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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: JUL 20 2012 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center recommended the denial of the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the decision of the director. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 18, 2011. In the Form I-129 visa petition, the petitioner describes itself as an enterprise with 24 employees that is engaged in software development and information technology (IT) consulting services and that was established in 2004. In order to employ the beneficiary in what it designates as a computer programmer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found 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 qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director certified the petition for review by the AAO on March 29, 2012.¹

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's June 20, 2011 decision denying the petition; (5) the director's February 3, 2012 Service motion combined with a Notice of Intent to Deny (NOID) the petition; (6) the petitioner's response to the NOID; and (7) the Notice of Certification recommending that the petition be denied once again. The AAO reviewed the record in its entirety before issuing its decision.

The AAO observes that a review of U.S. Citizenship and Immigration Services (USCIS) records indicates that on April 30, 2012, a date subsequent to the director's certification of the petition to the AAO, another employer filed a Form I-129 petition seeking nonimmigrant H-1B classification on behalf of the beneficiary. USCIS records further indicate that this other employer's petition was approved on May 8, 2012. The AAO notes that the beneficiary has been approved for H-1B classification with another employer, indicating that the issues in this proceeding are now moot. Although another employer's H-1B petition was approved on behalf of the beneficiary, the AAO will nevertheless provide a full *de novo* review of the instant matter in order to address the issues certified by the director to the AAO. For the reasons that will be discussed below, the AAO agrees with the director's decision on each of the enumerated grounds. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically,

¹ Although the petitioner was provided a thirty day briefing period, the AAO did not receive a brief on certification from the petitioner or its counsel. The record will therefore be considered complete as currently constituted.

beyond the decision of the director, the AAO finds that the petitioner (1) failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions; and (2) failed to establish that it would pay the beneficiary the required wages for his work if the petition were granted. Thus, the petition cannot be approved for these reasons as well, with each ground considered as an independent and alternative basis for denial.

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).

The petitioner stated in the Form I-129 and supporting documentation that it seeks the beneficiary's services as a computer programmer on a full-time basis. With the initial petition, the petitioner submitted a letter dated April 14, 2011 that provided the following job duties, along with the percentage of time the beneficiary will spend performing the tasks, for its proffered position of computer programmer:

1. Design Code, integrate, test, develop, maintain and implement applications according to project requirement within the time and cost constrains (approximately 25% of daily work time);
2. Design application user interface. Gather and analyze business requirement and design functional and non-functional specifications (approximately 15% of daily work time);
3. Write SQL queries to validate input data submitted through GUI wit [sic] th [sic] database analyzed test results. Perform manual and automated testing tools including HP Mercury interactive test suite (approximately 15% of daily work time);
4. Write test cases based on business requirements and technical specifications. Create and run automated test scripts for functional regression and performance testing using QTP and load Runner (approximately 15% of daily work time);
5. Perform data extraction, transformation and loading. Map original data to XML script data in the file (approximately 15% of daily work time)[;]
6. Document process flow, process dependencies and production environment configuration. Perform automation testing and GUI testing (approximately 10% of daily work time)[; and]
7. Use various computer languages, tools and technologies including PL/SQL, SQL, T-SQL, C#, .NET, VB.NET, ASP.NET, ASP, VB Script, My SQL, SQL server 2005/ 2-8, ORACLE, MS Access, HTML, DHTML, Java/J2EE, XML,

DHTML, XSL, XSLT, CSS, PHP, AJAX (approximately 15% of daily work time)[.]

The AAO notes that the percentage of time spent performing the above tasks equals 110%. No explanation was provided.

In the letter of support, the petitioner stated that the proffered position "requires a candidate to hold at least a Bachelor of Science Degree or its equivalent in Mathematics, Accounting, Statistics, Computer Science or Engineering." The AAO notes that such an assertion, i.e., the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., mathematics, accounting, statistics, computer science or engineering) implies that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

In general, it must be noted that provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty."² See 214(i)(1)(b) of the Act (emphasis added). Here, the petitioner claims that a bachelor's degree in "Mathematics, Accounting, Statistics, Computer Science or Engineering" is acceptable for its computer programmer position, suggesting that a bachelor's degree in a *specific specialty* is not required.

Notably, the petitioner claims that a bachelor's degree in the field of engineering is suitable for the proffered position. The field of engineering is a broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. Furthermore, it is unclear how a bachelor's degree in accounting, a field fundamentally different from computer science or engineering, could possibly qualify an individual to perform the duties of a position requiring computer programming duties, whether at an associate degree or baccalaureate degree level. As previously stated, 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 degree with a generalized title, such as engineering, without further specification, does not establish the

² Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To establish 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business or engineering, 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).

In addition to the letter of support, the petitioner submitted several documents with the Form I-129 petition, including an itinerary. In the itinerary, the petitioner stated that it "entered into a contract with [the] end client, Letuie LLC, and has employed the beneficiary at Letuie's corporate offices located at [sic] Chicago, IL."³ The petitioner also submitted a letter from [REDACTED] the [REDACTED] Letuie LLC, dated March 30, 2011. Mr. [REDACTED] reported that the beneficiary was currently providing services as a contractor for Letuie. Additionally, Mr. [REDACTED] furnished the following job duties for the proffered position of computer programmer:

- Involve [sic] in designing architecture and development of various modules depending on user requirements using agile development methodology.
- Develop various Web parts, User Controls and Apps using ASP.NET for the modular driven aspects of Web Site.
- Use of JavaScript (jQuery) to enhance UI experience on Client-Side and ASP.NET built in AJAX to do "Asynchronous Post Back Calls".
- Use Data Repeaters, Data List, Login Controls and several other ASP.NET Controls.
- Develop Server-side scripting using C# for creating high performing, reusable code for user controls and web pages.
- Design of SQL Server tables and create stored procedures and functions to retrieve data.
- Use of web development technologies like XML, Web Services, JavaScript, HTML and CSS.

