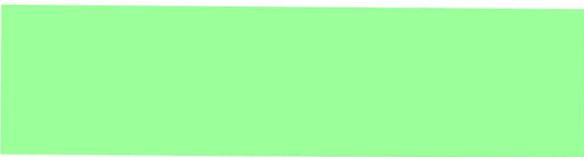




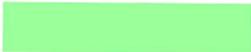
U.S. Citizenship
and Immigration
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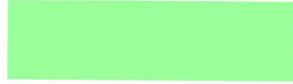
OFFICE: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an IT consulting firm established in 2012. In order to employ the beneficiary in what it designates as a systems administrator 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

In the petition signed on August 21, 2012, the petitioner indicates that it wishes to employ the beneficiary as a systems administrator on a full-time basis at the rate of pay of \$56,000 per year. In addition, the petitioner indicates that the beneficiary will work at the [REDACTED]

[REDACTED] In the undated letter of support, the petitioner states that the beneficiary would be employed to perform the following duties:

- Maintain and administer computer networks and related computing environments including computer hardware, systems software, applications software, and all configurations.
- Perform data backups and disaster recovery operations.
- Diagnose, troubleshoot, and resolve hardware, software, or other network and system problems, and replace defective components when necessary.
- Plan, coordinate, and implement network security measures to protect data, software, and hardware.
- Configure, monitor, and maintain email applications or virus protection software.
- Operate master consoles to monitor the performance of computer systems and networks, and to coordinate computer network access and use.
- Load computer tapes and disks, and install software and printer paper or forms.
- Design, configure, and test computer hardware, networking software and operating system software.

- Monitor network performance to determine whether adjustments need to be made, and to determine where changes will need to be made in the future.
- Confer with network users about how to solve existing system problems.

In addition, the petitioner states the following:

The Systems Administrator may perform necessary maintenance to support network availability and to monitor and test web site performance to ensure web sites operate correctly and without interruption. The System Administrator also assists in network modeling, analysis, planning and coordination between network and data communications hardware and software. He may supervise computer user support specialists and computer network support specialists and administer network security measures.

The petitioner also states that "[t]he minimum requirements that we at [the petitioner] establish for the position of a Systems Administrator include a Bachelor's degree in computer science, information technology or a related field."

Further, the petitioner provides the following information:

THE NAME OF THE PROJECT THE BENEFICIARY IS ASSIGNED TO

- [REDACTED]

ADDRESS WHERE THE BENEFICIARY PERFORMS THE WORK

- [REDACTED]

THE CONTRACTED EMPLOYMENT DATES – ITINERARY OF SERVICES AND DURATION

- 09/01/2012 to 12/31/2012 (renewed annually)

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Science degree in industrial technology and transcript from [REDACTED] in Kentucky, awarded on May 9, 2009. In addition, the petitioner submitted a copy of the beneficiary's foreign academic credentials, as well as a credential evaluation from [REDACTED]

In addition, the petitioner submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA lists the place of employment as [REDACTED]. The LCA also indicates that the petitioner will pay the beneficiary \$56,000 per year.

- An offer of employment letter from the petitioner to the beneficiary. The letter is dated August 1, 2012. Notably, the letter indicates that the beneficiary's annual salary is \$68,000.
- An organizational chart.
- An email correspondence regarding [REDACTED] being sold to the petitioner, effective January 1, 2012.
- Contracts between the [REDACTED]. The AAO notes that the most recent contract, effective December 20, 2011, indicates that "[t]he term of this Contract Amendment shall be from January 1, 2012 through December 31, 2012."
- A copy of the beneficiary's resume.
- A copy of the petitioner's Employee Handbook.
- A document entitled "Benefit Summary 2012."
- Copies of the petitioner's promotional materials and brochures.
- Information regarding its health and dental plan, including a welcome letter from United Healthcare, a printout on how to access its administration kit online, an installation summary, a document entitled "NB Proposal Cost Summary for [the petitioner]," and a document entitled "NB Proposal Employee Payment Detail for [the petitioner]."
- A copy of the petitioner's "Profit and Loss."

