



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 02 2013

OFFICE: VERMONT 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.

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 rejected.

The petitioner submitted a Form I-129, Petition for Nonimmigrant Worker, to the Vermont Service Center on April 1, 2011. In the Form I-129 visa petition, the petitioner describes itself as a software development and consulting company established in 1988. In order to employ the beneficiary in what it designates as a business consultant 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 November 14, 2011. Subsequently, a Form I-290B, Notice of Appeal or Motion, signed by counsel was filed on December 16, 2011. A new, completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, was submitted with a Form I-290B. The Form G-28 includes the name of the petitioning company and lists [REDACTED] as the petitioner's designated authorized official. However, comparing the signatures in the record of proceeding, the AAO observed that the signature on the new Form G-28 for [REDACTED] is visibly different from signatures on other forms in the record of proceeding for [REDACTED].

On January 25, 2013, the AAO sent the petitioner a notice requesting clarification on the issue of the signature on the Form G-28 that accompanied the Form I-290B.¹ The petitioner's designated authorized official, [REDACTED], responded to the request. He confirmed that he is an authorized official of the petitioning company. He further stated that he "did not personally sign the Form G-28 Notice of Entry of Appearance as Attorney or Accredited Representative" submitted with the appeal and that he "do[es] not now remember, more than one year later, whom [he] authorized to sign the G-28."

The general requirements for filing benefit requests are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .

The petitioner must establish eligibility at the time of filing the benefit request. Specifically, the regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part, the following:

¹ The AAO notes that there are a numerous possibilities as to the reason the signature on the Form G-28 appeared to be visibly different from the signatures on other documents in the record of proceeding. Accordingly, the AAO sent a notice to the petitioner requesting an explanation. In response to the request, [REDACTED] (the person designated on the Form G-28 as the petitioner's authorized representative) stated that he did not personally sign the Form G-28, and that he is not able to identify who signed the form. Upon review of the response, the AAO determined that there is no evidence to indicate that the person who signed the Form G-28 was an affected party in this proceeding.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS [U.S. Citizenship and Immigrations] instructions.

Title 8 C.F.R. 292.4(a), states, in pertinent part, the following:

The form [Form G-28] must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation in order for the appearance to be recognized by DHS.

Moreover, in accordance with the regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative] must be filed with an appeal filed with the Administrative Appeals Office." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). Furthermore, the instructions to the Form G-28 state that the petitioner must sign the form.

The regulation at 8 C.F.R. § 103.2(a)(2) provides:

Signature. An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

There is no regulatory provision that waives the signature requirement for a petitioning U.S. employer.² The regulation generally requires a handwritten signature unless the petition is filed

² To be valid, 28 U.S.C. § 1746 requires that declarations be "subscribed" by the declarant "as true under penalty of perjury." In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: "Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury."

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration "for" another. Without the authorized official's actual signature as the declarant, the declaration is completely robbed of evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D. Cal.) (not selected for publication).

electronically. It makes no provision for proxy signatures, unless the person is less than 14 years old or mentally incompetent.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part, the following regarding the term "affected party":

- (B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. . . . An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. Specifically, the regulation at 8 C.F.R. § 103.3(a)(2)(v) states the following:

- (A) *Appeal filed by person or entity not entitled to file it—(1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

An attorney for a petitioner may properly file an appeal on behalf of a petitioning entity in certain circumstances. However, the regulation at 8 C.F.R. § 103.2(a)(3) provides that where a notice of representation on a Form G-28 is "not properly signed, the benefit request will be processed as if the notice had not been submitted."³

The AAO notes that the integrity of the immigration process depends on the authorized official signing the immigration forms. Allowing someone other than the petitioner's designated authorized official to sign a form on behalf of the petitioner would leave the immigration system open to fraudulent filings.⁴

In the instant case, under penalty of perjury of the laws of the United States, the petitioner's designated official stated that he did not sign the Form G-28 in his/her authorized capacity on behalf of the petitioner, and that the identity of the person who signed the form is not known. There is no

³ Not only does the petitioner's signature on the Form G-28 authorize representation by an attorney or accredited representative in matters before USCIS, it serves as consent to disclose information covered under the Privacy Act of 1974. The Immigration and Naturalization Service (legacy INS) first implemented the requirement that a petitioner or applicant sign the Form G-28 in the final rule "Changes in Processing Procedures for Certain Applications and Petitions for Immigration Benefits" 59 Fed. Reg. 1455 (Jan. 11, 1994). The agency emphasized that the "petitioner must sign the Form G-28 to definitively indicate to the Service that he or she has authorized the person to represent him or her in the proceeding." *Id.*

⁴ The AAO notes prior examples where individuals have been convicted of various charges, including money laundering and immigration fraud, after signing immigration forms of which the employer had no knowledge. *United States v. O'Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case No. 1:02CR00502 (E.D. Va. December 11, 2002).

