

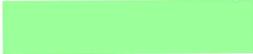


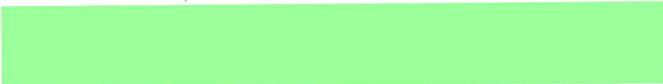
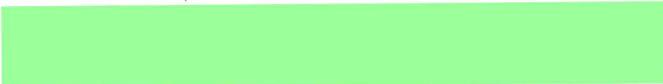
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 01 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

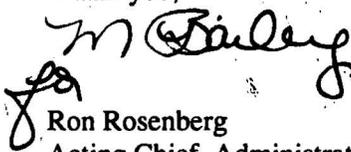
SELF-REPRESENTED

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 9, 2012. In the Form I-129 visa petition, the petitioner describes itself as a software development and IT consulting company established in 1994. In order to employ the beneficiary in what it designates as a business system analyst 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 denied the petition on May 26, 2012, finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements. In support of this assertion, the petitioner submitted a brief and supporting evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (4) the response to the RFE; (5) the director's denial letter; and (6) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in this decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for his work as required under the applicable statutory and regulatory provisions; (2) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (3) failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.¹

In this matter, the petitioner stated in the Form I-129 petition that it is a software development and IT consulting company and that it seeks the beneficiary's services as a business system analyst to work on a full-time basis for \$51,000 per year. In a letter dated April 2, 2012, the petitioner provided the following job description:

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

- Analyst designing the Risk Based Haircut and Customer Portfolio Management Systems through which the risk management of Financial instruments such as equities, options futures and options of futures is done.
- Systems help maintain margin requirements for Market makers, Broker dealers and customers at OCC[.]
- Design the system for applying Risk Based Haircut methodology based on Cox Rebenstein options valuation to Foreign Marginable securities.
- Responsibilities ranged from meeting with users, understanding their needs creation of program specification of documentation (sic), creation of testing criteria, complete beta testing and oversee the implementation of the enhancement/product.

[The beneficiary] will also review, repair and modify software programs to ensure technical accuracy and reliability of programs. Finally, he will be responsible for maintenance of system integrity and the periodic enhancement of software developed during the project cycle. He will also train clients on use of information systems and debug programs to eliminate errors.

The petitioner indicated that the beneficiary will serve on a software development project for its client, [REDACTED] (end-client), located at [REDACTED] Chicago, IL [REDACTED], through its vendor, [REDACTED] (vendor).

The petitioner also stated that the proffered position "requires the candidate to hold at least a Bachelor's degree or the equivalent in Computer Science/Electronics/Management Information Systems/Engineering or a related area." With the petition, the petitioner submitted copies of the beneficiary's diplomas and transcripts. The documentation indicates that the beneficiary was granted a Master of Science in Management (Supply Chain) from [REDACTED] in May 2009 and a Master of Business Administration in Business and Management from the [REDACTED] in May 2011. The petitioner also submitted the beneficiary's foreign academic credentials but did not provide an educational evaluation.

Moreover, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analyst" - SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position. In the LCA, the petitioner indicated that the beneficiary would work at the end-client site located at [REDACTED] Chicago, IL [REDACTED].

Furthermore, the petitioner submitted documentation in support of the petition, including the following evidence:

- Document entitled "Itinerary and Right to Control." The itinerary indicates that the beneficiary will be placed at the end-client's above mentioned location from

10/01/2012 to 10/01/2015. Under the subsection entitled "Right to Control," the petitioner states, in part, that the beneficiary "will render his services to [the petitioner] exclusively and he will function at all times under exclusive direction and control of [the petitioner]'s management." Further, the beneficiary "will be supervised, trained and his performance will be evaluated by [the petitioner]'s Manager." The document is on the petitioner's letterhead and signed by the petitioner's president.

- Offer letter signed by the petitioner and the beneficiary. The letter is dated October 20, 2011. The AAO notes that this letter was written six months prior to filing this petition and states that it is for an internship position. Specifically, the letter states that the petitioner is offering an "internship in the role of Business Systems Analyst" and that "annual salary will be \$60,000." The AAO notes that the proffered wage for the instant petition is \$51,000 per year, and it appears that the beneficiary's salary will significantly decrease. The letter further states that the "offer is contingent on [the] OPT Employment Authorization." The AAO notes that there is no evidence that the agreement between the petitioner and the beneficiary was amended, or that the parties created an addendum or other agreement specifying additional or different terms.
- Employment and Non-Disclosure Agreement between the petitioner and the beneficiary dated November 4, 2011. Regarding the beneficiary's annual salary, the agreement states "[r]efer to [the] offer letter." The AAO finds that the document is extremely vague regarding the services that the beneficiary will perform. For example, the document states "at [the petitioner's] sole discretion, [the petitioner] may place Employee with any of its Clients as a Business/Systems Analyst to work on a temporary basis with the Client while remaining as [the petitioner]'s Employee."