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on September 7, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On October 5, 2012, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence. Specifically, the petitioner and counsel submitted, in part, (1) a printout from the Foreign Labor Certification (FLC) Data Center, Online Wage Library (OWL) for the occupational category "Network and Computer Systems Administrator"; (2) job vacancy announcements; (3) a copy of the petitioner's work product; (4) a list of its employees, including their job titles and education; (5) copies of its employees' resumes; and (6) a position evaluation report by [REDACTED] Executive Director for [REDACTED]

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly

specialized knowledge in a specific specialty. The director denied the petition on November 28, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

To establish eligibility for H-1B classification, a petitioner demonstrate that it is qualified to file a petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F). (In the instant case, the petitioner does not claim to be a U.S. agent.) Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States

employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 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.¹

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts

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 318-319.²

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).

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

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).³

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 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

³ 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).

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."

As a preliminary matter, the petitioner has provided inconsistent information regarding the beneficiary's rate of pay. For instance, in the Form I-129 petition and LCA, the petitioner indicates that the beneficiary rate of pay is \$56,000 per year. However, in the August 1, 2012 offer of employment letter, the petitioner states that the beneficiary's annual salary is \$68,000. No explanation for the variance was provided.⁴

In the undated letter of support, the petitioner states that the beneficiary "will be a W-2 employee, and his salary will be paid directly from us, [the petitioner], via direct deposit." In addition, the petitioner states that it "will provide [the beneficiary] with a compete [sic] benefit package consisting of: life insurance, health insurance (including medical, dental and eye care), personal time off, and the option to take part in a 401k retirement savings plan." The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an offer of employment letter from the petitioner to the beneficiary dated August 1, 2012. However, upon review of the document, the AAO notes that the employment agreement does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While an offer of employment letter may provide some insights into the relationship of a petitioner and a beneficiary, it

⁴ The petitioner has provided inconsistent information as to the beneficiary's rate of pay for the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Upon review of the record of proceeding, the petitioner did not provide any information on this matter.

Further, upon review of the record, the petitioner has not established that the beneficiary will be employed in a specialty occupation during the entire period requested in the petition. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from September 1, 2012, to August 31, 2015. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED]

With the initial petition, the petitioner submitted copies of contracts between the [REDACTED]. The most recent contract, effective December 20, 2011, indicates that "[t]he term of this Contract Amendment shall be from January 1, 2012 through December 31, 2012." The document does not contain any information regarding the beneficiary, the duties and requirements of the proffered position, any information to establish the employer-employee relationship between the petitioner and the beneficiary, etc.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from September 1, 2012 to August 31, 2015. However, the documentation establishes, at best, that the [REDACTED] project will continue until December 31, 2012. The AAO notes that in the undated letter of support, the petitioner claims that the contract with [REDACTED] "is renewed on an annual basis and has been renewed consistently for the last 5 years." However, the petitioner has not provided probative evidence to establish that the contract with [REDACTED] will be renewed through August 31, 2015. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. In the undated letter of support, the petitioner stated that "[t]he supervision of [the beneficiary's] work will take the form of weekly conference calls and/or status reports, time-sheets, and other communications as needed on a frequent and ongoing basis." In addition, the petitioner submitted an organizational chart. The chart shows that the beneficiary will report to the Technology Architect, [REDACTED]. The petitioner did not provide any further information regarding the supervision of the beneficiary for this project (or any other projects).

Further, in the undated letter of support, the petitioner claimed that it "maintains the right to evaluate [the beneficiary's] performance, remove him from the project and terminate his employment if need be." However, this is a conclusory statement and does not relate any specificity or details for the basis of the

claim. The petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the criteria for determining bonuses and salary adjustments.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. The petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence indicates that [REDACTED] or possibly some other future client or end client will assign the beneficiary's projects. Moreover, the day-to-day work of the beneficiary appears to be supervised and overseen by [REDACTED] with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary.

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

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term

"degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

Furthermore, the AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client's 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 INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* 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 [REDACTED] 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, [REDACTED] the company that will actually be utilizing the beneficiary's services (according to 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.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ The petitioner asserts in the LCA that the proffered position falls under the occupational category "Network and Computer Systems Administrators."

