

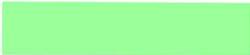


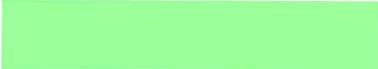
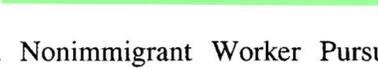
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 30 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

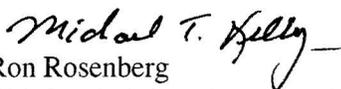


INSTRUCTIONS:

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  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a supplier of software products and services<sup>1</sup> established in 1981. In order to employ the beneficiary in what it designates as a “consultant process and domain” position,<sup>2</sup> the petitioner seeks to extend his classification 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, concluding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s letter denying the petition; (5) counsel’s motion to reopen and reconsider; (6) the director’s letter dismissing the motion; and (7) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director’s ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds two additional aspects which, although not addressed in the director’s decision, nevertheless also preclude approval of the petition, namely: (1) the petitioner’s failure to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) its failure to demonstrate that it had secured work for the entire period of requested employment when it filed the petition.<sup>3</sup> For these additional two reasons, the petition must also be denied.

To ease the reading of this discussion, the AAO will first discuss its supplemental finding that the petitioner has not established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, “Custom Computer Programming Services.” U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “541511 Custom Computer Programming Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Aug. 29, 2013).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 15-1121, the associated Occupational Classification of “Computer Systems Analysts,” and a Level II (qualified) prevailing wage rate.

<sup>3</sup> 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 two grounds for denial.

control the work of any such employee.” See 8 C.F.R. § 214.2(h)(4)(ii). It will then address the director’s finding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. The AAO will then discuss its additional finding that the petitioner failed to demonstrate that, at the time it filed the petition, it had secured work for the entire period of requested employment. However, before discussing any of those matters the AAO will address counsel’s claims with regard to this proceeding’s applicable standard of proof.

**I. Standard of Proof**

As a preliminary matter, and in light of counsel’s references to the requirement that the AAO apply the “preponderance of the evidence” standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in

*Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Applying that same standard, the AAO finds further that the petitioner has also failed to demonstrate: (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that at the time it filed the petition, it had secured work for the entire period of requested employment.

Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claim is "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim is "more likely than not" or "probably" true.

## II. Employer-Employee Relationship Between the Petitioner and the Beneficiary

The AAO will first address its supplemental finding that the petitioner failed to establish 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:

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

"United States employer" is defined 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.

As noted above, the record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that “United States employers” must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary “employees.” 8 C.F.R. §§ 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

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

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term “United States employer” to be even more restrictive than the common law agency definition.<sup>4</sup>

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<sup>4</sup> While the *Darden* court considered only the definition of “employee” under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(6), and did not address the definition of “employer,” courts have generally refused to extend the common law agency definition to ERISA’s use of employer because “the definition of ‘employer’ in ERISA, unlike the definition of ‘employee,’ clearly indicates legislative intent to extend the definition beyond the traditional common law definition.” *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff’d*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term “United States employer” was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency’s interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee,” “employed,” “employment” or “employer-employee relationship” indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition.” Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the “conventional master-servant relationship as understood by common-law agency doctrine,” and the *Darden* construction test, apply to the terms “employee,” “employer-employee relationship,” “employed,” and “employment” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>5</sup>

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).<sup>6</sup>

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

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision);

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<sup>5</sup> 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))).

<sup>6</sup> 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).

see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

Applying the *Darden* and *Clackamas* tests to this matter, the 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."

As a preliminary matter, it is noted that the petitioner has provided inconsistent information regarding who will supervise the beneficiary. In its September 4, 2012 letter of support, the petitioner claimed that the beneficiary "is required to report to [the petitioner's] Project Manager, [REDACTED]". However, in its deputation letter, which was also prepared on September 4, 2012, the petitioner stated that "[w]hile in the USA, [the beneficiary] will report to [REDACTED] Delivery Manager." In a document entitled "Job Description" that the petitioner attached to its October 30, 2012 letter of support, the petitioner stated that the beneficiary's "Reporting Manager" would be [REDACTED]. The petitioner provided no explanation for these inconsistencies. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Even if this were not the case, the AAO would still find that the petitioner had failed to demonstrate the existence of an employer-employee relationship.