Further, the documents states "the [beneficiary] shall be employed as a Business/Systems Analyst responsible for providing services to [the petitioner]'s client and/or Client, as directed and/or required by [the petitioner], involving, for example, [r]equirements gathering, technical assistance in design, development support, testing, implementation, developing Use Cases and Test cases, Functional and Business Requirements analysis, training, consulting, project management, and/or related data processing and services." It is also noted that the description of the duties differs from what the petitioner provided in its support letter.

- Non-standard sub-vendor agreement between the petitioner and [REDACTED], Inc. (the vendor) dated October 19, 2011 for the petitioner to provide temporary staffing services to the "Customer." The document is signed by [REDACTED] Program Manager, for the vendor, and the petitioner's president.
- A letter dated March 28, 2012 from [REDACTED] Program Manager for the vendor stating it has a services agreement with the end-client to provide systems analyst

services. The letter identifies the petitioner as a sub-vendor and the beneficiary as the IT technical professional.

The letter lists the following skills required to perform the job offered:

1. Technical systems analyst with heavy expertise in functional specifications and design documents
2. Heavy development experience with SQL
3. The systems analyst is a key member the execut[or] of all projects [for] the customer. This person is a true technical team member that will
 - act as the liaison between the business and development teams. This person is the glue that holds the teams together. This person is
 - responsible for all of the applications design for the applications. This person will take business requirements and user needs and turn
 - them into technical design documents for the developers to create the applications from . [sic] This person also will be heavily involved in
 - the development of SQL for data processing and performing all of the backend testing for the applications. This person will act as the
 - main point of contact for the database development of the applications. This person will be a very analytical person that can create
 - robust applications. The ideal candidate will be someone for a development background that wants to get into a more business centric role.

The document does not provide any particular academic requirements. Further, the letter states "the duration of the relationship between the petitioner and beneficiary" as "three years." The AAO notes that the skills and duties required for the position differs from what the petitioner stated in the support letter. Further, the AAO notes that the letter is oddly constructed and appears to have been altered as there are lines in key areas of information.

- A letter dated March 30, 2012 from [redacted] Program Manager for the vendor stating that the beneficiary is a full-time employee for the petitioner, and will be assigned at the end-client's location. She further states that this "assignment is an ongoing one with a potential extension for the next Six years." This letter also is oddly constructed and has lines in the areas of critical information.
- Performance Appraisal Process Steps.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2012. The director acknowledged that the petitioner had submitted various documents in support of the petition, but found that the evidence was insufficient to establish that a valid employer-employee relationship will exist for the duration of the period

requested. The director outlined the types of evidence to be submitted. Furthermore, the petitioner was notified that it may submit any and all additional evidence that it believed would establish eligibility for the benefit sought.

The petitioner responded to the RFE by submitting a brief and additional evidence. In a letter May 14, 2012, the petitioner stated that it is "the actual employer and has the responsibility for paying, supervising, terminating and controlling the work of its employees, [i]ncluding [the beneficiary]." The petitioner submitted the same description of duties previously provided.

The petitioner further stated the "Business Analyst/Specialist position at [the petitioner's organization] is a professional position requiring an individual with at least the equivalent of a Bachelor's degree in Computer Science, Engineering, **Business, Math, Physics** or a related technical field or equivalent (emphasis added)." The AAO notes that this statement of the academic requirement for the proffered position differs from the petitioner's previous statement. That is, in the letter of support submitted with the initial petition, the petitioner claimed a requirement of a degree in computer science, **electronics/management information systems/engineering** or a related area (emphasis added). No explanation was provided.

Further, the petitioner claimed that the "educational requirement is confirmed by the most closely related position in the O*NET and the Occupational Outlook Handbook, (Computer and Information Systems Managers, 11-3021)."