The AAO reviewed the chapter of the *Handbook* entitled "Network and Computer Systems Administrators," including the sections regarding the typical duties and requirements for this occupational category.⁶ However, contrary to the assertions of the petitioner, the *Handbook* does not indicate that "Network and Computer Systems Administrators" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Network and Computer Systems Administrator" states the following about this occupation:

⁵ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁶ For additional information regarding network and computer systems administrator positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Network and Computer Systems Administrators, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-1> (last visited July 31, 2013).

Network and computer systems administrators must often have a bachelor's degree, although some positions require an associate's degree or professional certification along with related work experience.

Education

A bachelor's degree in fields related to computer or information science is most common. However, because administrators work with computer hardware and equipment, a degree in computer engineering or electrical engineering usually is acceptable as well. These programs usually include classes in computer programming, networking, or systems design.

Some positions require an associate's degree or a postsecondary certificate in a computer field with related work experience.

Because network technology is continually changing, administrators need to keep up with the latest developments. Many continue to take courses throughout their careers. Some businesses require that an administrator get a master's degree.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Programmers, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-4> (last visited July 31, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed

⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that some positions require an associate's degree or professional certification along with related work experience. Furthermore, the narrative of the *Handbook* reports that a bachelor's degree in fields related to computer or information science is most common. Moreover, the *Handbook* indicates that a degree in computer engineering or electrical engineering usually is acceptable as well. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a *specific specialty*, or its equivalent.

In response to the director's RFE, the petitioner and counsel submitted a printout of the FLC Data Center, OWL for the occupational category "Network and Computer Systems Administrators." The AAO reviewed the printout in its entirety. However, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. A designation of Job Zone 4 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the OWL statement is a condensed version of what the Occupational Information Network (O*NET) actually states about its Job Zone 4 designation. See the O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones> (explaining that Job Zone 4 signifies only that *most* but not all of the occupations within it require a bachelor's degree). Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. *Id.* Therefore, despite the petitioner's assertions to the contrary, the OWL and O*NET information is not probative of the proffered position qualifying as a specialty occupation.

In addition, the petitioner and counsel submitted a position evaluation report from [REDACTED] Executive Director for the [REDACTED]. The report is dated September 20, 2012. In the report, Ms. [REDACTED] states that "[i]t is the opinion of [REDACTED] that the job duties described in the report for the position of *System Administrator* offered by [the petitioner] in Urbandale, Iowa, U.S.A. would require that the prospective candidate to possess at least a *U.S. Bachelor's degree in Computer Information Systems* or related field."

Ms. [REDACTED] provided a summary of her education and experience. She described her qualifications, including her educational credentials and professional experience in the foreign credential evaluation field. However, based upon a complete review of Ms. [REDACTED] report, it is unclear how her education, training, skills or experience in the foreign credential evaluation field would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of IT consulting firms similar to the petitioner for *systems administrator* positions (or parallel positions).

Ms. [REDACTED] report does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any

work or conducted any research or studies pertinent to the educational requirements for *systems administrators* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The report contains no evidence that it was based on scholarly research conducted by Ms. [REDACTED] in the specific area upon which she is opining. In reaching this determination, Ms. [REDACTED] provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Ms. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the report, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion. Ms. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that Ms. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Ms. [REDACTED] provides general conclusory statements regarding systems administrator positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner and counsel advised Ms. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). It appears that Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Notably, Ms. [REDACTED] claims that a bachelor's degree in computer information systems is adequate for the proffered position. However, she fails to acknowledge that such an assertion is not consistent with the petitioner's claimed requirements for the proffered position.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the report rendered by Ms. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Ms. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron*

International, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds the report as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding Ms. [REDACTED] report into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

The AAO acknowledges that the record of proceeding contains a position evaluation report from Ms. [REDACTED]. However, as previously discussed in detail, the AAO finds that the report does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In response to the director's RFE, the petitioner and counsel submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner and counsel's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that it is an IT consulting firm established in 2012, with five employees. The petitioner further stated that its gross annual income is over \$1million and its net annual income is \$250,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541513.⁸ The AAO notes that this NAICS code is designated for "Computer Facilities Management Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in providing on-site management and operation of clients' computer systems and/or data processing facilities. Establishments providing computer systems or data processing facilities support services are included in this industry.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, – Computer Facilities Management Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 31, 2013).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

⁸ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited July 31, 2013).