On the Form I-129 the petitioner stated that the beneficiary would work offsite at [REDACTED] in San Jose, California, and the LCA was certified for employment at that address.<sup>7</sup> The petitioner's September 4, 2012 letter to the petitioner called for a similar arrangement.

The record also contains an excerpt from a Statement of Work (SOW) dated October 19, 2012, which was issued pursuant to a "Master Services or Offshore Development Agreement" (MSA) executed between the petitioner and [REDACTED] on July 1, 2005.<sup>8</sup> This document calls for the petitioner to provide personnel to [REDACTED] upon issuance of a purchase order. The record, however, does not contain a purchase order issued pursuant to the SOW.<sup>9</sup> Finally, the record contains a letter from [REDACTED] dated October 23, 2012, in which [REDACTED] states that the beneficiary will remain an employee of the petitioner while providing his services to [REDACTED]. [REDACTED] does not, however, describe the duties that the beneficiary would perform in any meaningful detail.

Upon review, the AAO finds that the record of proceeding fails to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary. The evidence submitted by the petitioner makes clear that the beneficiary would provide his services to [REDACTED] in San Jose, California. However, the record of proceeding does not contain any documentation from [REDACTED] providing substantial details regarding the nature and scope of the work that the beneficiary would perform on its premises.

The evidence of record does not demonstrate the requisite employer-employee relationship between the petitioner and the beneficiary. 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, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The October 23, 2012 letter from [REDACTED] does not establish that the petitioner would control the beneficiary's work, as it adds little information regarding that work. For example, it does not provide a probative description of his projected job duties or otherwise describe his position in a meaningful way. Nor does the SOW establish that the petitioner would control the beneficiary's work: the language of the SOW itself makes clear that it is nonbinding absent a purchase order, and the record of proceeding does not contain such a purchase order.

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<sup>7</sup> The petitioner's office is located in Plano, Texas.

<sup>8</sup> This July 1, 2005 MSA is not contained in the record of proceeding.

<sup>9</sup> The SOW specifically states that no work is to be performed until [REDACTED] has issued a purchase order.

For all of these reasons, the key element in this matter, which is who exercises actual control over the beneficiary and his work, has not been substantiated. While the record contains multiple assertions from the petitioner regarding its claimed right to control the work of the beneficiary, it is noted that 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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 petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, 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. The evidence of record does not establish which of the business entities that would be involved in assigning work for this beneficiary would substantially control the beneficiary in his day-to-day work, would determine the specifications and requirements of that work, and would gauge the quality of the beneficiary's performance and hence, ultimately, the beneficiary's acceptability for continued assignment.

Based on the tests outlined above, the petitioner has not established that it or any of its clients 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). Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

### III. Specialty Occupation

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

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the position, combined with the nature of the petitioning entity’s business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, [REDACTED]) may require as the ultimate employment of the beneficiary. See generally *Defensor v. Meissner*, 201 F.3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

The AAO notes that, as recognized by the court in *Defensor, supra*, where, as here, the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

As discussed above, the record of proceeding in this case does not contain documentary evidence from the end-client, [REDACTED] sufficient to establish the substantive nature of whatever work that the beneficiary would perform for [REDACTED]. The petitioner’s failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner

normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

However, even if the evidence of record were sufficient to establish the substantive nature of the work the beneficiary would perform for [REDACTED], the AAO would still find that the petitioner had failed to demonstrate that the proffered position is a specialty occupation. In order to afford the petitioner a comprehensive analysis of the specialty-occupation issue, the AAO will now perform such an analysis.