In addition, the petitioner submitted the following documents:

- Non-Secondary Supplier Service Agreement-Named Customer Only between the petitioner and the vendor. The document lists the petitioner as a "secondary supplier" who assigns its employees to the end-client through the vendor. However, the document does not establish the duties to be performed or the employees to be assigned. In the section described as "Job Descriptions," it states that the petitioner "agrees to assign its employee(s) listed in the attached Exhibit B Work Order ("Work Order") to [end-client] in order to perform the Work described in Exhibit A for Customer." However, the document does not have the exhibits attached.
- Vendor's timesheet for the beneficiary from April 14 to 28, 2012. It is noted that the worksite location is listed as [redacted] Keller, TX. The managers are listed [redacted] and [redacted]. The record of proceeding does not establish who employs [redacted] and [redacted].
- Petitioner's Project Delivery Organization Chart. The chart only lists various job titles but only identifies the beneficiary and another lead business analyst by name. The AAO observes that the managers named in the vendor's timesheet are not listed on the petitioner's organization chart, suggesting that the managers are not employed by the petitioner.
- Pay statements issued by the petitioner to the beneficiary from March 16 to April 30, 2012.

- End-client's timesheet for the beneficiary from November 6 to 12, 2011, and April 1 to May 5, 2012. The beneficiary's position title is "consultant" and the manager is listed as [REDACTED] and the project lead is [REDACTED]. The timesheet for November 2011 lists the task as "Admin-General & Administrative" which is recorded as 40 hours and also lists "AD Design," but does not allocate any time spent on the category. The task described for April to May 2012 is "AD Design." No further information is provided.
- A "Benefits Proposal" prepared by [REDACTED] for the petitioner.
- Certificate from the Treasurer of the State of New Jersey stating that the petitioner is an active business in good standing as of May 2012.
- A copy of the petitioner's lease agreement.

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on May 26, 2012. The petitioner submitted an appeal of the denial of the H-1B petition.²

The matter is now on appeal before the AAO. The AAO reviewed the record of proceeding in its entirety and will make some preliminary findings 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 of proceeding. Notably, there are significant discrepancies in the record of proceeding with regard to the proffered position. These material conflicts, when viewed in the context of the record of proceeding, undermine the claim that the petitioner has established eligibility for the benefit sought under the pertinent statutory and regulatory provisions.

The petitioner has provided inconsistent information as to the nature and requirements for the proffered position. For example, in the letter of support submitted with the initial petition, the petitioner claimed a requirement of a degree in computer science, **electronics/management information systems/engineering** or a related area. In response to the RFE, the petitioner claimed that the position requires a degree in computer science, engineering, **business, math, physics** or a related technical field or equivalent. The petitioner has provided inconsistent statements regarding the academic requirements for the proffered position. No explanation for the variance was provided.

² With the appeal, the petitioner submitted additional evidence. However, the AAO notes that the petitioner was put on notice that the evidence submitted with the initial petition was not persuasive in establishing eligibility for the benefit sought and given a reasonable opportunity to provide additional evidence for the record before the visa petition was adjudicated. The petitioner failed to submit the evidence with the initial petition or in response to the RFE and now the petitioner attempts to submit it on appeal. Notably, the petitioner did not provide a valid reason for failing to previously submit the documentation. The AAO is not required to consider evidence that was encompassed in the RFE but submitted for the first time on appeal for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Notably, the vendor did not state that the position requires any particular education level. Moreover, the petitioner did not provide any documentation from the end-client to establish the requirements for the proffered position. 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 made assertions regarding the qualifications required for the proffered position, it failed to submit probative and credible evidence to substantiate its 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).

Moreover, as previously mentioned, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position.³ In response to the RFE, the petitioner claimed that the "educational requirement is confirmed by the most closely related position in the O*NET and the Occupational Outlook Handbook, (Computer and Information Systems Managers, 11-3021)."⁴

With respect to the LCA, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer

³ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See 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.

⁴ For more information about prevailing wage for Computer and Information Systems Managers-SOC (ONET/OES Code) 11-3021 in Cook County, Illinois, see <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-3021&area=16974&year=12&source=1> (last visited March 13, 2013).

shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Computer Systems Analysts" as \$50,939 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Computer and Information Systems Managers" is listed as \$72,114 per year. Thus, the prevailing wage for "Computer Systems Analysts" is significantly lower than the prevailing wage for "Computer and Information Systems Managers." According to DOL guidance, if the petitioner believed its position fell under the occupational category "Computer and Information Systems Managers" (or was a combination of the occupations "Computer Systems Analyst" and "Computer and Information Systems Managers"), it should have chosen the relevant occupational code for the highest paying occupation – in this case "Computer and Information Systems Managers." However, the petitioner selected the occupational category for the lower paying occupational category for the proffered position on the LCA.⁵

⁵ The AAO notes that the petitioner classified the position in the LCA as falling under the occupational category "Computer Systems Analysts." It must be noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

The AAO notes that 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 petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupation at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position and that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the nature of the petitioning entity, the exact position offered, the location of employment, the proffered wage, et cetera. 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.