³ Letuie LLC is hereafter referred to by the AAO as "the client."

The AAO observes that the majority of duties provided by the client are virtually the same as a description of the beneficiary's duties as stated in a letter from [REDACTED] Manager of "In the MO."⁴ Ms. [REDACTED] letter confirms the beneficiary's employment as a "Developer" from December 2, 2009 to January 28, 2011. Upon review of the record of proceeding, the AAO notes that while the petitioner has identified its proffered position as that of a computer programmer, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval for occupations that do not categorically qualify as specialty occupations. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. As discussed in greater detail *infra*, the job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

A crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The AAO finds that the petitioner has failed to meet its burden in this regard.

Furthermore, the AAO observes that in the client letter, Mr. [REDACTED] stated that Letuie "require[s] at least a Bachelor degree for the performance of the duties of this position." As previously discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not

⁴ The letterhead lists the company name as "In the MO." The beneficiary's resume states that he was employed as a Software Developer by CML Media, Inc. in Santa Monica, California from December 2009 to January 2011. The beneficiary's entry for CML Media, Inc. also states "Social Network Website (www.inthemo.com)." The record of proceeding contains Form W-2, Wage and Tax Statements, issued to the beneficiary by CML Media, Inc. for 2009 and 2010. The AAO observes that according to the Form I-20 for the beneficiary, submitted by the petitioner to USCIS, the beneficiary was authorized for a 17-month extension of Optional Practical Training (OPT) to serve with the petitioner, not CML Media, Inc. The dates of authorized OPT on the Form I-20 are from January 8, 2010 to June 7, 2011. Notably, there is no explanation in the record of proceeding as to the reason that the Form I-20 was endorsed for employment with the petitioner, but that the beneficiary provided services to CML Media and received compensation from CML Media (based upon the beneficiary's resume, letter of employment and Form W-2 statements). The Form I-20 does not indicate a change of employer.

just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition. That is, 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. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558. In this matter, the petitioner's client claims 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. Thus, the petitioner's assertion that the proffered position is a specialty occupation is conclusory and unpersuasive as it is not supported by the job descriptions, the educational requirements (as stated by the petitioner and by the client), or by probative evidence substantiating the petitioner's claim.⁵

With the initial petition, the petitioner also submitted the following documents:

- A Subcontractor Services Agreement between Letuie LLC and the petitioner, dated January 1, 2011. The agreement is for the services of a contractor; however, the person listed in the agreement is not the beneficiary. Additionally, the AAO observes that the document was not properly endorsed on each of the pages and the final page of the agreement apparently corresponds to another document, not in the record.
- Pay statements issued to the beneficiary from the petitioner.

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

The director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on April 25, 2011. The petitioner was asked to submit additional documentation, including probative evidence that a valid employer-employee relationship will exist between the petitioner

⁵ For purposes of determining whether a position qualifies as a specialty occupation in a staffing or outsourcing situation, the end client's requirements for the position must be considered and are in fact more relevant to the eligibility determination than that of the claimed petitioning employer. *See Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000).

and the beneficiary and evidence to demonstrate that there is sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period.

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).

Counsel for the petitioner responded by submitting additional evidence, including the following documents:

- An Employment Agreement between the petitioner and the beneficiary dated February 1, 2011. The document states that the petitioner is "please to **extend** [the beneficiary's] job as Computer Programmer with [the petitioner]." [Emphasis added.] The Employment Agreement and Form I-20 (which was endorsed for the beneficiary to work with the petitioner) indicate that the beneficiary was employed in some capacity by the petitioner prior to February 1, 2011; however, other documents in the record of proceeding reveal that, during this same timeframe, the beneficiary was serving as a developer and received compensation from CML Media, Inc.
- A Subcontractor Services Agreement between Letuie LLC and the petitioner entered into on February 7, 2011. The agreement states that the beneficiary will be "responsible for performing information and related services for Letuie's clients." The document further reports that the agreement will continue until approximately February 7, 2012, and "may be extended by mutual agreement of the parties in writing."

Notably, the petitioner never provided documentation substantiating that by "mutual agreement of the parties in writing" the Subcontractor Services Agreement was extended beyond February 7, 2012 (even in response to the NOID, which was submitted by the petitioner in March 2012 – approximately one month *after* the expiration of the Subcontractor Services Agreement).⁶ There

⁶ The petitioner submitted a letter from [REDACTED] Willow Creek Association (WCA). Mr. [REDACTED] states that "WCA has been working with Letuie LLC in the past for our IT needs and we expect to continue to work with Letuie for at least three years from the date of this writing." The AAO notes that assisting with "IT needs" covers a range of possible projects and does not substantiate the petitioner's claim that it has arranged H-1B caliber work for the beneficiary for the period of employment requested in the petition.

is no evidence that the Subcontractor Services Agreement was amended, or that the parties created an addendum or other agreement extending the terms. Moreover, the petitioner did not submit documentation that it had arranged for additional work for the beneficiary after February 2012. There is a lack of probative evidence in the record of proceeding substantiating the petitioner's assertion that it had arranged H-1B caliber work for the beneficiary for the entire requested validity period.

