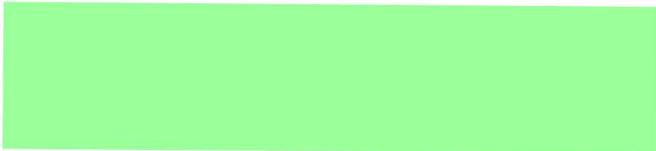


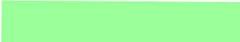
(b)(6)

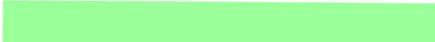
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **AUG 06 2013** Office: VERMONT 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:



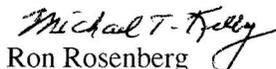
INSTRUCTIONS:

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,


for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on May 14, 2012. On the Form I-129 visa petition, the petitioner describes itself as a software solutions and services business with approximately 250 employees, established in 1998. In order to employ the beneficiary in a position to which it assigned the job title "Business Systems Analyst," 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 beneficiary is qualified to perform services in a specialty occupation. The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

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

In this decision, the AAO will address two additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, beyond the decision of the director, the AAO will first discuss its finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary, which is essential to a petitioner's standing to file an H-1B specialty occupation petition as a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). Next, the AAO will discuss its finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation.

At the outset, the petitioner should note, that since – as will be later discussed - the evidence in the record of proceeding does not establish the proffered position as a specialty occupation, the director erred both in attributing to the position a need for, and also in analyzing the beneficiary's qualifications in terms of proof of attainment of, a particular degree, or degree equivalency, in a specific specialty. Consequently, the AAO does not have a basis to sustain the appeal, and the appeal will be dismissed and the petition will be denied.

U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and

¹ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these additional grounds for denial.

second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation.]). In this matter, however, the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. Therefore, before addressing the director's basis for denial of the petition, the AAO will first discuss its determination that, as presently constituted, the record of proceeding does not establish the proffered position as a specialty occupation.

Salient documentation

At the outset, the AAO will address the documentary evidence upon which the petitioner relies.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Business Systems Analyst to work on a full-time basis at a salary of \$70,000 per year. In addition, the petitioner indicated that the beneficiary will be employed at [REDACTED]

Among the documents submitted with the Form I-129 is a May 10, 2012 letter of support. The letter is signed by the petitioner's human resources manager. The letter's "Information about the position" section introduces the following information and list of duties of the position:

[The beneficiary] will be hired as a member of the [petitioner's] technical team who provide Oracle services to our client [REDACTED] located in [REDACTED] North Carolina. No middle vendor is involved in the assignment. [REDACTED] is a direct client of [the petitioner]. Details of our company's agreement for contracted services can be found in the enclosed [REDACTED] Statement of Work [(SOW)]. [The petitioner] has a long-term engagement with Semprius to implement, support and maintain an Oracle ERP infrastructure that will assist them in reacting to market changes and more capably manage their rapid business growth.

The Oracle Solution is an All-In-One solution specifically tailored to high-tech manufacturing.

Some of the duties being performed by [the beneficiary] on this assignment will include:

- Oracle configuration[;]
- Writing and maintaining functional specifications[;]
- Writing and maintaining test cases for configuration objects[;]
- Assisting with integration test planning and execution[;]
- Resolving test problem reports during integration tests[;]
- Providing production support[;] [and]
- Providing status reports[.]

In addition to the aforementioned letter of support, the documents filed with the Form I-129 included, *inter alia*, the following:

- A copy of the employment offer letter from the petitioner's human resources manager to the beneficiary, dated April 13, 2012² and agreed to and accepted by the beneficiary on April 14, 2012, stating that the beneficiary's job responsibilities will be a combination of the following:
 1. Systems analysis, consulting with users and determining hardware, software and/or system functional specifications.
 2. Design, analysis, creation, development, documentation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications;
 3. Documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.
- A copy of the Employment Agreement, signed by the petitioner's representative on April 13, 2012 and by the beneficiary on April 14, 2012.
- A two-page document entitled "Itinerary of [beneficiary]," signed by the petitioner's human resources manager on May 10, 2012, stating that the beneficiary's work location is at [REDACTED] North Carolina, and that the duration of the assignment is "[t]o be determined" and "has no firm end date established." The document further states, in part, the following:
 - [The] [p]etitioner has the right to control the beneficiary's work, including the ability to hire, fire, pay, supervise, assign work to and evaluate the performance of the beneficiary, and to control when, where and how [the] beneficiary performs the job duties.
 - The offer of employment to the [b]eneficiary is valid and not speculative.
- Copies of the beneficiary's earnings statements for pay dates starting from January 6, 2012 to April 13, 2012.
- A copy of an undated and unsigned document entitled "ORACLE ERP Implementation Statement of Work for Semprius presented by [the petitioner]," (which will hereinafter be referenced as the petitioner's 10-week Implementation Project SOW Presentation). The petitioner's 10-week Implementation Project SOW Presentation states that "the ten week ORACLE ERP Implementation ("SEI") project is scheduled to start on April 2, 2012 with a project go-live of June 8, 2012." In

² The AAO notes that while there are some partial markings in the signature line area, it is unclear whether the employment offer letter was signed by the petitioner's human resources manager.

section 4.3, "Roles and Responsibilities," the petitioner's 10-week Implementation Project SOW Presentation states the following: "Below is a detailed description of [the] roles and responsibilities for the project. The organization envisioned to fulfill each role is noted in the far right column," as follows:

Role	Responsibilities	Lead
Client Business Analysts	Client Business Analysts are responsible for: <ul style="list-style-type: none"> - Reviewing all functional specs and requesting updates / clarifications where necessary[;] - Providing knowledge to the configuration team on the operations of existing systems being replaced[;] - Executing deployment tasks as assigned by project management[;] - Participating in writing and maintaining of test cases[;] - Participating in the building of test scenarios / packages[;] - Assisting with integration test planning and execution[;] [and] - Providing written status reports as directed by project management[.] 	

On July 6, 2012, in response to the director's RFE, the petitioner, through counsel, provided additional supporting evidence, including, *inter alia*, the following:

- A letter from the petitioner addressed to USCIS, dated June 11, 2012.³

³ The AAO notes that this letter contains some inaccuracies. For instance, the first sentence of the letter states that "[t]his letter is to confirm that H-1B employment of [the name of an individual other than the beneficiary] is being sought by [the petitioner]. . . ." Also, the letter states that the employment dates are

- A document on the petitioner's letterhead (hereinafter, the RJT Document), listing, in part, the client as [REDACTED] the project name as "Oracle ERP Implementation, Support and Maintenance"; the account manager; the place of work as [REDACTED] headquarters facility in [REDACTED] NC"; the resources needed as "7 to 10 for implementation, 2 for continued support and maintenance"; the start date as "June 2012"; the expected duration as "ongoing"; and the scope of work as the following:
 - Implementation of solution footprint (Financials, Manufacturing, Sales Orders, Purchase Orders and Inventory)[;]
 - Installation of system to support substantial growth[;]
 - Integration of solution across [REDACTED] core business process scope[;] [and]
 - Ensure ability to expand to support multi-company, multi-location requirements.

Also, the RJT Document lists the duties, as follows:

- Fit Analysis
- Unit Testing
- Establish migration plans
- Acceptance Testing
- PROD infrastructure set-up
- Oracle Configuration
- Writing and maintaining functional specifications
- Ongoing support and maintenance
- Sequence of deployment:
- Financials (GL, AP, AR, Cash Management, Fixed Assets)
- Purchasing
- Sales Orders
- Discrete Manufacturing
- Inventory
- Oracle Database
- Accelerator Implementation

In addition, the RJT Document lists the "Skill Sets," as follows:

- Oracle EBS 12
 - Oracle Financials, Supply Chain and Manufacturing modules
 - MS SQL for DBA
- A copy of the petitioner's organizational chart.

"October 1, 2012 to October 1, 2015," whereas the dates of intended employment on the Form I-129 are October 1, 2012 to April 1, 2014.