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 of course change a material term and condition of employment. However, such a change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition, with fee and a valid LCA, for USCIS to consider. See 8 C.F.R. § 214.2(h)(2)(i)(E).

In the instant case, the petitioner has provided inconsistent information as to the nature of the proffered position by classifying the business system analyst position on the LCA under the occupational category "Computer Systems Analysts," but, thereafter, claiming the "educational requirement is confirmed by the most closely related position in the O*NET and the Occupational Outlook Handbook, (Computer and Information Systems Managers, 11-3021)." The petitioner's request to reconsider the original petition as a petition for a different occupational classification is, therefore, rejected.

The next issue that the AAO will address is whether the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter and that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee" in accordance with the applicable statutory and regulatory provisions.

To establish eligibility for H-1B classification, a petitioner demonstrate that it is qualified to file a 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). (In the instant case, the petitioner does not claim to be a U.S. agent.) Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

The record is not persuasive in establishing that the petitioner 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, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify

aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

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

"United States employer" to be even more restrictive than the common law agency definition.⁶

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.*

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See 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).

Darden, 503 U.S. at 318-319.⁷

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁸

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties,

⁷ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

The 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 beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. As previously mentioned, 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. 591.

In the instant case, the AAO notes that while the petitioner and vendor claim that the beneficiary will be working for the end-client located at [REDACTED] Chicago, Illinois [REDACTED] the record of proceeding lacks probative evidence from the end-client to establish the duties of the proffered position, requirements for the position, nature of the project and place of employment. The only documents in the record from the end-client are timesheets but they are insufficient to establish the nature of the beneficiary's employment. For example, the timesheets list the beneficiary's title as "consultant" and the task as "AD Design" but there is no further information regarding the beneficiary's actual duties, the requirements for the position and the location of the position. On appeal, the petitioner claims that "[d]ue to some legal/confidentiality aspects and as per the agreement between the Vendor [REDACTED] and end-client [REDACTED] the vendor could not provide the agreement and other related documents." The petitioner did not submit similar or secondary evidence. See 8 C.F.R. § 103.2(b)(2).

While the petitioner never specifically claimed that the evidence was privileged, the AAO notes that the petitioner claimed that it failed to submit the evidence "[d]ue to some legal/confidentiality aspects." While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to

provide such a document if that document is material to the requested benefit.⁹ Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977). Notably, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Here, while the petitioner makes various assertions regarding the beneficiary's employment, the record lacks sufficient documentary evidence to support the claims.

In the instant case, the petitioner did not provide any documentation from the end-client establishing the length of the project. Notably, the petitioner submitted letters from [REDACTED] that provide inconsistent information as to the length of the project. More specifically, a letter from [REDACTED] of [REDACTED] dated March 28, 2011 states that "[t]his project is expected to extend through November 2015 with the opportunity for extensions." In a letter dated March 30, 2011, [REDACTED] claims that "[t]his assignment is an ongoing one with a potential of extension for the next Six years." The record does not provide the basis for [REDACTED] assertion that the project will extend through November 2015 or her assertion (two days later) that the assignment has the potential to be extended for the next six years. Moreover, the record does not contain a written agreement between the [REDACTED] and [REDACTED] establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

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.

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

⁹ Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

(b)(6)

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

* * *

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

As previously noted the offer letter dated October 20, 2011 appears to have been issued during the beneficiary's optional practical training period, and is devoid of several critical aspects of the beneficiary's employment such as the actual position being offered and duties for the proffered position. Further, the Employment and Non-Disclosure Agreement dated November 4, 2011 is extremely vague regarding the services that the beneficiary will perform. For example, the documents states "the Employee shall be employed as a Business/Systems Analyst responsible for providing services to [the petitioner]'s client and/or Client, as directed and/or required by [the petitioner], involving, for example, [r]equirements gathering, technical assistance in design, development support, testing, implementation, developing Use Cases and Test cases, Functional and Business Requirements analysis, training, consulting, project management, and/or related data processing and services." 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.