- A letter from [REDACTED] dated May 18, 2011. This letter is almost identical to Mr. [REDACTED] March 30, 2011 letter, which was submitted with the Form I-129 petition. Mr. [REDACTED] confirms the same job duties that were submitted in his previous letter. Additionally, Mr. [REDACTED] reiterates that Letuie requires "at least a Bachelor degree for the performance of the duties of this position." Notably, Mr. [REDACTED] does not assert that the proffered position requires at least a bachelor's degree in a *specific specialty* closely related to the requirements of the occupation.
- A letter from [REDACTED] Willow Creek Association (WCA). Mr. [REDACTED] states that Letuie is currently developing a web application named "Engage" for WCA and that "[p]rogrammer analysts and software engineers of Letuie develop the project at [Letuie's] site." Mr. [REDACTED] further states that this "arrangement is more convenient to enable the project development supervision directly from Letuie" and that WCA does not "assume employer responsibilities of Letuie including hiring, firing, paying taxes, assignment or replacement of Letuie's consultants, programmer analysts and software engineers." Mr. [REDACTED] does not mention the petitioner, the beneficiary, or the proffered position.
- A photo identification badge stating "Letuie," the beneficiary's name, and the word "contractor." The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced, for what purpose, or by whom.

Mr. [REDACTED] continues by stating that "Letuie develops projects to meet WCA's IT needs" and that "Letuie is currently developing a web application named 'Engage' for WCA." Mr. [REDACTED] claims that Letuie "delivers the end results within an agreed-upon time and cost limit." The letter is devoid of critical information necessary to substantiate the petitioner's claim that it has arranged sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period. For example, Mr. [REDACTED] does not reference the beneficiary, his job title, the duties he is expected to perform, the requirements for the position, confirm that the beneficiary is working on any particular projects, etc. Mr. [REDACTED] references "programmer analysts and software engineers of Letuie" but does not mention the proffered position entitled "computer programmer." Although Mr. [REDACTED] states that WCA expects to continue working with Letuie (for WCA's IT needs), he does not provide any specific information regarding the duration of the Engage project. Mr. [REDACTED] claims that Letuie and WCA have determined an "agreed-upon time" for the Engage project; however, no specific details or probative evidence was provided regarding the expected timeframe for the project.

- Documents regarding the project "Engage." The documents list the beneficiary as a "Developer" and indicate that various tasks have been assigned to the beneficiary by [REDACTED] Letuie). No explanation was provided for designating the beneficiary's role as a "Developer," whereas other documents in the record of proceeding state that the beneficiary serves as a computer programmer.
- Bi-Weekly Performance Reports (purportedly written by the beneficiary) dated February 11, 2011 to May 20, 2011. The beneficiary repeatedly mentions his manager. It appears that the beneficiary's manager is a Letuie employee.
- Letuie time records for the beneficiary, which reference the client as Willow Creek. The documents state that "[b]y signing this form, or by submitting this form electronically, the employee agrees that the information on this form is as accurate as possible." Notably, the beneficiary is referred to as an employee. There is no evidence that the petitioner or Letuie reviewed the time records.
- Checks issued to the petitioner by Letuie from January 2011 to April 2011. The documents do not state the purpose of the payments.
- Emails forwarded from the beneficiary to the petitioner on May 23, 2011 and May 24, 2011. The original messages span from March 23, 2011 to May 12, 2011, thus indicating that the emails were not forwarded to the petitioner contemporaneously. It is noted that the local-part of the email address is the username of the beneficiary, and the domain name is "letuie." The original emails are sent between the beneficiary and various people whose email addresses also contain the domain name "letuie." There is no distinction in the domain name between the beneficiary and [REDACTED] (an employee of Letuie).
- An organizational chart for the petitioner. The hierarchy of the petitioner's staffing is depicted as the beneficiary reporting to Gangadhar Polavarapu, Software Team Lead/Programmer Analyst, who serves under [REDACTED] Technical Manager. [REDACTED] is listed as the Vice-President. Inexplicably, [REDACTED] the petitioner's President (according to the Form G-28), is not included on the organizational chart.

In the instant case, the director notified the petitioner through the RFE, that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the notice was appropriate, not only on the basis that the evidence 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.

The director reviewed the response to the RFE and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on June 20, 2011. Thereafter, to acknowledge all aspects of the evidence in the record and to provide a more affirmative decision, USCIS, on its own motion, reopened the petition and issued a NOID to the petitioner on February 3, 2012. The NOID addressed the deficiencies in the record of proceeding with regard to the employer-employee relationship and the specialty occupation issues.

In response to the NOID, the petitioner submitted several documents, including the following:

- A letter from [REDACTED] dated February 28, 2012. *For the first time*, Mr. [REDACTED] claims that "Letuie and its clients require at least a Bachelor's degree in Computer Software Engineering, Computer Science, Systems Engineering or any closely related field." Mr. [REDACTED] further reports that "[p]referably, the candidate should also have either five years of experience or a Master's degree due to the complex nature of the work performed." This letter repeats the general job duties that were previously submitted by Mr. [REDACTED] but also includes the percentage of time the beneficiary is expected to spend performing each duty. Mr. [REDACTED] references an August 12, 2011 letter; however, the record of proceeding does not contain a letter from Mr. [REDACTED] with this date.
- Excerpts from the beneficiary's telephone records from January 2011 to April 2011. The petitioner and counsel claim that the records show telephone calls made between the petitioner and [REDACTED] the petitioner's Vice President.
- Emails sent to the petitioner and to Letuie from the beneficiary regarding timesheets for the weeks ending March 4, 2011, April 1, 2011, April 8, 2011 and April 15, 2011.
- A printout from the United Kingdom government regarding employment contracts. As the document is related to British employment law, it does not appear relevant to the instant proceedings and the petitioner has not established otherwise.
- Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner for 2011. *The total wages and compensation is listed as \$31,242.40.*
- A pay statement issued to the beneficiary by the petitioner on January 13, 2012. Notably, the record of proceeding indicates that the beneficiary was granted work authorization until June 7, 2011 based upon OPT. The record does not contain documentation of the beneficiary's authorization to work through January 13, 2012.