- Copies of e-mails between the petitioner's employees requesting timesheets for employees currently providing services at [REDACTED] and copies of timesheets for other consultants, submitted, according to the cover sheet on top of such information, as "evidence of ongoing work at [REDACTED]"
- A copy of a document on [REDACTED] letterhead, dated February 28, 2012, stating, under the word "Description," "Oracle ERP License and implementation according to the SOW⁴ and Services Agreement V110711, dated 2/29/2012⁵," and a total price of "\$361,990.00." The AAO notes that the "Services Agreement V110711, dated 2/29/2012," was not submitted by the petitioner into the record of proceeding.
- A copy of a purchase order, dated February 29, 2012, stating, under the word "Description," "Oracle Program License Fees," and "Oracle Program Support Fees," and a total price of "\$80,987.87."

At this juncture, the AAO will address why it finds that the major documentary evidence upon which the petitioner heavily relies is not probative of either an employer-employee relationship between the petitioner and the beneficiary or of the proffered position's being a specialty occupation.

First, the AAO notes that, in contrast to the petitioner's assertion that the beneficiary would work at the location of its client, [REDACTED] for the duration of the intended employment period specified in the petition (i.e., October 1, 2012 to April 1, 2014), the Employment Agreement document clearly indicates that the beneficiary would be subject to assignments to other clients, as yet unnamed and at locations and for projects not yet identified. In this regard, the AAO draws the petitioner's attention to the following clause at subparagraph 16.4 of the Employment Agreement:

. . . it being understood and agreed during the course of his/her employment with [the petitioner], Employee will be asked to provide services to clients or accounts of [the petitioner] throughout the United States, and that not all such accounts are necessarily capable of identification as of the date of this Agreement. . . .

Further still, the AAO finds that neither the employment offer letter nor the Employment Agreement mentions any assignment, for any period, at [REDACTED] which, as previously noted, the petitioner asserts as the location of the work in which the beneficiary would purportedly engage.

Next, the AAO notes that neither copies of the e-mails pertaining to timesheet requests, nor the copies of the timesheets that were provided in response, have any evidentiary value towards establishing the duration and the substantive nature of any work performed or to be performed by the beneficiary at any time. This is clear on the face of the documents themselves – none of which relate to the beneficiary.

⁴ As previously noted, the document which the petitioner refers to as the "SOW" is referenced herein as the petitioner's "10-week Implementation Project SOW Presentation" herein.

In addition, the AAO finds that the petitioner fails to establish that the [REDACTED] document cited as “Oracle ERP License and implementation according to the SOW⁶ and Services Agreement V110711, dated 2/29/2012,” has any material bearing on establishing the specific nature of any work that the petitioner had secured for the beneficiary at [REDACTED]. There is no document in the record that is identifiable as either part of “the SOW and Services Agreement” specified in this [REDACTED] document. Likewise, the Purchase Order issued by the petitioner to Oracle for Oracle Program License Fees and Oracle Program Support Fees for [REDACTED] does no more than establish contractual relationships between the petitioner and Oracle and between the petitioner and [REDACTED] it does not indicate how, if at all, the Purchase Order relates either to the beneficiary or to establishing the nature, terms, and conditions of any work that he would perform for [REDACTED] or any other entity.

The AAO will now discuss the aforementioned 10-week Implementation Project SOW Presentation document.

At the outset, the AAO observes that this undated, unsigned document appears to be comprised of the petitioner’s own commentary regarding an SOW – but it is *not* an SOW itself. Further, the AAO finds, the document is incomplete, as can be gleaned from the fact that it references a section 7 but does not have that many sections. That being said, the AAO also observes that the document does not even reference any contractual commitments between the petitioner and Semprius beyond a 10-week implementation project.

A survey of the above-reviewed documentary evidence and the totality of the evidence submitted by the petitioner in support of the petition reveals an overarching evidentiary defect that is fatal to this appeal, namely, the lack of any evidence from the client for whom the beneficiary is allegedly to work that specified whatever substantive work the beneficiary would perform for it, whatever terms and condition the client may impose over such work, the conditions under which the beneficiary would perform such work, the duration of the beneficiary’s assignment to that client, and the educational qualifications, if any, that the client specified for the work.