evidence in the record of proceeding to indicate that the petitioner's authorized official delegated his signature authority under the exceptions permitted by the regulation. Moreover, the petitioner does not claim, and there is no evidence to support an assertion, that the person who actually signed the Form G-28 was an affected party ("the person or entity with legal standing") in this matter. Accordingly, the individual who actually signed the Form G-28 and his/her legal representative have no legal standing in this proceeding. Thus, counsel was not authorized to file the appeal in this matter. Accordingly, the AAO finds the appeal was not filed by an affected party to the proceeding, and must be rejected.⁵

The appeal must be rejected, thus rendering the remaining issues in this proceeding moot. Accordingly, the AAO does not need to examine the director's basis for denial of the petition. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's finding that the petitioner has not established eligibility for the benefit sought. Had the appeal not been rejected, the AAO, nevertheless, would have dismissed the appeal. Moreover, the AAO notes that even if the petitioner had overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought as there are additional issues that preclude the approval of the H-1B petition.

In this matter, the petitioner stated in the Form I-129 petition that it is a software development and consulting company and that it seeks the beneficiary's services as a business consultant to work on a full-time basis.

On the form I-129 (Part 1, Question 3), the petitioner listed its address as [REDACTED]. The petitioner was asked in the Form I-129 (Part 5, Question 3) to provide the "Address where the beneficiary(es) will work if different from address in Part 1. (Street number and name, city/town, state zip code)." The petitioner stated, "Same as Part 1." However, on the Form I-129 (Part 5, Question 5), the petitioner indicated that the beneficiary would work off-site. Additionally, in the Form I-129 H-1B Data Collection Supplement (page 19), in the section entitled "**Part D. Off-Site Assignment of H-1B Beneficiaries**" (emphasis in the original), the petitioner responded to all three questions in the affirmative. The petitioner's response confirmed that the "beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought."

In a letter dated March 30, 2011, the petitioner provided the following job description for the proffered position:

As a Business Consultant, [the beneficiary] is responsible for suggesting and implementing methods to improve efficiency and reduce business costs for [the petitioner's] clients, in a variety of business environments-Finance, Distribution, Data Warehousing, Manufacturing, and other public and private sector operations. He consults with various organizational units within the client site to analyze

⁵ If the petitioner wishes to pursue H-1B classification for the beneficiary, it may, of course, file a new, properly executed Form I-129, accompanied by the required filing fee(s) and supporting evidence, for consideration by USCIS.

requirements and identify problems. He then establishes a business plan to improve efficiency and address business concerns.

Additionally, the petitioner stated that it "wishes to temporarily employ [the beneficiary] in H-1B status in the position of Business Consultant based out of [the petitioner's] office in [redacted]

Furthermore, in the letter of support, the petitioner claimed that the academic requirement for the proffered position is a "Bachelor's degree (or higher) in Business, Computer Science, Engineering, or a related field, plus a strong background in Enterprise Resource Planning ("ERP") and business analysis." The petitioner asserted that the business consultant must "also be well-versed in the technological aspects of implementation and have knowledge of general business structure and operations."

Further, 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 System Analysts" – SOC (ONET/OES Code) 15-1051, at a Level I wage rate.⁶ Notably, the certified LCA indicates that the beneficiary will work only at the petitioner's business location in [redacted]. No other places of employment were provided.

In addition, the petitioner submitted a forty-page document described by counsel as "web site excerpts." The documentation provides some general insights into the petitioner's history, various services, location of its offices, offshore projects, and lists its clients and "strategic alliances." The petitioner also provided documentation relating to the beneficiary, including a copy of his passport, resume, foreign academic credentials, and an educational evaluation.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and

⁶ 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.

issued an RFE on May 31, 2011. The director noted that the petition was filed with an unclear itinerary of employment, based on the nature of the petitioner's business and the beneficiary's proffered job duties. The director further noted that while the petitioner indicated that the beneficiary will be performing services at the petitioner's address, the record does not contain evidence of an in-house project. The director specifically requested the petitioner provide a complete itinerary of services with the dates and locations of the services and submit probative evidence to establish an employer-employee relationship with the beneficiary. The director also requested additional evidence to establish that the beneficiary's degree in textile engineering qualifies him for the proffered position as a business consultant. The director indicated that the petitioner must submit probative evidence to establish eligibility for the benefit sought and outlined the types of evidence to be submitted. Additionally, the petitioner was notified that it may submit any additional evidence it believed would establish eligibility.