- Bi-Weekly Performance Reports (purportedly written by the beneficiary) dated February 25, 2011 to May 20, 2011. The beneficiary repeatedly mentions his manager and it appears that the beneficiary is referring to a Letuie employee.

The director found that the evidence did not establish eligibility for the benefit sought and certified the petition for review by the AAO. 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.

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the actual nature and requirements of the proffered position and which are material to the determination of the merits of this petition. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the proffered position and sufficiency of the petitioner's evidence into each basis discussed below for the denial of the petition.

I. Labor Condition Application

The AAO will now discuss the discrepancies between what the petitioner claims about the requirements and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage-level indicated on the LCA submitted in support of the petition.

The AAO notes that the petitioner submitted letters from [REDACTED] of Letuie, dated March 30, 2011 and May 18, 2011, which assert that a general bachelor's degree is sufficient for the proffered position. In these two letters, Mr. [REDACTED] did not state, or even suggest, that the proffered position required that a candidate possess a degree in any particular field of study. Notably, the AAO observes that the RFE specifically asked for this type of information and the petitioner responded with Mr. [REDACTED] letter dated May 18, 2011, that restated that a general bachelor's degree (no specific field of study) was required for the position.

In response to the NOID, the petitioner and client claimed, *for the first time*, that the proffered position requires "at least a Bachelor's degree in Computer Software Engineering, Computer Science, Systems Engineering or any closely related field" and that "[p]referably, the candidate should also have either five years of experience or a Master's degree due to the complex nature of the work to be performed."⁷

⁷ More specifically, the petitioner quoted the director as stating in the NOID that "[s]ince a degree in a specific specialty has not been identified as the requirement for the proposed duties, it has not been demonstrated that the proffered position qualifies as a specialty occupation." The petitioner followed the director's quote with a new assertion that Letuie requires as a minimum qualification for the proffered

No explanation was provided as to the reason that the petitioner and the client failed to previously provide this information to USCIS with the initial petition or in response to the director's RFE. With regard to Mr. [REDACTED] letter dated February 28, 2012, which contains the revised requirements, the AAO notes that evidence created after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the facts to be proven and existent at the time of the director's notice.

Notably, the acceptable fields of study for the proffered position as reported by the petitioner differ from the fields of study that the client claimed would be acceptable. In the letter of support dated April 14, 2011, the petitioner stated that the proffered position required a bachelor's degree in **mathematics, accounting, statistics**, computer science or **engineering (no specific discipline)**. In contrast, the client initially asserted that a **general-bachelor's degree** was acceptable for the proffered position, but later stated that a bachelor's degree in **computer software engineering**, computer science, **systems engineering** or any closely related field was required and that "[p]referably, the candidate should also have either five years of experience or a Master's degree due to the complex nature of the work to be performed." No explanation for the variances was provided.

Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Although the petitioner and Mr. [REDACTED] made assertions regarding the qualifications required for the proffered position, they failed to submit probative and credible evidence to substantiate their claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

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).

Moreover, the record of proceeding contains discrepancies between what the petitioner and its client claim about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Computer Programmers" at a Level 1 (entry level)

position a bachelor's degree in computer software engineering, computer science, systems engineering or any closely related field and that a candidate should also have five years of experience or a master's degree "due to the complex nature of the work to be performed."

wage.

Wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf. It is important to note that prevailing wage determinations start with an entry level wage (i.e. Level 1) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁸ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description. *Id.*

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. *Id.* A Level 1 wage rate is described by DOL as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

In the instant case, the petitioner and its client claim that the beneficiary "serves as a key technical

⁸ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

resource to develop, implement and support complex enterprise web applications" and that the nature of the proffered position involves complex and/or specialized tasks. Additionally, in response to the NOID, the client asserts that the proffered position requires "at least a Bachelor's degree in Computer Software Engineering, Computer Science, Systems Engineering or any closely related field" and that "[p]referably, the candidate should also have either five years of experience or a Master's degree due to the complex nature of the work to be performed."

The AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 591-92.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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 (emphasis added):

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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reasons for the director's recommended denial, the petition could still not be approved for this reason.

II. H-1B Required Wages

Furthermore, even if the proffered position were determined to be a Level 1 position, upon review of the Form I-129 and LCA, the AAO finds that the petitioner failed to establish that it would pay the beneficiary an adequate salary for his work as required under the applicable statutory and regulatory provisions.

In the Form I-129 petition, the petitioner identified the proffered position as a computer programmer and stated (on page 5 and page 17) that the rate of pay for the proffered position would be \$50,400 per year. The petitioner's vice-president signed the Form I-129 under penalty of perjury that the information supplied to USCIS on the petition and the evidence submitted with it was true and correct.

In the LCA, the petitioner specified that the proffered position falls under the occupational classification "Computer Programmers." The petitioner stated in the LCA that the wage level for the proffered position was Level 1 (entry) and claimed that the prevailing wage in Cook County (Chicago, Illinois) for the proffered position was \$50,357 per year.⁹ The prevailing wage source is

⁹ It is noted that, if the proffered position were determined to be a higher level position, the minimum wage required to be paid by the petitioner at that time would have been \$63,586 per year for a Level 2 position, \$76,814 per year for a Level 3 position, and \$90,043 per year for a Level 4 position.

listed in the LCA as the OFLC Online Data Center.¹⁰ The petitioner stated in the LCA that the offered salary was \$50,400 per year (a difference of \$43 from the prevailing wage listed in the LCA). The LCA was certified on April 8, 2011 and signed by the petitioner on April 11, 2011.