The petitioner’s failure to establish an employer-employee relationship

As a preliminary issue, beyond the decision of the director, the AAO will discuss whether the petitioner has established that it meets the regulatory definition of a “United States employer” as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

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

⁶ As previously noted, the document which the petitioner refers to as the “SOW” is referenced as the petitioner’s “10-week Implementation Project SOW Presentation” herein.

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)

The term “United States employer” is defined 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.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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 former 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.⁷

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. §

⁷ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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 318-319.⁸

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).⁹

Thus, 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

⁸ 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))).

⁹ 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).

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

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

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

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

The AAO notes that the record is devoid of any contractual documentation, signed by both the petitioner and its client, [REDACTED] regarding the relationship between the petitioner and [REDACTED] and between [REDACTED] and the beneficiary. Also, the record is devoid of any documentation from [REDACTED] confirming, at a minimum, the beneficiary's assignment, duration of the assignment, job duties, educational requirements for the position, and the measure of control over the beneficiary and his work. As noted above, the AAO acknowledges that the petitioner submitted a document entitled “Itinerary of [beneficiary],” signed by the petitioner. However, the contents of the document do not indicate that it was accepted and signed by the client, [REDACTED]. The AAO further notes that the petitioner submitted a copy of the petitioner's 10-week Implementation Project SOW Presentation, however, such document is undated and unsigned, and there is no evidence that the terms therein were agreed to and accepted by [REDACTED]. Also, as the AAO previously noted, the copy of the document on [REDACTED] letterhead, dated February 28, 2012, referenced a “Services Agreement V110711, dated 2/29/2012,” which the petitioner failed to submit into the record.

As such, the key element in this matter, which is who exercises actual control over the beneficiary and his work, was not substantiated. Thus, without any documentary evidence between the petitioner and [REDACTED] and based on the information in the record of proceeding, the AAO finds that (1) the record of proceeding does not indicate whether [REDACTED] has endorsed the information provided by the petitioner regarding the nature of the beneficiary's work for [REDACTED], and (2) the petitioner has failed to establish that it exerts any substantial control over the beneficiary and the work he would perform while on asserted assignment to its client, [REDACTED].

Also, based on the information provided, the AAO also finds that the relationship between [REDACTED] and the petitioner appears to be indicative of a contractual scenario wherein the beneficiary would be assigned to [REDACTED] solely to augment [REDACTED] staff – a role which, in the absence of countervailing evidence – is indicative of day-to-day control by the client, whose staff is normally subject to the client’s direction.

Further, the AAO finds materially significant the absence of any documentation from the client, [REDACTED] regarding any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED]. While, in its response to the RFE, counsel for the petitioner states that “the Petitioner supervises and controls the work of the beneficiary,” and states “[s]ee attached payroll,” the AAO notes that there is no evidence from the client, [REDACTED] confirming the petitioner’s assertions. Moreover, the “attached payroll” to which counsel cites in the RFE-response letter refers to consultants other than the beneficiary. Also, the petitioner’s 10-week Implementation Project SOW Presentation lists [REDACTED] as the “lead” (thereby indicating some primary measure of control) for the “Client Business Analysts,” in which category the beneficiary’s proposed position of “Business Systems Analyst” would, in the absence of any evidence to the contrary, presumably fall. 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 Obaigbena*, 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).

While social security contributions, worker’s compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary’s employer. Without full disclosure of all of the relevant factors relating to the end-client, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a “United States employer,” as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner’s employee and that the petitioner supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Without evidence from the client supporting the petitioner’s claims, the petitioner has not established eligibility in this matter. 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)).