Counsel for the petitioner responded to the RFE by submitting a brief and additional evidence.⁷ More specifically, counsel response included the following documentation:

- A brochure, which provides general information regarding the petitioner's business services (four-pages in length);
- The previously submitted forty-page "web site excerpts";
- Additional website printouts that provide general information regarding the petitioner's business (approximately fifty-pages in length, although some of the pages are blank);
- A 28-page proposal prepared by the petitioner for [REDACTED] (dated February 8, 2011);
- A one page document that counsel describes as the beneficiary's "assignments for the month of June, July and August";
- Documents described by counsel as "sample contracts [that] are provided to document the company's business though [the beneficiary] has not been assigned to these clients" (approximately 60+ pages in length);
- Unsigned copies of the petitioner's 2009 and 2010 tax returns (approximately 100

⁷ In response to the RFE, counsel provided a revised description of the duties of the proffered position. It is noted that this expanded description of the duties of the proffered position is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbenà*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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pages in length);

- Photographs – a few of the photos are identified as the petitioner's business location, however, the petitioner did not provide any identifying information for the majority of photographs (specific location, people being photographed);
- Documentation regarding the petitioner's insurance programs (approximately sixty-pages in length);
- The petitioner's employee handbook (approximately 36-pages in length);
- A one-page organizational chart;
- Form W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 2008, 2009 and 2010 (each one-page in length);
- Copies of pay statements issued by the petitioner to the beneficiary in 2011 (eleven pages);
- Timesheet Data and Travel Expense Reports, along with receipts, for the beneficiary (approximately 85-pages);
- Unsigned lease agreement for the petitioner (approximately 40+ pages in length);
- ADP Quarterly Statement of Deposits and Filings (approximately nine-pages in length);
- Resubmission of the educational evaluation of the beneficiary's foreign academic credentials (seven-pages in length); and
- Excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding the occupational category "Computer Systems Analysts" (six-pages in length).

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on November 14, 2011. Counsel submitted an appeal of the denial of the H-1B petition.

Based upon a complete review of the record of proceeding, the AAO will note some findings that are material to the determination of the merits of this appeal.

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.

While the petitioner has identified its proffered position as that of a business consultant, the description of the beneficiary's duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a such a description may be appropriate when defining the range of duties that are performed within an occupation, such a generic description cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval as there is insufficient information regarding how the beneficiary's duties will be allocated during the requested validity period. The petitioner has not established that the beneficiary's overall day-to-day duties, for the entire period requested, would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. That is, in establishing a position as a specialty occupation, 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. In the instant case, the job description fails 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.

The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary is "responsible for suggesting and implementing methods to improve efficiency and reduce business costs for [the petitioner's] clients, in a variety of business environments." The statement fails to sufficiently define how this translates to specific duties and responsibilities. The phrase "responsible for suggesting and implementing" does not delineate the actual work the beneficiary will perform, and the petitioner does not explain the beneficiary's specific role in "suggesting and implementing." As so generally described, the statement does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. The petitioner also claims that the beneficiary "consults with various organizational units within the client site to analyze requirements and identify problems." The petitioner does not identify such information as with whom the beneficiary will consult, which organizational units are involved, the method(s) used, types of problems he will identify, etc. The statement fails to provide any particular details regarding the demands, level of responsibilities and requirements of this task. This is further illustrated by the petitioner's statement that the beneficiary "establishes a business plan to improve efficiency and address business concerns." The statement fails to provide any specifics regarding the beneficiary's role in "establish[ing] a business plan" and it does not provide any information as to the complexity of the job duties, the amount of supervision required, and the level of judgment and understanding required to perform the duty. Furthermore, the general phrase "improve efficiency and address business concerns" could cover a range of issues, and without further information, does not provide any insights into the beneficiary's day-to-day work. Additionally, the petitioner did not provide any

information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks are major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Upon review of the record of proceeding, the AAO finds that the overall responsibilities for the proffered position contain insufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their daily performance. Furthermore, although the petitioner submitted general documentation regarding its services, the petitioner did not provide sufficient documentation to establish and substantiate the actual job duties and responsibilities of the proffered position. The petitioner failed to establish the beneficiary's specific role within its business operations.

Additionally the AAO observes that the petitioner stated the academic requirement for the proffered position as a bachelor's degree or higher in business, computer science, engineering, or a related field. Notably, 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., business, 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).

To begin with, the petitioner claims that a degree in one of several disciplines (i.e., business, computer science, or engineering) is sufficient for the proffered position. 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, such as philosophy and engineering, 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 states that its minimum educational requirement for the proffered position is a bachelor's degree in "Business, Computer Science, Engineering, or a related field." Absent evidence to the contrary, the fields of business, computer science and engineering are not closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Moreover, the petitioner's statement that a bachelor's degree in business is an adequate academic credential to perform the duties of the proffered position suggests that a degree in a specific specialty is not required for the proffered position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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 business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

That is, to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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).⁸

Furthermore, the petitioner claims that a 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

⁸ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

engineering or nuclear engineering, is closely related to business and computer science 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 business, computer science and engineering in general are closely related fields, or (2) that engineering or any and all engineering specialties 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.