In response to the RFE, the petitioner submitted an Employment Agreement between the petitioner and beneficiary that is dated February 1, 2011. In the agreement, the petitioner states that the beneficiary's will be entitled to receive a payment of \$50,400 per annum. In the section entitled "Termination," the agreement states, in pertinent part, the following:

In the event that you breach the termination on notice or other provisions of this agreement or that your employment is terminated voluntarily or for cause prior to the completion of twelve months of employment or prior to the completion of any project to which you are then assigned, whichever is later, you agree (i) to repay in full all expenses towards obtaining work permit, relocation, air fare expenses, training costs or other advances paid or reimbursed to you by the Company and you authorize the Company to deduct and withhold such repayment in full from any compensation or other amounts otherwise owed or payable to you (ii) to pay the Company as liquidated damages and not as a penalty a further sum of Five Thousand Dollars (\$5,000) or any penalties that the client imposes on the company whichever is higher.

The document further states that "the period of engagement pursuant to this Agreement shall commence contingent upon the date of the approval of your H1 petition."

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)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The definition for the term "actual wage" is found at 20 C.F.R. § 655.731(a)(1), which states, in pertinent part, the following:

The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. . . .

¹⁰ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

The prevailing wage is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The regulation at 20 C.F.R. § 655.731(a)(2), states, in pertinent part, the following:

The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Security Agency (SESA) (now known as State Workforce Agency or SWA), an independent authoritative source, or other legitimate sources of wage data.

The required wage rate means the rate of pay which is the **higher** of the actual wage for the specific employment in question or the prevailing wage rate. *See* 20 C.F.R. § 655.715. The regulation at 20 C.F.R. § 655.731(c), specifies, in pertinent part, the following regarding deductions from an H-1B employee's wages:

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--

(i) Deduction which is required by law (e.g., income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

* * *

- (C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)).

* * *

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (i.e., paragraphs (c)(10)(i) and (ii)):

- (i) A penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

- (A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

- (B) The employer is permitted to receive bona fide liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

* * *

- (ii) A rebate of the \$500/[\$750/\$1,500] filing fee paid by the employer, if any, under section 214(c) of the INA. The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the \$500 additional filing fee (for a petition filed prior to December 18, 2000) or [\$750/\$1,500] additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H-1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the \$500/[\$750/\$1,500] filing fee (see paragraph (c)(10)(i) of this section). . . .

Statutory and regulatory provisions therefore prohibit a petitioner from requiring an H-1B employee to pay a penalty for ceasing employment with the petitioner prior to a contracted date, although liquidated damages may be permitted pursuant to relevant state laws. *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(9) and (10).

As noted above, the regulations prohibit a petitioner from payroll deductions of an H-1B employee's wages with regard to recouping a business expense of the employer "(including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition)" and causing the employee's wages to fall below required wage levels. According to the Act, it is a violation for an employer to require a beneficiary to reimburse, or otherwise compensate, the employer for part or all of the cost of the American Competitiveness and Workforce Improvement Act (ACWIA) fee. *See* 212(n)(2)(C)(vi)(II) of the Act; *see also* 20 C.F.R. § 655.731(c)(10)(ii). Notably, the Act also states that "the Secretary of Homeland Security shall impose a fraud prevention and detection fee **on an employer filing a petition.**" *See* 214(c)(12)(A) of the Act (emphasis added).

The regulations at 20 C.F.R. § 655.731(c)(11) and (12) state that "[a]ny unauthorized deduction taken from wages is considered by the Department [of Labor] to be non-payment of that amount of wages" and that "[w]here the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expense(s), the Department will consider the amount to be an unauthorized deduction from wages."

In the Employment Agreement, the petitioner states that under certain conditions the beneficiary will be required to repay expenses towards obtaining "work permit, relocation, air fare expenses, training costs or other advances paid or reimbursed to [the beneficiary] by the Company," as well as a fee of \$5,000 for "liquidated damages" in addition to other possible penalties. When filing and signing the LCA, the petitioner declared that it would comply with the statements as set forth in the cover pages of the LCA and the DOL regulations at 20 C.F.R. § 655, Subparts H and I. In the instant case, the petitioner has failed to establish that it would comply with the applicable statutory and regulatory provisions regarding payment of the beneficiary's required wages, if the petition were approved.¹¹ Thus, for this reason as well, the H-1B petition cannot be approved.

III. Employer – Employee Relationship

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

¹¹ Notably, USCIS may revoke the approval of an H-1B petition if it is determined that the petitioner violated terms and conditions of the approved petition of which the LCA is a part. *See* 8 C.F.R. §§ 103.2(b)(1) and 214.2(h)(11)(iii)(A)(3).

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) . . .

"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 of proceeding is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

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

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

purposes of the H-1B visa classification, these terms are undefined.

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

"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.¹²

¹² 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

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 318-319.¹³

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 *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).¹⁴

more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

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).

¹³ 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))).

¹⁴ 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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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 support of the H-1B petition, the petitioner submitted copies of pay statements and a Form W-2, Wage and Tax Statement, for 2011 that it issued to the beneficiary. The AAO acknowledges that the method of payment of wages 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., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

For H-1B classification, 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 employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an Employment Agreement between the petitioner and the beneficiary dated February 1, 2011. However, upon review of the document, the AAO notes that the Employment Agreement fails to adequately establish several critical aspects of the beneficiary's employment. For example, the agreement states that the beneficiary will be "engaged to work on **[the petitioner's] Software development, testing project(s)** as directed by supervisor and/or (Client's) supervisor." [Emphasis added.] The agreement further states that the beneficiary will "perform all duties of said engagement as they are customarily performed by a person holding said position in businesses similarly situated."