In its September 4, 2012 letter of support, the petitioner claimed that the duties of the proffered position would include the following:

- Supporting his supervisor in requirement workshops and current-systems studies;
- Analyzing diagnostic/as-is-assessments/audit reports;
- Identifying high-level process/system changes;
- Defining and documenting problems based on client and supervisor input;
- Providing input to supervisors on solution alternatives based on research;
- Building proof-of-concepts;
- Comparing solutions from various PLM packages;
- Reviewing and analyzing requirement specifications from business needs;
- Supporting the creation of to-be flows, configuration sheets, specification documents, and fit-gap analysis documentation;
- Defining and reviewing detailed functional processes, infrastructure, and security design;
- Supporting business process modeling, data modeling, and security and integration modeling in the context of the PLM package;
- Configuring, building, and supporting the resolution of issues with requirements and solution design;

- Supporting the customization, configuration, data migration, and integration of PLM packages;
- Providing inputs for plan customization, algorithms, solution capabilities, and resolving issues efficiently;
- Following development plans, resolving data migration issues, resolving cut-over user issues, and supporting other team members in the deployment of activities for smooth “go live”;
- Writing test plans and cases, performing tests, and resolving issues;
- Checking non-functional system requirements;
- Checking simulation results and value models;
- Preparing and reviewing system appreciation documents;
- Creating client training materials; and
- Conducting reverse knowledge transfers.

In its September 4, 2012 letter of support, the petitioner stated that “[t]he position is professional in nature and scope and requires, at a minimum, a Bachelor’s degree in Computer Science, Engineering, Math, Business or a related technical field, or the equivalent.” Thereafter, in the same letter, the petitioner claimed that the position “is a professional level position, requiring the attainment of at least a Bachelor’s degree in Computer Science, Engineering, or a related technical field.”

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty,” unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required “body of highly specialized knowledge” is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory “the” and the regulatory “a” both denote a singular “specialty,” the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes

how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, in the letter of support, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering, math, business, or a related technical field. However, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

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

Furthermore, the petitioner indicated that a general-purpose degree such as a degree in business is acceptable for the proffered position. Although a general-purpose bachelor's degree, such as a degree in business, 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*, F.3d 147.<sup>10</sup>

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<sup>10</sup> 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.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree (such as a degree in business) 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 id.*

Having made these general initial findings, the AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>11</sup> As noted above, the petitioner submitted an LCA in support of this position certified for a job-offer as a computer systems analyst. The AAO agrees with the petitioner that the duties proposed for the beneficiary in the petitioner's September 4, 2012 are similar to those described in the *Handbook's* "Computer Systems Analysts" occupational category.

The *Handbook's* discussion of the duties and educational requirements of computer systems analysts states, in pertinent part, the following:

Computer systems analysts study an organization's current computer systems and procedures and make recommendations to management to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both. . . .

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness

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<sup>11</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Prepare an analysis of costs and benefits so that management can decide if computer upgrades are financially worthwhile
- Devise ways to make existing computer systems meet new needs
- Design and develop new systems by choosing and configuring hardware and software
- Oversee installing and configuring the new system to customize it for the organization
- Do tests to ensure that the systems work as expected
- Train the system's end users and write instruction manuals, when required

Analysts use a variety of techniques to design computer systems such as data-modeling systems, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. They also do information engineering, designing and setting up information systems to improve efficiency and communication

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (accessed Aug. 29, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Most computer systems analysts have a bachelor's degree in a computer-related field. . . .

\* \* \*

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.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (accessed Aug. 29, 2013).

These statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook's* statement that "most" computer systems analysts possess a bachelor's degree in a

computer-related field, it is noted that the first definition of “most” in *Webster’s New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is “[g]reatest in number, quantity, size, or degree.” As such, if merely 51% of computer systems analyst positions require at least a bachelor’s degree in computer science or a closely related field, it could be said that “most” computer systems analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for “most” positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part “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.” Section 214(i)(1) of the Act.

Furthermore, the *Handbook* specifically states that an associate’s degree combined with work experience is sufficient for some computer systems analyst positions. Additionally, with regard to positions that do require attainment of a bachelor’s degree or equivalent, the *Handbook* indicates that a bachelor’s degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer systems analysts have liberal arts degrees and gained their programming or technical expertise “elsewhere.”

The materials from DOL’s Occupational Information Network (O\*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine’s Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position’s inclusion within any of these occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a “particular position” for which “[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry.”