In the appeal brief, counsel claims that the beneficiary "has been employed by [the petitioner] in the specialty occupation of Business Consultant since 2008 in valid L1B status." The AAO finds no merit in counsel's contention that the grant of L-1B classification is relevant to these proceedings as to whether the proffered position qualifies as a specialty occupation. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty occupation petitions provide for the approval of an H-1B petition on the grounds argued by the petitioner's counsel, or even indicate that USCIS decisions on L-1B adjudications are relevant to the adjudications of Form I-129 H-1B petitions. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. It may not rely on a previous grant of L-1B classification to establish eligibility for H-1B classification.

Moreover, in the appeal, counsel claims that the RFE response "included over 500 pages of documents evidencing its availability for specialty occupation work in the form of client contracts, a thorough explanation of the Petitioner's right to control, and evidence of the Beneficiary's role in a specialty occupation." The AAO reviewed the record in its entirety and notes that the majority of the documentation relates to the petitioner's business operations.⁹ However, the evidence submitted fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. The AAO reminds counsel that it is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence.

⁹ The AAO reviewed all of the documentation submitted and notes that approximately 100 pages of the submission consisted of the petitioner's tax returns, another 40 pages consisted of the petitioner's unsigned lease agreement, 60 pages of information regarding the petitioner's insurance programs was provided, another 60 pages of "sample contracts" unrelated to the beneficiary's assignment was provided. Additionally, counsel submitted a 40 page document of "web site excerpts" that had been previously provided with the initial petition, along with other evidence. The AAO examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence.

The AAO will now discuss the issue of whether the petitioner has 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). To establish eligibility for the benefit sought, the petitioner must demonstrate that it meets the regulatory definition of a United States employer. *Id.* Based upon a complete review of the record of proceeding, the AAO finds that 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 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.¹⁰

¹⁰ While the *Darden* court considered only the definition of "employee" under the Employee Retirement

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 318-319.¹¹

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).

¹¹ 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

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).¹²

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

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

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and

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))).

¹² 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).

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

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

* * *

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

The petitioner did not provide a written contract or any other document executed between the petitioner and the beneficiary. In the instant case, the petitioner claims that the beneficiary has served as its business consultant since 2008. In the letter of support dated March 30, 2011, the petitioner stated that "[n]o contract of employment has been entered into between [the petitioner] and [the beneficiary]."

Counsel provided a copy of the petitioner's Employee Handbook, which counsel claims "inform[s] the company employees about its office policies and procedures during employment with the company." Notably, the introduction section of the handbook specifically states that "this Handbook should not be construed as, or be considered evidence of, a contract or a guarantee of any kind." The AAO notes that the last page titled "Acknowledgement of Receipt and Consent of Employee Handbook" is not signed by the beneficiary. Moreover, the Handbook also states the following:

NO MANAGER OR REPRESENTATIVE OF [THE PETITIONER] HAS THE RIGHT OR THE AUTHORITY TO ENTER INTO ANY VERBAL CONTRACT

OF EMPLOYMENT OF ANY KIND. ALL CONTRACTS RELATING TO EMPLOYMENT MUST BE IN WRITING AND SIGNED BY AN OFFICER OR OFFICERS OF [THE PETITIONER].

The Handbook indicates that it is the petitioner's policy not to enter into "ANY VERBAL CONTRACT OF EMPLOYMENT OF ANY KIND" and that all employment contracts must be in writing and signed by the petitioner. In the instant case, no such evidence was submitted.

Upon review of the document, the AAO observes that the Handbook distinguishes "staff" from "consultants." Additionally, the Handbook states the following in reference to the period between assignments of projects for consultants:

"Bench time" refers to the time between assignments of projects, when Consultants are expected to work "in house." At [the petitioner's] discretion, [the petitioner] may request that a Consultant return to the original country from which his or her H-1B Visa is approved, or require the Consultant to use his/her unused vacation during Bench Time.

Thus, based upon the Employee Handbook, it appears that the petitioner may not have ongoing in-house work to assign to those who are designated as consultants. The Handbook states that consultants in H-1B classification may be requested to leave the country or be required to use unused vacation time. The AAO reminds the petitioner of its wage obligations for H-1B nonimmigrants in nonproductive status. Specifically, 20 C.F.R. 655.731(c) provides, in pertinent part, the following:

(7) Wage obligation(s) for H-1B nonimmigrant in nonproductive status--

(i) Circumstances where wages must be paid. If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA.

* * *

(ii) Circumstances where wages need not be paid. If an H-1B nonimmigrant experiences a period of nonproductive status due to *conditions unrelated to employment* which take the nonimmigrant away from his/her duties *at his/her voluntary request and convenience* (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided

that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). Payment need not be made if there has been a *bona fide termination of the employment relationship*. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(Emphasis added.) As noted above, the petitioner must continue to pay an H-1B employee who is not performing work if it is due to nonproductive status at the direction of the petitioner. The petitioner must pay the employee the required wage. This does not include circumstances due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience or render the nonimmigrant unable to work. Furthermore, the petitioner is not required to pay an H-1B employee if there has been a bona fide termination of the employment relationship as described above.