For instance, the advertisements include positions with [REDACTED] (a company in the manufacturing industry); [REDACTED] (a company that "specializes in advanced Visualization and Virtual Reality systems"); [REDACTED]. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted a job posting placed by a staffing firm [REDACTED] for which little or no information regarding the employer is provided. Consequently, the record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is **common to the industry** in parallel position **among similar organizations** (emphasis added).

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner and counsel submitted a posting by [REDACTED] which requires a degree and "3-5 years [of] work experience." The petitioner and counsel also provided a posting by [REDACTED] which requires a degree and "5+ years [of] practical experience in Information Technology or related field." Moreover, the petitioner and counsel submitted a posting for [REDACTED] which requires a degree and "5 years [of] experience in troubleshooting network connectivity and performance issues within computer systems and the LAN/WAN infrastructure." Additionally, the petitioner and counsel submitted a job posting by [REDACTED] which requires candidates to possess a degree and "two years [of] experience in a computer networking environment and/or two years of experience in an IT customer support role." The petitioner and counsel also submitted an advertisement posted by [REDACTED] which requires a degree and "3-5 year's [sic] work experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, three of the postings [REDACTED] and [REDACTED] state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required.⁹ As discussed *supra*, 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 position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree,

⁹ The posting for [REDACTED] list the qualifications for the advertised position as including a "Bachelor's degree – A specialized Network Administration degree is preferred." Thus, a general-degree is acceptable, as obviously a *preference* for a degree in network administration is not an indication of a *requirement* of a degree in the discipline.

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 at 147.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.¹⁰

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

On appeal, counsel claims that the proffered position involves complex and/or unique duties. In the instant case, the record of proceeding contains documentation regarding the petitioner's business operations, including copies of its promotional materials and brochures; organizational chart; Employee Handbook; a document entitled "Benefit Summary 2012"; "Profit & Loss" reports; and a printout of its work product. However, upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of systems administrator. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

¹⁰ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of systems administrator for companies that are similar to the petitioner and in the same industry requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the systems administrator position. Specifically, the petitioner failed to demonstrate how the systems administrator duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a systems administrator position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Programmers" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.¹¹

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Therefore, the evidence of record does not establish that this position is significantly different from other network and computer systems administrator positions such that it refutes the *Handbook's* information to the effect that a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty, is acceptable for network and computer systems administrator positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than network and computer systems administrator positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic background and experience in the industry will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not explain or clarify at any time in the record which of the duties,

¹¹ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or by the client / end-client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner and counsel provided a list of the petitioner's employees, including their job titles and general education credentials.¹² Notably, the document did not list the proffered position. In addition, the petitioner and counsel submitted resumes of six of the employees. The AAO observes that the petitioner did not submit the academic credentials of these individuals, e.g., copies diplomas, transcripts. The petitioner should note that the evidentiary weight of a resume is insignificant. It represents a claim by an individual, rather than evidence to support that claim. In the instant case, no further documentation was submitted of the individuals' asserted credentials. As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Moreover, the petitioner stated in the Form I-129 petition that it has five employees and was established in 2012. The submission of *six resumes* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that in the appeal, counsel claims that the proffered position involves specialized and complex duties. In addition, the AAO notes that it reviewed the documentation provided by the petitioner regarding its business operations and related materials. For example, in the instant case, the record of proceeding contains documentation regarding the petitioner's business operations, including a copy of its promotional materials and brochures; organizational chart; Employee Handbook; a document entitled "Benefit Summary 2012"; "Profit & Loss" reports; and printout of its work product. However, upon review of the record of the proceeding, the AAO notes that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for

¹² It must be noted for the record that the list indicates that the petitioner has nine employees. However, the Form I-129 (signed by the petitioner on August 21, 2012) indicates that the petitioner has five employees. 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. 582, 591-92 (BIA 1988).

"beginning level employees who have only a basic understanding of the occupation." It is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal must be dismissed and the petition denied.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.