In the petition and supporting documentation, the petitioner does not assert and there is no evidence to suggest that the beneficiary will work on the "petitioner's software development, testing projects." Accordingly, it does not appear that the Employment Agreement encompasses the work that the petitioner and its client claim that the beneficiary will perform if the H-1B petition is approved. More specifically, in response to the RFE, counsel submitted a letter, stating "[t]he beneficiary shall develop Letuie's projects Letuie, LLC develops projects for various religious organizations."¹⁵ In a letter dated February 11, 2011, the Chief Financial Officer of Willow Creek Associates stated that "Letuie is currently developing a web application named 'Engage for WCA.'" No explanation was provided as to the reason an Employment Agreement was submitted to USCIS which states that the beneficiary would work on the "petitioner's software development, testing projects," which does not appear to correspond to the actual work the beneficiary is expected to

¹⁵ In the itinerary, the petitioner stated that the "the beneficiary is expected to **initially** work at Letuie as indicated on the enclosed purchase order." [Emphasis added.] In response to the RFE, counsel stated that the "beneficiary will be placed exclusively at the location of client company Letuie, LCC . . . [he] **shall develop Letuie's projects at Letuie's location exclusively**." [Emphasis in original.]

perform, which is "develop[ing] Letuie's projects." There is no evidence that the document was amended, or that the parties created an addendum or other agreement specifying additional or different terms.

The Employment Agreement also reports that the beneficiary will be "included in or eligible" for medical benefits and/or "such other employee welfare plans and fridge benefits that the Company may provide from time to time to employees of the Company in accordance with the terms of such plans." However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plans, including eligibility requirements, was provided to USCIS.

Notably, the Employment Agreement does not provide any level of specificity as to the beneficiary's duties, the requirements for the position, number of hours to be worked per week, annual leave allotment, etc.¹⁶ While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to address or submit any probative evidence on the issue.

Upon review of the record, the AAO also notes that the petitioner has not established the duration of the relationship between the parties. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2011 to September 30, 2014. The petition and supporting documents indicate that the beneficiary would be working at the Letuie client site in Chicago, Illinois. No other work locations were provided. In the itinerary, the petitioner stated that "the beneficiary is expected to **initially** work at Letuie as indicated on the enclosed purchase order." [Emphasis added.] The petitioner submitted a Subcontractor Services Agreement between the petitioner and Letuie, stating that the beneficiary would be employed as a consultant. The document states that agreement commenced on February 7, 2011 and would continue until approximately February 7, 2012. According to the document, the agreement may be

¹⁶ The agreement also states that the beneficiary will provide "assistance and support to the [petitioner] as and when so required by the [petitioner] from time to time." Counsel claims that the Employment Agreement contains a flexibility clause "which give the parties freedom to amend the contract . . . It is not intended to be taken literally or to convey part-time or intermittent employment." In support of his assertion, he references a printout from the United Kingdom government regarding employment contracts. As the document was produced by the British government and is related to British employment law, it does not appear relevant to the instant proceedings.

"extended by mutual agreement of the parties in writing." The petitioner claims that "the project is likely to be extended beyond this period." However, the record does not contain a written agreement between the petitioner and Letuie, or any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

The petitioner submitted two letters from Mr. [REDACTED] who claimed that Letuie required the services of the beneficiary for three years from the date of each of the letters – which is March 30, 2014 based upon the first letter submitted, and May 18, 2014 based upon the second letter submitted. The above documentation provides conflicting information as to the end date of the beneficiary's work on the project. Notably, none of the documentary evidence endorsed by the client corroborates that the beneficiary's work would be extended to September 30, 2014, as requested on the Form I-129 petition. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed in the itinerary that the beneficiary would be working on software projects for the petitioner/clients if the project with Letuie ends prior to September 30, 2014. However, the petitioner did not submit probative evidence substantiating additional projects or specific work for the beneficiary.

The AAO finds that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed 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. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.¹⁷

¹⁷ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

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

Nevertheless, based on what evidence was provided with regard to who will control the beneficiary during the requested employment period, it must be noted that the record indicates that the beneficiary will be physically located at the Chicago, Illinois corporate office of Letuie. The petitioner is located approximately 270 miles away in Farmington Hills, Michigan, raising the additional issue of who would supervise, control and oversee the beneficiary's work.

The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit an organizational chart, a brief description of who will supervise the beneficiary along with the person's duties, a description of the performance review process and/or other similarly probative documents.

The petitioner's response included an organizational chart depicting its staffing hierarchy. As previously mentioned, the chart showed the beneficiary as reporting to [REDACTED] Software Team Lead/Programmer Analyst, who serves under [REDACTED] Technical Manager. Aside from the organizational chart, the record of proceeding does not contain any documentation to establish that Mr. [REDACTED] supervised or would supervise the beneficiary. Furthermore, there is no evidence that Mr. [REDACTED] have had any contact with the beneficiary.¹⁸

In a letter dated March 2, 2012, the petitioner claimed that it "establishes work standards, evaluates [the beneficiary's] work performance and determines his bonus and salary adjustment."¹⁹ However, this is a conclusory statement and does not relate any specificity or details for the basis of the claim. The petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the criteria for determining bonuses and salary adjustments.

In response to the RFE, counsel stated that "Letuie, LLC develops projects for various religious organizations at its own site. This arrangement is more convenient for all parties involved as indicated by the letter from Letuie and from an umbrella group for its church clients on their respective letterheads." Upon review of the letter from Mr. [REDACTED] of WCA, the AAO notes that Mr. [REDACTED] states that "[p]rogrammer analysts and software engineers of Letuie develop the projects at [Letuie's] own site. This arrangement is more convenient to enable the project development supervision directly from Letuie." Mr. [REDACTED] further states that "WCA does not assume employer responsibilities of Letuie including hiring, firing, paying taxes, assignment or replacement of Letuie's consultants, programmer analysts and software engineers." Mr. [REDACTED] indicates that the

214.2(h)(2)(i)(E).