Furthermore, the AAO finds that there are discrepancies and inconsistencies in the record of the

proceeding with regard to the beneficiary's dates of intended employment.¹⁰ For instance, in the Labor Condition Application (LCA), the petitioner indicates that the dates of intended employment for the beneficiary are October 1, 2012 to October 1, 2015. The Form I-129 indicates that the dates of intended employment are October 1, 2012 to April 1, 2014. The RJT Document, submitted in response to the RFE, indicates that the start date is "June 2012" (prior to the beginning of the requested H-1B validity period), the expected duration is "ongoing," and does not list an end date. Also, the June 28, 2012 letter from counsel in response to the RFE states that the petitioner is requesting an H-1B validity period from October 1, 2013 to April 1, 2014. Finally, the June 11, 2012 letter from the petitioner in response to the RFE, states that the employment dates are October 1, 2012 to October 1, 2015. No explanation for the variances was provided.

In addition, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. The "Itinerary" document, submitted with the petition, indicates that the duration of the assignment is "[t]o be determined." Moreover, the record does not contain a written agreement between the petitioner and [REDACTED] or any other organization, establishing that any work, let alone H-1B caliber work, exists for the beneficiary for the duration of the requested period.

Moreover, the AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2012 to April 1, 2014, there is a lack of substantive documentation regarding any work for the duration of the requested period. While it appears from the documentation provided that the project start date is June 2012, no end date is specified. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, counsel for the petitioner simply claimed in response to the RFE that "[the beneficiary] will work for the Petitioner and continue to work on the project for the full three years of the requested H-1 visa application, and on other projects at client site as per attached contracts and LCA." However, the petitioner and counsel did not provide the referenced "attached contracts." 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 Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Also, as previously noted, there is no documentary evidence from [REDACTED] establishing the duration of the project. Thus, the record does not demonstrate that the petitioner would be maintaining an employer-employee relationship with the beneficiary 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). Again, 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).

¹⁰ The AAO notes that in the RFE the director noted that "the beneficiary will reach a total of six years in an "H" and/or "L" nonimmigrant status on July 5, 2013," and that "[i]t appears the beneficiary is eligible to recapture a total of 144 days for time spent outside the United States, therefore eligible for an end validity date of November 26, 2013." However, because this issue is not material to the outcome on appeal, the AAO will not determine the precise amount of time available to the beneficiary in connection with this petition.

For the reasons discussed above, the AAO finds that 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). This material aspect of the evidentiary record precludes approval of the petition.

Moreover, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition still could not be approved.

The petition's failure to establish the proffered position as a specialty occupation

Now the AAO will address its determination that the evidence of record fails to establish the proffered position qualifies as a specialty occupation.

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

In this matter, the petitioner submitted a copy of the beneficiary’s three-year Bachelor of Science degree from [REDACTED] in India.¹¹ In addition, in response to the RFE, the petitioner

¹¹ The AAO notes that the beneficiary’s diploma does not list a specific major for which the degree was awarded. Further, the AAO notes that in his resume, the beneficiary stated that he has a Bachelor of Science degree in Physics, Chemistry and Math.

submitted a document entitled, "Credential Evaluation Report," rendered by Dr. [REDACTED] an evaluator with [REDACTED], dated June 21, 2012, which states that the combination of the beneficiary's professional experience and his foreign degree in science equates to a U.S. Bachelor's degree in Business Administration.

The AAO finds no evidentiary value in the opinion rendered by [REDACTED]. As the [REDACTED] evaluator professes that his evaluation is rendered "pursuant to the requirements of [USCIS]," he should know that USCIS recognizes as competent to evaluate the educational equivalency of training and/or work experience only "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The evaluator provides no documentation that this evaluator is such an official. Further, the evaluator's discussion of the beneficiary's experience is cursory, superficial, and insubstantial. It provides no substantive analysis of how the beneficiary's work experience equates to the years of college-level coursework pronounced by the evaluator. Further, as Universal and its evaluators should know, USCIS recognizes evaluation agencies as competent to render evaluations of education, but not training or experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(4). USCIS may, in its discretion, use as advisory opinions 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 preliminary matter, the AAO notes that counsel's letter in response to the RFE, dated June 28, 2012, is rife with inconsistencies with respect to the title and educational requirements of the proffered position, and with respect to the nature of the petitioner's business. For instance, in the RFE-response letter, counsel stated that the petitioner "is in [the] business of [REDACTED] [REDACTED]¹² [and] therefore requires [a] Programmer Analyst¹³ with [a] bachelor's Degree in Computers, Engineering or related." Counsel also stated that the "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in Business Administration." However, in the same letter in response to the RFE, counsel stated that the educational requirement for the proffered position is a Bachelor's Degree in Business Administration, Management Information Systems, Management of Technology, or a related field and related experience.

