that the memorandum was issued more than a decade ago, during what the NSC Director perceived as period of "transition" for certain-computer related occupations; that the memorandum referred to now outdated versions of the *Handbook* (the latest of those being the 2000-2001 edition); and that the memorandum also relied partly on a perceived line of relatively early unpublished (and unspecified) AAO decisions in the area of computer-related occupations, which were, of course, non-precedential and which, necessarily, did not address the computer-related occupations as they have evolved since those decisions were issued more than a decade ago. The memorandum is immaterial to this discussion regarding the petitioner's proffered position.

Upon a complete review of the record, 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).

As reflected in the discussion above, 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. Also, there are no submissions from 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.

Thus, based upon a complete review of the record, the petitioner has not established 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 particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

It is noted that in the appeal, the petitioner and counsel do not assert that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

The duties as described in the record of proceeding are generally stated and generic and do not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The evidence in the record of proceeding does not establish that the position itself is so complex or unique that it cannot be performed by a person whose position-related knowledge was obtained 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. 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. The evidence provided does not demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as

more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that can be performed by a person with less than a baccalaureate degree in a specific specialty or its equivalent, 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 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.¹³

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. 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

¹³ 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.

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").

Upon review of the record, 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. 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.

In the instant case, no evidence was submitted regarding the past recruiting and hiring practices for the position of programmer analyst. The record of proceeding does not establish that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO will now briefly address the director's final ground for denying the petition. The director was unable to determine whether there is a current, credible offer of employment because of

discrepancies in the record regarding the wages paid to the beneficiary in connection with the petitioner's prior H-1B petition.

The petitioner stated on the Form I-129 that the petition was a continuation of previously approved employment without change. The petitioner stated on the petition and supporting documentation that the proffered salary for the position is \$66,000 per year. [The AAO notes that the offer letter between the petitioner and the beneficiary, dated May 22, 2006, stated that the beneficiary's salary "shall be \$55,000 per annum."]

The director noted that the Form W-2 Wage and Tax Statements issued to the beneficiary revealed that the petitioner paid the beneficiary \$25,709.12 in 2007 and a total of \$40,019.42 for 2008. The AAO notes that based upon a review of the beneficiary's earning statements, it appears that he was paid approximately \$45,984.66 in 2009.

In the appeal, counsel asserts that "the wages were lower because the beneficiary entered the United States on March 14, 2007 on H-1B status." The AAO notes that if the beneficiary were paid for nine months of work in 2007, he would have been paid approximately \$41,250 (assuming a base salary of \$55,000 per year). Yet, the Form W-2 statement issued to the beneficiary for 2007 indicates that he was merely paid \$25,709.12. Additionally, counsel claims that the beneficiary traveled abroad from March 18, 2008 to April 24, 2008 and from November 27, 2008 to December 12, 2008, as well as "took unpaid vacation in November" and "4 weeks in the month of July due to personal leave."

In support, the petitioner submitted a written statement from the beneficiary. No further evidence was provided. The petitioner should note that the evidentiary weight of the beneficiary's declaration is limited. It represents a claim by the beneficiary, rather than evidence to support the claim. Moreover, the document does not explain the petitioner's failure to pay the beneficiary the offered wage for the period of time he was presumably employed in 2007 and it lacks essential details about the beneficiary's "unpaid vacation" and "personal leave" in 2008, including specific time periods. As such, the evidentiary weight does not exceed the cumulative corroborative information other documents of record provide, as well as the lack of documentation submitted. The record of proceeding is devoid of documentary evidence that establishes or corroborates counsel's statements and the beneficiary's declaration. As previously mentioned, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The petitioner has not adequately explained and documented the reasons for the discrepancy in the offered wage and the beneficiary's actual wages.

Therefore, the AAO finds that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment.

Next, the AAO will discuss the director's decision to deny the petition because the petitioner failed to establish that the LCA submitted with the petition properly supports the Form I-129. The AAO will not discuss this issue at length, because its determination on the other issues is itself dispositive of this appeal. The AAO, however, will identify the decisive aspects of the record of proceeding leading it

to affirm the director's determinations on the LCA issue. The totality of the evidence before the director was insufficient to corroborate the claim that the beneficiary would be serving as a programmer analyst at the client's facility for the entire period sought in the petition. As previously discussed, 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, (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). No evidence was provided of additional projects or work for the beneficiary. Without further information, the AAO concurs with the director that the petitioner did not provide sufficient documentation to determine that it had submitted a valid LCA covering all the locations where the beneficiary would be employed for the period requested.

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.