¹⁸ The AAO notes that based upon the LCA wage-level selected by the petitioner for the proffered position, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Moreover, he will receive specific instructions on required tasks and expected results.

¹⁹ Notably, the Employment Agreement between the petitioner and beneficiary states that the beneficiary will be "engaged to work on [the petitioner's] Software development, testing project(s) as directed by supervisor and/or (Client's) supervisor."

people serving on the projects, as well as the "employer responsibilities" are entirely Letuie's and that Letuie provides direct supervision. Mr. [REDACTED] does not mention the petitioner.

In response to the NOID, the petitioner stated that "[i]t is customary in the IT business to remotely supervise Computer Programmers, and we have been doing this electronically and telephonically." Additionally, the petitioner provided a letter dated February 28, 2012 from Mr. [REDACTED] of Letuie, who claimed that the petitioner has "exclusive control over the supervision of [the beneficiary's] day to day tasks." Mr. [REDACTED] further stated that the beneficiary "reports his progress in writing and telephonically to [the petitioner], which in turn provides guidance and direction." The AAO has considered the assertions of the petitioner and Ms. [REDACTED] within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions.

The petitioner and counsel claim that timesheets, performance evaluations and telephone records establish the relationship between the petitioner and the beneficiary. In support of this assertion, the petitioner submitted email messages to the director that are between the beneficiary and Letuie team members. The AAO observes that the domain name of the email address for the beneficiary and all of the original recipients is "letuie." The original messages span from March 23, 2011 to May 12, 2011 but were not forwarded to the petitioner until May 23, 2011 and May 24, 2011.²⁰ Thus, the emails were not forwarded contemporaneously. Although the petitioner claims to supervise the beneficiary "electronically and telephonically," the AAO notes that the record does not contain any email correspondence from the petitioner to the beneficiary. That is, the record is devoid of any evidence that the petitioner has supervised, directed, guided or even contacted the beneficiary electronically.

The petitioner also submitted several weekly timesheets for the beneficiary. The documents appear to be the client's time records (not the petitioner's) as the company name is listed as Letuie. The documents reference the client as Willow Creek and state "Engage" in the field regarding task description. The documents do not include any information regarding the petitioner. The documents state that "[b]y signing this form, or by submitting this form electronically, the employee agrees that the information on this form is as accurate as possible." Notably, the beneficiary is referred to as an employee.

In the NOID, the director stated that it was unclear who created the timesheets since there was no indication that the documents were sent to the petitioner. In response, the petitioner submitted four emails sent by the beneficiary to general email addresses for the petitioner and Letuie (the usernames are "timesheets" and "weekly.") Each of the emails contains only one Excel sheet (.xls) attachment. Each attachment is entitled "TimeSheet" along with a date. The beneficiary has the same message in each email, simply stating that a timesheet is attached. He does not request that anyone review, approve and/or validate the timesheets.

²⁰ In the NOID, the director noted that it appears that [REDACTED] of Letuie has provided the beneficiary with work for various clients, stating that one of the emails requests the beneficiary to perform work for a mobile firm that is not WCA.

The petitioner also submitted performance reports, which purportedly were written by the beneficiary, to establish the relationship between the petitioner and the beneficiary. Although the petitioner claims that the beneficiary prepared the reports, the AAO observes that the documents are not signed or endorsed by the beneficiary. The writer of the reports makes several references to a manager, who appears to be a Letuie employee. The writer does not make any references to the petitioner. Instructions at the bottom of the page state that the reports should be emailed to the petitioner along with approved timesheets. However, there is no evidence in the record of the proceeding that any of the performance reports were sent to the petitioner (with the timesheets or otherwise) and/or that the petitioner received and responded to the performance reports.

The director stated in the NOID that it was unclear who created performance reports since there was no indication that they were sent to the petitioner. The petitioner and counsel did not address the director's concern in their response to the NOID. Notably, the record does not contain any information from the petitioner regarding the purpose of the performance reports; whether the reports are reviewed and analyzed; if so, by whom; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the performance reports; the consequences, if any, of failing to prepare the reports; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the documents to the matter here.

In March 2012, the petitioner provided telephone records to the director in response to the NOID. Counsel claims the documents indicate "the number the beneficiary called belongs to [REDACTED] a Teknest officer who had signed the I-129 and LCA. Hence, the Petitioner reviewed the Beneficiary's work both electronically and telephonically." The telephone records indicate that calls were made between Mr. [REDACTED] (based upon his assigned telephone numbers) and the beneficiary on approximately ten days from January 13, 2011 to April 16, 2011. Notably, many of the calls are just a few minutes in length. Some of the telephone calls occurred prior to the Employment Agreement between the petitioner and the beneficiary and before the beneficiary reportedly began to serve at Letuie. There does not appear to be any pattern or schedule to the calls. Some of the calls occurred on the same day, some occurred weeks apart. The AAO observes that the Form I-129 petition was submitted by the petitioner on behalf of the beneficiary on April 18, 2011. Thus, it appears that the telephone communication between Mr. [REDACTED] and the beneficiary ceased a few days before the Form I-129 petition was submitted to USCIS. No further telephone records were submitted to establish any telephone communication between the parties after April 16, 2011.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter 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). 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). 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. 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).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence indicates that Letuie or possibly some other future client or end client will assign the beneficiary's projects. Moreover, the day-to-day work of the beneficiary appear to be supervised and overseen by Letuie, with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client or end client. See *Defensor v. Meissner*, 201 F.3d at 388.