Counsel stated in response to the RFE that the beneficiary "was hired [by the petitioner] on March 3, 2008 and has been continually employed by [the petitioner] ever since." The petitioner submitted copies of the beneficiary's Form W-2, Wage and Tax Statements (2008 to 2010), pay statements issued in 2011, as well as evidence of employee benefits for the beneficiary. The AAO finds that the documents are pertinent to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, federal and state income tax withholdings, and other benefits are relevant factors in determining the relationship between the petitioner and a beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.¹³

Upon review of the record, the AAO finds that the petitioner and counsel failed to adequately establish several basic elements of the beneficiary's employment. Counsel stated in response to the RFE that the beneficiary "has been assigned to meet the service needs of [the petitioner's] contracted client, [REDACTED] (client)" since 2009 and it "expects to require [the beneficiary's] services to meet the needs of this client." However, the AAO notes that although the petitioner stated in the Form I-129 petition that it is a software development and consulting company and that the beneficiary would be assigned to this client, there is no evidence that the client has agreed to use the beneficiary's services as a business consultant.

¹³ The method of payment is one of several factors to be considered. Notably, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. See *Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

Counsel submitted a proposal prepared by the petitioner for the client entitled "[REDACTED] M3 Support Contract." Although the vice president for the petitioner refers to the document as a "proposal," it appears that the document was later accepted by [REDACTED] as the document was signed on February 11, 2011 by both the petitioner and [REDACTED]. However, upon examination, the AAO finds that the document lacks sufficient information regarding the proffered position, which is necessary to establish the beneficiary's employment. Since the document appears to have been prepared as a proposal, the document simply outlines the services offered, costs, tools and utilities used, and other general terms, but it does not offer any specific information to establish that the beneficiary will be assigned to [REDACTED] and what services, if any, he will provide.

The document indicates that the petitioner's team consists of project team leaders, functional team members, technical team members and an account executive.¹⁴ A section regarding the consulting rates provides the following job titles: programmer/software engineer, developer, testing/QA engineer, project leader/team leader, technology platform expert/architect, functional expert. The document does not provide any information as to the job duties of the positions. The beneficiary's role as a business consultant is not designated in the document. No explanation was provided by the petitioner or counsel. The record is devoid of evidence from the petitioner clarifying whether the petitioner's business consultant position is the same or another position entirely – than the positions referred to in the agreement. Additionally, there is no evidence that the agreement between the petitioner and [REDACTED] was amended, or that the parties created an addendum or other agreement specifying additional or different terms and which stated the beneficiary's role in providing services. Contrary to the petitioner's claim, the document does not establish that the petitioner has secured work or has any ongoing assignments for the beneficiary. The AAO is not in a position to "guess" or assume that the proffered position falls into one of the listed jobs in the agreement. It is the petitioner's obligation to fully clarify such inconsistencies in the record with documentary evidence.

Upon review of the record of proceeding, the petitioner has not provided any documents from [REDACTED] (or any other company) that identifies the beneficiary as serving as a business consultant. The petitioner failed to submit documentation from the client outlining (either generally or in detail) the nature and scope of the beneficiary's services. Moreover, although counsel claims that the beneficiary has been assigned to this client for the past few years, no further evidence regarding the petitioner's relationship with [REDACTED] and/or any evidence from the client regarding the beneficiary's work was submitted. There is no documentation from [REDACTED] providing details such as a description of the work to be performed, the qualifications that are required to perform the job duties, an acknowledgement that the beneficiary has served in this role for the past several years, etc.

Additionally, the AAO finds that the petitioner provided conflicting information about the length of the beneficiary's employment. On the Form I-129 and in the support letter, it was indicated that the

¹⁴ Moreover, the proposal provides information regarding the petitioner's team members (six to seven individuals) who will be onsite at [REDACTED] during the transition phase, which appears to be expected to last approximately two to three weeks. No information regarding the proffered position of business consultant is provided.

beneficiary will be employed from October 1, 2011 to September 13, 2013 (approximately two years). This was also confirmed in the petitioner's letter of support dated March 30, 2011. However, in response to the RFE, counsel claims that the petitioner "intends to continue [the beneficiary's] employment for an additional **three years** in the capacity described in the related petition (emphasis added)."¹⁵ The petitioner and counsel did not provide an explanation for the variance.