As an additional preliminary matter, the petitioner's claim, through counsel, that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and

¹² In the letter in response to the RFE, counsel also states that the petitioner is a "[REDACTED]" whereas in the Form I-129 the petitioner described itself as a "software solutions and services business." In the same letter, counsel also references an "attached brochure of the company," which was not introduced into the record of proceeding, and incorrectly states "a request for extension of H-1B," when the beneficiary is presently in L, rather than H, nonimmigrant status.

¹³ As previously noted, in the Form I-129, the petitioner has assigned the job title of "Business Systems Analyst" to the proffered position.

specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, 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).

To prove 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. 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 proposed position. 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).¹⁴ Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

The AAO notes that in its response to the RFE, the petitioner, through counsel, expanded upon the beneficiary's duties, as follows:

[The] Business Analyst will be responsible for interacting with developers and the product marketing to analyze the user requirements, functional specifications to understand product and its features. 10% He will analyze business applications to automate or improve existing systems. 20% Confer with personnel involved to determine current operational procedures, identify problems, and learn input and output requirements. 25% Perform object[-]oriented analysis, and development of software for client server platforms using computer skills. 25% Analyzing users' data, general modes of operation, existing operation procedures, and

¹⁴ 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.

problems and devising methods and approaches to meet the users' need based upon knowledge of data processing techniques, management information, and statistical, audit, and control systems. 30% [T]he position involves extensive use of modern computer languages and high-end databases.

Approximate percentage of time:

Software Configuration Management: 30%

Analyze [sic] and development of software[:] 30%

Programming, Coding[:] 20-30%

Miscellaneous: approx. 10%

It is very important to note that the AAO finds that, while the petitioner ascribes a wide variety of duties to the proffered position, the petitioner describes them in relatively abstract terms of generalized functions. Further, the AAO finds, the petitioner fails to provide substantially detailed information and documentation towards establishing the substantive nature of the work involved in the day-to-day performance of those functions within the business operations of the petitioner, and, more importantly, which of those functions would actually be performed within the framework of the beneficiary's assignment to Semprius, in what proportions, and involving what educational levels of a body of highly specialized knowledge in a specific specialty. Consequently, the record of proceeding lacks an adequate evidentiary foundation to establish either the substantive nature of the work that the beneficiary would actually perform or the theoretical and practical applications of any particular level of a body highly specialized knowledge in any specific specialty that would be involved. For adjudicative economy's sake, the AAO hereby incorporates the comments and findings of this paragraph into its later analysis of the evidentiary value of the opinion submitted by Dr. [REDACTED] regarding the educational requirements of the proffered position.

The petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the job title listed on the LCA is "Business Analyst"¹⁵ and that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121.00, at a Level I wage.

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

¹⁵ As previously noted, on the Form I-129, the petitioner has assigned the job title of "Business Systems Analyst" to the proffered position.

The AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a Business Systems Analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁶ As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the occupational group "Computer Systems Analysts."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.¹⁷ The AAO notes that the *Handbook* does not support a conclusion that this occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

Education

¹⁶ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

¹⁷ For additional information regarding the occupational category "Computer Systems Analysts," *see id.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited July 1, 2013).

Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).

Some employers prefer applicants who have a Master of Business Administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Some analysts have an associate's degree and experience in a related occupation.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

Advancement

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

Important Qualities

Analytical skills. Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to predict how changes may affect the project.

Communication skills. Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

Creativity. Because analysts are tasked with finding innovative solutions to computer problems, an ability to "think outside the box" is important.

Teamwork. The projects that computer systems analysts work on usually require them to collaborate and coordinate with others.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited July 1, 2013).