It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

IV. Specialty Occupation

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described by the petitioner constitutes a specialty occupation.

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics,

physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. 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. *See Defensor v. Meissner*, 201 F.3d at 387-388. 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 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²¹ The petitioner asserts that the proffered position falls under the occupational category "Computer Programmers." As previously discussed, the petitioner designated the proffered position as a Level 1 position on the LCA, which is indicative of a comparatively low, entry-level position relative to others within the occupation and that the beneficiary is only expected to possess a basic understanding of the occupation. *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

²¹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.²² However, contrary to the assertions of the petitioner and counsel, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupation:

Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field in addition to their degree in computer programming. In addition, employers value experience, which many students get through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree also gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and many other tasks that they will do on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 18, 2012).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level 1 position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

²² U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited July 18, 2012).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required 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. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers get a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty is normally required for entry into the occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships.

The *Handbook* states that most computer programmers have a bachelor's degree, but the *Handbook* does not report that it is an occupational, entry requirement.²³ The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire employees with less than a bachelor's degree, including candidates that possess an associate's degree. The *Handbook* does not support the petitioner's claim that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

The petitioner and counsel claim that the job title of the proffered position is "Computer Programmer" and, therefore, the position is a specialty occupation. Counsel suggest that further probative evidence is not required because the "employment contract explicitly states that the position is for [a] Computer Programmer" and job duties for the proffered position are contained in the petition letter and client letter. However, as discussed below, the AAO is not persuaded by counsel's claim.

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 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

²³ Even if a specific specialty were designated, the statement that "most computer programmers have a bachelor's degree" would not support the view that computer programmer positions categorically qualify as specialty occupations, as "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. For instance, the first definition of "most" in *Webster's New Collegiate Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Greatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

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 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.*

The *Defensor* court noted that evidence of the client companies' job requirements is critical where the work is performed for entities other than the petitioner. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the particular projects planned along with a comprehensive description of the duties and requirements of the proffered position from the user of the beneficiary's services as they relate to specific projects for the entire duration of the period requested, whether the ultimate user be the petitioner or an end client. This is of particular importance when petitioning for a generic position, such as "Computer Programmer."

In response to the NOID, counsel mistakenly asserts that the position of computer programmer is "a per se specialty occupation position." In support of this assertion counsel cites a memorandum entitled "*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 service center 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 adjudications; and, framed as it was, as a memorandum to NSC "Adjudication's Officers," it was addressed exclusively to NSC personnel within that director's chain of command. As such, it has no force and effect upon the present matter, which was initially adjudicated by the California Service Center and certified to the AAO for review.

It is also noted that the legacy memorandum cited by counsel does not bear a "P" designation. According to the Adjudicator's Field Manual (AFM) § 3.4, "correspondence is advisory in nature, intended only to convey the author's point of view. . . ." AFM § 3.4 goes on to note that examples of correspondence include letters, memoranda not bearing the "P" designation, unpublished AAO decisions, USCIS and DHS General Counsel Opinions, etc. Regardless, the NSC no longer adjudicates H-1B petitions and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Even if the AAO were bound by this memorandum either as a management directive or as a matter of law, it was issued more than a decade ago, during what the NSC Director perceived as a 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 did not address the computer-

related occupations as they have evolved since those decisions were issued more than a decade ago.²⁴ In any event, the memorandum reminds adjudicators that a specialty occupation eligibility determination is not based on the proffered position's job title but instead on the actual duties to be performed. For all of the reasons articulated above, the memorandum is immaterial to this discussion regarding the job duties of the petitioner's proffered position and whether the petitioner has satisfied its burden of establishing that this particular position qualifies as a specialty occupation.

The fact that a person may be employed in a position designated as that of a computer programmer 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. 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding and as initially stated by the petitioner and its client do not indicate that position is one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry. On the contrary, and as discussed in greater detail *supra*, the petitioner's initial attestations regarding the requirements for the position indicate at most that a general bachelor's degree may be required but not one in a specific specialty or its equivalent. 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 such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ

²⁴ While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry.

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.

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Programmer" at a Level 1 (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The petitioner and the client claim that the beneficiary "serves as a key technical resource to develop, implement and support complex enterprise web applications" and that the nature of the proffered position involves complex and/or specialized tasks. However, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Notably, the Employment Agreement between the petitioner and the beneficiary states that the beneficiary will "perform all duties of said engagement as they are customarily performed by a person holding said position in businesses similarly situated." The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of computer programmer.

Specifically, the petitioner failed to demonstrate how the computer programmer duties described in the record require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is

required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While related courses may be beneficial or in some cases even required to perform certain duties of a computer programmer position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other computer programmer positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of acceptable degrees for computer programming positions, including associate degrees and degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer programmer 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 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 an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner (or in this case, the client or end-client) has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, 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.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's (or 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 the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or

its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 currently or previously held 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 fact, based on the initial statements made by the petitioner and its client with regard to their own claimed educational requirements for the position, it is clear that a general bachelor's degree is sufficient to perform the duties.

As the record of proceeding contains no documentary evidence to establish a history of normally requiring at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level 1 position (out of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."²⁵ Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage of \$90,043 per year. The petitioner has not provided probative evidence to satisfy this criterion of the regulations.

²⁵ *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner 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 it has satisfied any of the additional, supplement requirements 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 director's decision will be affirmed and the petition denied for this reason.

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

As previously mentioned, 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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (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.

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

ORDER: The director's decision is affirmed. The petition is denied.