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 counsel claims that the beneficiary "maintains site visits at three [redacted] locations: [redacted], MA; [redacted], GA; [redacted], MN." The petitioner is located in [redacted] (approximately 275 miles from [redacted], MA; approximately 800 miles from [redacted] GA; and approximately 1,345 miles from [redacted] MN), thus, raising questions as to who will supervise, control and oversee the beneficiary during his employment. 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. The chart does not list the beneficiary's name or the names of any employees. The organizational chart appears to indicate that business consultants, project managers and technical consultants report to the director – consulting services. The petitioner stated in the Form I-129 that it employs 45 people. There is no indication as to the number of people reporting to the director – consulting services. Moreover, the petitioner and counsel did not provide any further information as to the level of supervision, direction and/or control provided to the beneficiary. 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. However, 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. Although the petitioner claims that the beneficiary has served in the position since 2008, the petitioner did not provide a description of the supervisor's job duties and/or other probative evidence on the issue. Furthermore, there is no evidence that the director – consulting services (as listed in the organizational chart) has supervised or even had any contact with the beneficiary. Notably, counsel submitted the beneficiary's expense reports, which contain entries for the "supervisor" and for the "manager." However, none of the documents have been endorsed by a "supervisor" and a "manager."

Further, the AAO acknowledges that the Employee Handbook includes a brief section on

¹⁵ The AAO notes that in response to the RFE, counsel submitted copies of sample contracts with the petitioner's other clients. However, counsel indicates that the other contracts "are provided to document the company's business" and the beneficiary "has not been assigned to these clients."

performance evaluations. However, the Handbook does include 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. Moreover, the record of proceeding does not contain any information as to who specifically has in the past and/or will appraise the beneficiary's performance; the frequency of evaluations for this particular position; the appraisal criteria; how work and performance standards are established for this particular position; the methods for assessing and evaluating the beneficiary's performance; 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, counsel claims that the petitioner's office "is the location of all of [the petitioner's] support staff, equipment, supplies, and the location from where [the beneficiary] is provided direction." The proposal prepared by the petitioner for [redacted] (the client) states that for services performed "at the Client's offices, the Client agrees to provide working space and other services and materials as may be necessary in the performance of the Services." No further information was provided regarding the instrumentalities and tools required 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 counsel to merely claim that the petitioner 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 the 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. Moreover, when a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. 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). Based on the tests outlined earlier in the discussion, 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).

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).

Moreover, upon review of the record of proceeding, the AAO finds that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. That is, 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 at 147 (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.

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

For efficiency's sake, the AAO hereby incorporates its earlier discussion and analysis regarding the job duties and requirements of the proposed position in the record of proceeding. As previously discussed, the petitioner has not sufficiently established the actual duties of the proffered position, including the tasks the beneficiary will be responsible for or perform on a day-to-day basis. Moreover, as previously mentioned, the petitioner designated the proffered position under the occupational category "Computer System Analysts" in the LCA. However, the petitioner has not

established that the description for this occupation corresponds to the petitioner's business consultant position. The petitioner job description fails to establish the specific duties that the beneficiary will perform and the nature of the position.

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 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 client, the company that has been or will be utilizing the beneficiary's services as a business consultant (as stated by the petitioner).

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.¹⁶

Moreover, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

¹⁶ 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 petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

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 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, 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.

Additionally, DOL regulations governing LCAs states that "[e]ach LCA *shall state . . . [t]he places of intended employment.*" 20 C.F.R. § 655.730(c)(4) (emphasis added). "Place of intended employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant." 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment "with as much geographic specificity as possible" and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

On the form I-129 (Part 1, Question 3), the petitioner listed its address as [REDACTED]. The petitioner was asked in the Form I-129 (Part 5, Question 3) to provide the "Address where the beneficiary(es) will work if different from address in Part 1. (Street number and name, city/town, state zip code)." The petitioner stated, "Same as Part 1." However, on the Form I-129 (Part 5, Question 5), the petitioner indicated that the beneficiary would work off-site. Additionally, in the Form I-129 H-1B Data Collection Supplement (Part D), which is entitled "Off-Site Assignment of H-1B Beneficiaries," the petitioner responded to all three questions in the affirmative. Perhaps most notably in Part D is the fact that the petitioner indicated that the "beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought."

As previously mentioned, counsel for the petitioner stated that "since 2009, [the beneficiary] has been assigned to meet the service needs of [the petitioner's] contracted client, [REDACTED]." Counsel further added that the beneficiary "maintains site visits at three [REDACTED] locations: [REDACTED], MA; [REDACTED] GA; [REDACTED], MN." Counsel also stated that the beneficiary's "itinerary is fluid and dependent on the assignment of [the petitioner's] Director of Consulting Service." Counsel then provided the beneficiary's assignment for the months of June, July and August, which, as shown below, indicates that the beneficiary was working in the aforementioned locations.

On appeal, counsel cites to 20 C.F.R. § 656.3 to claim that the petitioner complied with the itinerary requirement and to assert that "any sites visited by the Business Consultant are not considered places of employment." The AAO notes that 20 C.F.R. § 656.3 applies to the labor certification process for permanent employment of aliens, which is not applicable to the instant case. Specifically, 20 C.F.R. § 656 is entitled "Labor Certification Process for Permanent Employment of Aliens in the United States." Thus, the AAO finds no merit in counsel's contention that this section of the regulations is relevant to this matter. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support the assertion that the labor certification process for permanent employment is relevant to the adjudication of Form I-129 nonimmigrant H-1B specialty occupation petitions.