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor does the single job-vacancy announcement submitted into the record satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petitioner has not submitted any evidence to demonstrate that this advertisement is from a company "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions. Nor has the petitioner established that this position is "parallel" to the proffered position. Nor does the petitioner submit any evidence regarding how representative this advertisement is of the industry's usual recruiting and hiring practices with regard to the position advertised. Again, 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. 158 at 165.<sup>12</sup>

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<sup>12</sup> Furthermore, according to the *Handbook* there were approximately 664,800 persons employed as computer systems analysts in 2010. *Handbook* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-6> (last visited Aug. 29, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the single submitted vacancy announcement with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that this advertisement was randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if this job-vacancy announcement established that the employer that issued it routinely recruited and hired for the advertised position only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that this job-vacancy announcement which appears to have been consciously selected could credibly refute the findings of the *Handbook* published by

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not 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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic computer-systems-analysis work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

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the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>13</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. 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 proposed 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.

The record contains no evidence pertaining to the qualifications of any current or prior computer systems analysts employed by the petitioner. As evidence of eligibility under this criterion, the petitioner submitted a copy of a job vacancy announcement it placed for a position entitled "senior associate consultant." However, the job title and job duties of the advertised position are not the same as the proffered position. The AAO finds that the advertisement is irrelevant to this matter as it is not an advertisement for the position proffered in this petition.

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<sup>13</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

Furthermore, the petitioner stated on the Form I-129 that it was established in 1981 (approximately 30 years prior to the submission of the H-1B petition). Thus, the submission of one advertisement (for a different position) over a 30-year period is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position, and has therefore not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

The AAO finds that the petitioner has not presented the proposed duties in sufficiently specific and substantive details to establish relative specialization and complexity as an aspect of their nature.

Further, there is the countervailing weight of the wage-level of the LCA. Both on its own terms and also in comparison with the two higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level II is indicative of duties of, at best, only a moderate degree of complexity requiring the exercise of only a limited degree of judgment by the beneficiary.

The *Prevailing Wage Determination Policy Guidance*<sup>14</sup> issued by DOL states the following with regard to Level II wage rates:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that this wage-level is appropriate for only "moderately complex tasks that require limited judgment."

Further, the AAO notes the relatively low level of complexity that this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

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<sup>14</sup> Available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last accessed Aug. 29, 2013).

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

By virtue of this submission the petitioner effectively attested that the proffered position requires that the beneficiary exercise only a "limited" degree of professional judgment, that the job duties proposed for him are merely "moderately complex," and that, as clear by comparison with DOL's instructive comments about the next higher level (Level III), the proffered position did not even involve "a sound understanding of the occupation" (the level of complexity noted for the next higher wage-level, Level III).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Thus, even if the evidence of record were sufficient to establish the substantive nature of the work the beneficiary would perform for [REDACTED] the AAO would still find that the petitioner had failed to demonstrate that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

#### IV. Securing of Work for Entire Period of Requested Employment at Time of Filing

Next, the AAO will discuss its supplemental finding regarding the petitioner's failure to establish that at the time of this petition's filing, it had secured work for the entire period of requested employment, that is, September 26, 2012 through May 16, 2015.

The petitioner filed the instant petition on September 10, 2012. However, the SOW was not executed until October 19, 2012, more than one month after the petition was filed, and any purchase order issued by [REDACTED] pursuant to this SOW would necessarily have been executed after that date. The letter from [REDACTED] regarding the beneficiary was also issued more than one month after the petition was filed.

Thus, even if the SOW and the October 23, 2012 letter from [REDACTED] did constitute credible evidence regarding work that the petitioner may have secured for the beneficiary to perform for [REDACTED] during the requested period of employment, they would not constitute evidence that, by the time of the petition's filing, the petitioner had secured definite, non-speculative employment with the beneficiary.<sup>15</sup> 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)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, this aspect of the petition would preclude its approval. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

#### V. Prior H-1B Approvals

Finally, it is noted that the beneficiary currently holds H-1B status. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely

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<sup>15</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

## VI. Conclusion

As set forth above, the AAO agrees with the director's finding that the petitioner failed to demonstrate that the proffered position is a specialty occupation. Beyond the decision of the director, the AAO finds additionally that the petitioner failed to: (1) demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) demonstrate that it had secured work for the entire period of requested employment when it filed the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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