The *Handbook* does not report that, as an occupational group, "Computer Systems Analysts" normally require at least a bachelor's degree in a specific specialty. The *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field," but "many analysts have technical degrees," and "[s]ome analysts have an associate's degree and experience in a related occupation." Also, this segment of the *Handbook's* "Computer Systems Analysts" chapter opens with the following statement that also is indicative of the fact that a particular position's inclusion within the "Computer Systems Analysts" occupational classification is not in itself sufficient to establish that position as one for which a bachelor's or higher degree, or the equivalent, in a specific specialty is a normal requirement for entry:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.¹⁸ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁹ That is, in accordance with the relevant DOL explanatory

¹⁸ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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/NPWHC_Guidance_Revised_11_2009.pdf.

¹⁹ 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

information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed 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 the Computer Systems Analysts occupational group. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

On appeal, the petitioner submitted an opinion letter, dated August 10, 2012, by [REDACTED], Ph.D., Professor Emeriti²⁰ Management and Information Systems, and Former Dean of the School of Business and Economics, at [REDACTED]. In the letter, Dr. [REDACTED] reviewed a list of the job duties for the proffered position that are similar to those that the petitioner presented in the record of proceeding.

may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

²⁰ The definition of "emeritus" in *Webster's New College Dictionary* 375 (Third Edition, Hough Mifflin Harcourt 2008) is "[r]etired but retaining an honorary title corresponding to that held immediately before retirement." Also, Dr. [REDACTED] name is not listed on [REDACTED] website's Faculty/Staff Employee Directory, Directory of Full-Time, Permanent Employees, available on the Internet at <http://www.spu.edu/info/directory-information.asp> (last accessed July 17, 2013).

The AAO will now explain its determination that Dr. [REDACTED] submission as a whole and his statement that “[t]he duties are complex and specialized such that a Bachelor’s degree in Business Administration with a concentration in Accounting²¹, or related field, is a prerequisite for entry into the proffered position” has little evidentiary value and merits no probative weight and no deference by the AAO.

Dr. [REDACTED] provided a summary of his education and experience, but did not submit a copy of his curriculum vitae. He described his qualifications, including his educational credentials and professional experience. Based upon a complete review of Dr. [REDACTED] letter, the AAO notes that, while Dr. [REDACTED] may, in fact, be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Dr. [REDACTED] claims that he is qualified to comment on the position of “Business Analyst” because of the position he held at [REDACTED]. However, without further clarification, it is unclear how his position as a Professor Emeriti of Management and Information Systems at [REDACTED] would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of a software solutions and services business (as designated by the petitioner in the Form I-129) similar to the petitioner for *business systems analyst* positions (or parallel positions).

Dr. [REDACTED] opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *business systems analysts* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Dr. [REDACTED] in the specific area upon which he is opining. In reaching this determination, Dr. [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Dr. [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 opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position

²¹ The AAO notes that in his opinion letter, Dr. [REDACTED] asserted that the beneficiary’s education and work experience are equivalent to a “U.S. Bachelor’s degree in Business Administration with a concentration in accounting.” The AAO finds no evidentiary value in the credential evaluation rendered by Dr. [REDACTED]. USCIS recognizes as competent to evaluate the educational equivalency of training and/or work experience only “an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual’s training and/or work experience.” 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Dr. [REDACTED] provides no documentation that he is such an official. Further, Dr. [REDACTED] discussion of the beneficiary’s experience is cursory, superficial, and insubstantial. It provides no substantive analysis of how the beneficiary’s work experience equates to the years of college-level coursework pronounced by Dr. [REDACTED]. As such, the AAO finds little probative value in the credential evaluation portion of Dr. [REDACTED] opinion letter.

undermines the credibility of his opinion. Dr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations – or of the work that the beneficiary would actually perform if and when assigned to [REDACTED] where the petitioner says he would be assigned - how the duties of the position would actually be performed in the context of the petitioner's actual business enterprise or on the beneficiary's asserted assignment to [REDACTED]. At this point, the AAO hereby incorporates into this analysis its earlier comments and findings with regard to this record's lack of a substantial evidentiary foundation with regard to the substantive work that the beneficiary would actually perform and the level and nature of any practical and theoretical applications of highly specialized knowledge that he would actually employ.