The correct reference in this matter is 20 C.F.R. § 655.730. The AAO reviewed the applicable provisions regarding the definition of "place of employment," and finds that counsel failed to demonstrate that the petitioner complied with the applicable regulatory provisions. The regulation at 20 C.F.R. § 655.730(1)(ii) states the following regarding the term "place of employment":

Place of employment means the worksite or physical location where the work actually is performed by the H-1B, H-1B1, or E-3 nonimmigrant.

(1) The term does not include any location where either of the following criteria--paragraph (1)(i) or (ii)--is satisfied:

(i) Employee developmental activity. An H-1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than "on-the-job-training" at a location where the employee is stationed and regularly works). For the H-1B worker participating in such activities, the location of the activity would not be considered a "place of employment" or "worksite," and that worker's presence at such location--whether owned or controlled by the employer or by a third party--would not invoke H-1B program requirements with regard to that employee at that location. However, if the employer uses H-1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be "places of employment" or "worksites" for any such employees and, thus, would be subject to H-1B program requirements with regard to those employees.

(ii) Particular worker's job functions. The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a "place of employment" or "worksite" if the following three requirements (i.e., paragraphs (1)(ii)(A) through (C)) are all met--

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a "strikebreaker" (i.e., the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of "non-worksite" locations based on worker's job functions: A computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a "home office" sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of "worksite" locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her "home office;" an auditor who works for extended periods at the customer's offices; a physical therapist who "fills in" for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an "as needed" basis at hospitals, nursing homes, or clinics.

(4) Whenever an H-1B worker performs work at a location which is not a "worksite" (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's "place of employment" or "worksite" for purposes of H-1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station

"place of employment" rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a "worksite"/" place of employment" for an H-1B nonimmigrant, the employer is required to provide reimbursement to the H-1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's "place of employment" or "worksite," the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H-1B nonimmigrant's purported "place of employment" is a location other than where the worker spends most of his/her work time, or where the purported "area of employment" does not include the location(s) where the worker spends most of his/her work time.

In response to the RFE, counsel stated that "[the petitioner] assigns its employees to perform work at various clients' sites as the work need arise for its clients." Counsel continued by stating that "[t]he end-client contracts with [the petitioner] specify that [the petitioner] will provide services at [the] client's site."

However, on appeal, counsel states that "[the petitioner's] position of Business Consultant maintains only one worksite/place of employment in [REDACTED]." Counsel further asserts that "[a]ny sites visited by the Business Consultant are not considered places of employment." In support of the claim, she provides the following list:

- (1) The nature of the job duties of Business Consultant requires the frequent visit to client sites;
- (2) The Business Consultant need not necessarily spend an extended period of time at any one particular locations;
- (3) The site visits made by the Business Consultant are normally peripatetic in nature, and though recurring, are not excessive;
- (4) Strikebreaking is not relevant to the type of business maintained by the Petitioner;
- (5) The duties of the Business Consultant is analogous to that of a computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions-an example provided by 20 C.F.R. § 656.3 of locations which may not be defined as a "worksite";] and
- (6) It is the normal business practice of [the petitioner] to provide reimbursement to all employees in the position of Business Consultant for expenses incurred traveling to client sites.

Title 20 C.F.R. § 655.715(1)(ii)(A)(1) states that "the H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location" or "the H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations." In the instant case, as mentioned, the petitioner provided only a general description of the duties of the proffered position. Further, the petitioner failed to provide documents from the end-client regarding the proposed job duties to be performed. The petitioner has failed to establish that the proffered position is "peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel" or that the beneficiary's duties "require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations."

Further, counsel claimed that the beneficiary "need not necessarily spend an extended period of time at any one particular locations" and "the site visits made by the Business Consultant are normally peripatetic in nature, and though recurring, are not excessive." However, based on the documentation submitted in response to the RFE, which outlines the beneficiary's schedule for June, July and August 2011, the AAO finds that the document does not sufficiently establish that the beneficiary is "not necessarily spend[ing] an extended period of time" or that the visits "are not excessive."