The AAO observes that the description of the duties in the Employment and Non-Disclosure Agreement differs from the description provided by the petitioner in its support letter and in its response to the RFE. In addition, it is noted that the vendor's letter March 28, 2012 provides a different description of generic duties for the proffered position, such as acting "as a liaison between the business and development teams"; "responsible for all of the applications design for the applications"; and "will take business requirements and user needs and turn them into technical design documents."

Furthermore, the offer letter indicates that the beneficiary will be paid a salary of \$60,000 per year. However, in the Form I-129 petition, LCA and letter of support, the petitioner stated that the beneficiary would be paid \$51,000 per year. Thus, it appears that the position offered to the beneficiary has changed since the issuance of the offer letter, since the beneficiary's salary has been reduced by \$9,000 per year. Notably, no explanation was provided.

The Employment Agreement also references "Medical and Dental Coverage benefits as per company policy." However, a substantive determination cannot be inferred regarding these "benefits." The petitioner submitted a benefits proposal for the petitioner created by [REDACTED]. The evidence does not indicate that the petitioner accepted the proposal and offered the benefits coverage to its employees (and specifically the beneficiary). Moreover, even if such a proposal was accepted by the petitioner, the record of proceeding lacks sufficient information

regarding the eligibility requirements for the plans. For example, the proposal differentiates eligibility for "All Active Full-Time employees in the class" and "Temporary or seasonal employees." There is no indication as to how the proffered position would be classified.

The petitioner also submitted printouts of the beneficiary's timesheets. The documents appear to be the vendor's time records and the end-client's time records (not the petitioner's). More specifically, the petitioner submitted a printout which includes the [REDACTED] name along with copyright information for [REDACTED] (the parent company of [REDACTED]). In addition, the website address of the link indicates, in pertinent part, [REDACTED]. Additionally, the petitioner submitted timesheets that state [REDACTED]. The website, in pertinent part, states [REDACTED]. The documents do not include any information regarding the petitioner.

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The record of proceeding provides insufficient probative evidence on this issue. For example, it must be noted that the petitioner claims that the beneficiary will be physically located in Chicago, Illinois. The petitioner is located approximately 780 miles away in Piscataway, New Jersey, raising serious questions as to who will 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 and/or other similarly probative documents.

The petitioner's response included an organizational chart depicting its staffing hierarchy. As previously mentioned, the chart shows the beneficiary as reporting to a lead business analyst. The document does not contain the name of the beneficiary's supervisor. Furthermore, the petitioner did not submit a description of the supervisor's job duties and/or other probative evidence on the issue. Aside from the organizational chart, the record of proceeding does not contain any documentation to establish that the petitioner has supervised or would supervise the beneficiary. Furthermore, there is no evidence that the lead business analyst (as listed in the organizational chart) has had any contact with the beneficiary.¹⁰

In response to the RFE, the petitioner states that it "has the sole authority to supervise and manage [the beneficiary's] work" and that the beneficiary "will update his direct supervisor, about his work by email on a weekly basis and physically meets with his supervisor as and when required to discuss tasks." However, the petitioner fails to provide any specific information regarding the beneficiary's supervisor (e.g., supervisor's name, role, location, employer). Further, the petitioner did not submit any email correspondence or other probative evidence to establish that the beneficiary has been supervised or even had any contact with the referenced supervisor. That is, the

¹⁰ 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.

record is devoid of any evidence establishing that the petitioner has supervised, directed, guided or even contacted the beneficiary electronically or in person ("physically meets").

Notably, the record of proceeding contains timesheets from the vendor and the end-client, which list the names of managers. Specifically, [REDACTED] is listed as the manager on the [REDACTED] timesheets. Furthermore, [REDACTED] and [REDACTED] are listed as the Managers on the [REDACTED] timesheets. However, there is no evidence to establish that [REDACTED] and/or [REDACTED] are employed by the petitioner. The documents do not contain their specific job titles and/or roles within the project. There is no evidence that the beneficiary has had any contact with [REDACTED] or [REDACTED] aside from perhaps submitting time records to them.

Further, as acknowledged, the record also contains a document entitled "Performance Appraisal Process Steps." However, the AAO finds that the document is a general template that can be commonly found in the Internet and does not provide any specific criteria with regard to the petitioner's operations and/or the proffered position. For example, the document does not relate any specificity or details regarding this particular position and the beneficiary's performance, including who specifically will appraise the beneficiary's performance; the frequency of evaluations for this particular position; the appraisal criteria for this particular position; how work and performance standards are established for this particular position; the methods for assessing and evaluating the beneficiary's performance for this particular position; and the criteria for determining bonuses and salary adjustments for this particular position.