Dr. [REDACTED] opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations and the asserted work at [REDACTED] 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 Dr. [REDACTED] has visited the petitioner's business, contacted [REDACTED] about details of the work being performed for it by the petitioner, observed the position while actually being performed in the context of this petitioner's business, interviewed knowledgeable staff about the substantive requirements of the proffered position, or documented the knowledge that would have to be applied on the job. Dr. [REDACTED] provides general conclusory statements regarding business systems analyst positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions regarding the actual position that is the subject of this petition.

Dr. [REDACTED] claims that the duties of the proffered position are complex and specialized. However, it must be noted that there is no indication that the petitioner and counsel advised Dr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary 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. It appears that Dr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Dr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Dr. [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Dr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he 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 opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 791. As a reasonable exercise of its discretion the AAO

discounts the advisory opinion letter 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 the opinion letter into each of the bases in this decision for dismissing the appeal.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition 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 of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). While, on appeal, counsel claims that the petitioner always requires a degree and that the petitioner "has more than 200 Business Systems Analyst[s]/Software Engineer[s] with similar background[s]," 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 Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Thus, the record of proceeding has not established 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 the equivalent.²²

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The evidence of record does not convey either the substantive nature or any particular level of specialization and complexity of any specific duties that the beneficiary would perform, and it does not distinguish the duties of the proffered position from the generic duties generally performed in the Computer Systems Analysts occupational group, which are ones for which the *Handbook* indicates no usual association with at least a bachelor's degree in a specific specialty.

In this regard, the AAO here also incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the pertinent occupational category. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." This aspect of the petition is materially inconsistent with the relative level of specialization and complexity required to satisfy this criterion.

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. Accordingly, for this additional reason, the petition cannot be approved.

Further, for the reasons discussed earlier with regard to the materially defective evaluations of education and experience submitted into the record regarding the material deficiencies of Professor [REDACTED] opinion, and (at footnote 21) of Dr. [REDACTED], the petitioner has also failed to establish the beneficiary as qualified to serve in any specialty occupation position. For this

²² 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 a 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.

reason also, the petition could not be approved even if the petitioner had established the proffered position as a specialty occupation.

Nevertheless, the AAO will now address the director's basis for denying the petition, namely the director's determination that the petitioner failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires.

Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), either.²³ As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;²⁴

²³ Although the record of proceeding contains an evaluation of the beneficiary's academic credentials, it does not establish that those credentials are equivalent to a bachelor's degree awarded by an accredited institution of higher education in the United States. Instead, it finds the *combination* of his academic studies and work experience equivalent to a bachelor's degree in Business Administration. Accordingly, that evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

In order to be relevant under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), an evaluation must be based upon the beneficiary's academic credentials alone.

²⁴ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As previously discussed, the record contains an evaluation of the beneficiary's academics and work experience prepared by Dr. [REDACTED] dated August 10, 2012. Dr. [REDACTED] claimed that, as of the date he signed the evaluation, he was Professor Emeriti Management and Information Systems, and Former Dean of the School of Business and Economics, at [REDACTED]. As noted above, according to Dr. [REDACTED] the beneficiary's foreign education and work experience are collectively equivalent to a U.S. bachelor's degree in Business Administration with a concentration in Accounting.

However, Dr. [REDACTED] evaluation does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the petitioner has not demonstrated that Dr. [REDACTED] currently possesses the authority to grant college-level credit for training and/or experience at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Simply 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.

For all of these reasons, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), the beneficiary is unqualified under this criterion because the record contains no evidence that he earned a baccalaureate or higher degree from an accredited college or university in the United States, and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of

evaluation service's evaluation of *education only*, not experience.

certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to achieving a USCIS determination that a beneficiary has the requisite qualifications to serve in a specialty occupation:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;²⁵
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of his expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

²⁵ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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