The following information was provided regarding the beneficiary's schedule for June, July and August 2011:

Client: [redacted]
 Business Consultant: [the beneficiary]

	Metso Automation	Dates	Location
1	Supplier actual delivery date report combining forwarded (DHL) report.	Aug-11	[redacted] GA
2	Requisition order status stuck in 66; Analysis of cause and resolution	June-11	[redacted] GA
3	MGI078 testing and Implementation not working as before. Need to check MEF settings to append the data instead of replacing.	Aug-11	[redacted] MA
4	Material plan visibility issues. Planned work order deleted in system has lines seen in the material plan. Purchase orders not seen in material plan. Plan resolution.	Jun-11	[redacted] PA
5	Auto-allocation issues for ATO.	Jun-11	[redacted], PA
6	Picking list has some items doubling in the quantity compared to the ordered or transaction quantity. Plan and carry-out resolution.	Jul-11	[redacted], GA
7	Configured Items issue, order dependent checked will not create acquisition orders. Plan resolution.	Jun-11	[redacted] PA

8	Configured Items Issue-Planned manufacturing order could not be released, gets back to status 20 from 60 when released. Plan resolution.	Jul-11	[REDACTED] PA
9	Documentation for [REDACTED] Processes.	Jun-11	[REDACTED], PA
10	Design priority date manipulation for allocation control.	Aug-11	[REDACTED], MN

The AAO finds that the document does not indicate the duration of the assignments. For example, according to the schedule, for June 2011, the beneficiary was scheduled to spend time in [REDACTED], Georgia and at the petitioner's business location. In July 2011, the beneficiary was again scheduled to work in [REDACTED] Georgia and at the petitioner's business location. In August 2011, the beneficiary was scheduled to be in [REDACTED], GA, [REDACTED], MA, and [REDACTED], MN, but was not scheduled to be at the petitioner's business location.

However, without a detailed itinerary that lists the dates for each location, the AAO is unable to determine if these assignments are on a "casual, short-term basis" and "not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations)" as described under 20 C.F.R. § 655.730(1)(ii)(B).

The AAO notes that counsel submitted copies of the beneficiary's timesheets and expense reports from 2010 and 2011. Notably, all of the documents contain signatory lines, however, the documents are devoid of the designated signatures. Moreover, the documents contain undefined acronyms. Nevertheless, the AAO reviewed the documentation and finds that the timesheets and expense reports generally do not indicate where the beneficiary was located. Further, the documentation provided does not appear to be consistent. For instance, the timesheet dated June 18, 2011 indicates that from June 13, 2011 to June 17, 2011, the beneficiary's "Task" was stated as "Support in [REDACTED]." (Notably the word "in" is used.) However, according to the schedule submitted above, the beneficiary was not assigned to be in [REDACTED], MA in June 2011. Counsel does not explain the discrepancy. Counsel also submitted copies of hotel, rental car and gasoline bills from 2011, which again do not correspond with other documentation in the record and appear to be incomplete.¹⁷ The AAO found only one hotel bill from June 2011, and it appears to be from [REDACTED], MA, and not [REDACTED], Georgia (as listed in the above chart). Thus, the AAO finds that there are inconsistencies in the record of proceeding, and that the timesheets, expense reports and

¹⁷ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO will not attempt to decipher or "guess" the meaning of information provided in poor photocopies, as well as undefined, obscure acronyms. Further, the AAO is not required to attempt to organize and cross reference receipts, expense reports, time sheets and other documentation in the record of proceeding to determine the beneficiary's location in 2010 and 2011, particularly when the evidence appears to be inconsistent. It is the petitioner's responsibility to establish the probative value of documentation submitted in support of the petition. Moreover, the petitioner is in the best position to organize and submit such evidence. Notably, the submission of documents without an accompanying statement or chart of the specific dates (MM/DD/YYYY to MM/DD/YYYY) the beneficiary spent at a particular location could be subject to error in interpretation and may not be considered probative. Similarly, a statement of dates must be accompanied by corroborating evidence (ideally submitted in a clear, organized manner).

other bills do not corroborate counsel's claims regarding the nature, frequency and duration of the trips.

Moreover, although counsel claims that "[the petitioner's] position of Business Consultant maintains only one worksite/place of employment in ██████████ Pennsylvania," the AAO observes that this statement is not supported by the petitioner's assertions in the Form I-129. As previously mentioned, on the Form I-129 (Part 5, Question 5), the petitioner indicated that the beneficiary would work off-site. Additionally, in the Form I-129 H-1B Data Collection Supplement (Part D), which is entitled "Off-Site Assignment of H-1B Beneficiaries," the petitioner responded to all three questions in the affirmative. The petitioner's response included confirmation that the "beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought."

Upon review of the documents submitted, the AAO finds that the petitioner did not provide sufficient evidence to substantiate counsel's claims that the beneficiary's work at the client's locations are not considered places of employment in accordance with the applicable regulations. 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.

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

The AAO reviewed the record in its entirety. As previously discussed, the appeal must be rejected. The petitioner has not established that the person who signed the Form G-28 accompanying the Form I-290B appeal is an individual who is an affected party and has legal standing in this proceeding. Furthermore, even if the appeal were not rejected, the AAO agrees with the director that the petitioner failed to establish eligibility for the benefit sought. Thus, even if the appeal had not been rejected, the appeal would have been dismissed and the petition denied for the above stated

reasons, with each considered as an independent and alternative basis for the decision.¹⁸ As previously mentioned, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

The AAO concludes that the appeal must be rejected.

ORDER: The appeal is rejected.

¹⁸ 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.