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 petitioner stated in the RFE that [REDACTED] will provide the hardware instrumentalities of work." Thus, in the instant case, the petitioner will not provide the instrumentalities and tools required for the beneficiary to perform the duties of the proffered position.

The AAO reviewed the record in its entirety and 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. It is not sufficient to establish eligibility in this matter for the petitioner to merely claim that it will be responsible for hiring, firing, supervising, and controlling the employment. 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). As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 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 that the beneficiary will not use the tools and instrumentalities of the petitioner. Moreover, the petitioner has not established that it will supervise and oversee the day-to-day work of the beneficiary. It appears that the petitioner's role is 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). That is, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In the instant case, as previously discussed, the petitioner has provided inconsistent information regarding its academic requirements. The petitioner claimed in a letter dated April 2, 2012 that the position "requires the candidate to hold at least a Bachelor's degree or the equivalent in Computer Science/Electronics/Management Information Systems/Engineering or a related area." However, in response to the RFE, the petitioner stated that it requires "an individual with at least the equivalent of a Bachelor's degree in Computer Science, Engineering, Business, Math, Physics or a related technical field, or equivalent." No explanation for the variance was provided.

In addition to providing inconsistent requirements for the position, the AAO observes that the documents do not establish that a bachelor's degree in a specific specialty is required for the position. For instance, the petitioner lists various disciplines as acceptable for entry into the position. In general, 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 two disparate fields, such as physics and business, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," 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. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in "Computer Science/Electronics/Management Information Systems/Engineering" and/or a degree in "Computer Science, Engineering, Business, Math, Physics."¹¹ The issue here is that it is not readily apparent that all of these fields of study are closely related or that all of the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

¹¹ Moreover, in the instant case, the petitioner indicated that a bachelor's degree in engineering is acceptable for the proffered position. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to all of the other disciplines listed, or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that disciplines are closely related fields of study or (2) that the all of the fields are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, 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 administration, 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).

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Moreover, the AAO notes that in the letter provided by the vendor dated March 28, 2012, the vendor lists the skills required as "heavy expertise in functional specifications and design documents" and "heavy development experience with SQL." The letter from the vendor does not state any particular academic requirements for the position, but simply lists skills. Thus, the documentation does not establish that a baccalaureate of higher degree in a specific specialty, or its equivalent is required for the proffered position.

Further, 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. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the 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.

In the instant case, the record of proceeding is devoid of substantive information from the end-client regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain any documentation on this issue from, or endorsed by the end-client that will actually be utilizing the beneficiary's services (according to the petitioner).

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.¹² For this additional reason, the appeal will be dismissed and the petition denied.

Moreover, beyond the decision of the director, the AAO will now address another basis for denial of the petition. More specifically, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations,

¹² A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications in this matter.

and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

Here, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a business systems analyst at [REDACTED] Chicago, IL [REDACTED] for the period sought in the petition. For example, in the letter of support dated April 2, 2012, the petitioner claimed that the beneficiary is "currently working as a Business Systems Analyst, at [REDACTED] Chicago IL USA." The petitioner submitted pay statements issued in March 2012 to the beneficiary indicating his address as [REDACTED] in Edison, New Jersey. The documents indicate New Jersey taxes/deductions were withheld.

Later, in response to the RFE, the petitioner submitted additional pay statements issued to the beneficiary in May 2012. The beneficiary's address is listed as [REDACTED] in Chicago, Illinois. The documents indicate New Jersey taxes/deductions were withheld. In the same submission, the petitioner provided [REDACTED] timesheets for the beneficiary, for April 2012, listing the beneficiary's "Worksite Location" as [REDACTED] Keller, Texas.

Although the petitioner claimed in the initial petition that the beneficiary had been working and would continue to be employed at the [REDACTED] location in Chicago, IL, the AAO observes that the petitioner provided documentation that is not consistent with the claim. No explanation was provided. Without further evidence, it appears that the beneficiary will work at multiple locations at some point during the requested period of employment and that the petitioner failed to provide this information in the itinerary when it filed the Form I-129 in this matter. Thus, the petition must also be denied on this additional basis.

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 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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.¹³ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

¹³ As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the petition cannot be approved for the above stated reasons, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.

(b)(6)

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