

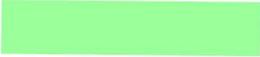
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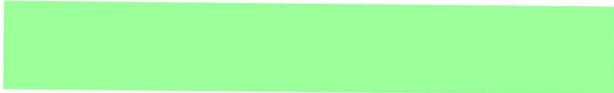
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

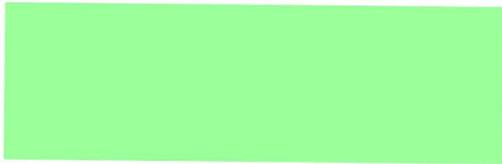


DATE: **JUL 22 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a product development and software consulting firm established in 2006. In order to employ the beneficiary in what it designates as a business analyst position, the petitioner seeks to classify her 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 it will have a valid employer-employee relationship with the beneficiary in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) failed to establish that the beneficiary is qualified to serve in a specialty occupation position. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.¹

In the petition signed on May 22, 2012, and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary as a business analyst on a full-time basis at the rate of pay of \$50,000 per year. In addition, the petitioner indicates that the beneficiary will be employed at [REDACTED]. In the support letter dated May 19, 2012, the petitioner states that the beneficiary would be employed to perform the following duties:

- Provide assistance in evaluating, and developing systems and procedures that are cost effective and meet business requirements[;]
- Create business requirement documents and system design documents[;]
- Work with user groups and provide training, resolve questions, assess user needs, and recommend changes[;]

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

- Prepare specifications for system changes[;]
- Evaluate the data collected through task analysis, business process, surveys and workshops[;]
- Provide suggestions to the development team during the development stage of product to meet the client's business needs[; and]
- Initiate systems testing and use tools and process definition/improvement to re-engineer technical processes for greater efficiencies[.]

The petitioner also states that "[t]he position requires the person to have a degree in Business Administration." The AAO observes that the petitioner does not indicate the degree level (e.g., associate's degree, vocational degree, baccalaureate, master's degree) for the position.

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Business Administration degree and transcript from [REDACTED] awarded on August 13, 2011.

In addition, the petitioner submitted the following documents:

- A Master Services Agreement between [REDACTED] and the petitioner, effective April 17, 2012. The AAO notes that the Master Service Agreement includes the following information:

- The document states in section 1. D. Statement of Work the following:

The Services to be performed under this Agreement shall be specified in an applicable, completed Work Order or other statement of work ("Statement of Work"), which shall be approved and executed by both parties. Each Statement of Work shall specify, at a minimum, the Services to be performed, the timeframe for performance, including milestones, if any, and the Consultant(s) who will perform such Services, along with each Consultant's hourly rates. The parties agree that time is of the essence in performing their respective obligations under any Statement of Work.

- A Statement of Work (SOW). The document indicates the following:

Consultant	:	[REDACTED]
Start date	:	06/01/2012
Project	:	Date [sic] Warehouse PLUS: Phase 1
Duration	:	For the duration of the project period

Notably, the document does not indicate the proffered position.

- A letter from [REDACTED] The letter is dated May 8, 2012. In the letter, [REDACTED] states that "we have contracted [the petitioner], a solutions provider in Dallas, Texas, to take over an IT project called

Data Warehouse PLUS." In addition, [REDACTED] states that "[the petitioner] is to assign approximately 10 employees to the project. Individuals involved are software developers and IT managers." [REDACTED] further states that "[the beneficiary] is one of the employees assigned to the project." The AAO notes that [REDACTED] does not indicate that business analysts are involved in the project.

- An offer of employment letter from the petitioner to the beneficiary. The letter is dated May 7, 2012.
- An Employment Agreement between the petitioner and the beneficiary dated May 3, 2012.
- A letter from the petitioner regarding the method of evaluating its employees. The letter is dated May 2012.
- A copy of its Employer's Quarterly Federal Tax Return for the 4th quarter of 2011.
- A copy of its promotional materials and printouts from its website.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 7, 2012. The petitioner was asked to submit, *inter alia*, probative evidence to establish that it has specialty occupation work available for the entire requested H-1B validity period. The director outlined the specific evidence to be submitted.

On August 13, 2012, in response to the director's RFE, counsel provided additional supporting evidence, including the following documentation:

- Printouts from [REDACTED] website.
- Copies of the Semi Monthly Time Sheets of the beneficiary.
- A document entitled "Data Warehouse Plus" from [REDACTED]
- A job description for the position of programmer analyst. As previously noted, the proffered position is business analyst. The petitioner has not established the relevancy of the job description for a programmer analyst position to the instant case.
- Printouts of press releases from [REDACTED] website.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 20, 2012. Counsel submitted an appeal of the

denial of the H-1B petition. With the appeal brief, counsel submitted additional evidence.²

The issue before the AAO is 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:

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 in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or*

² With regard to documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

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 (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.³

³ 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 318-319.⁴ 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).⁵

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,

⁴ 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))).

⁵ 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).

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).

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

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

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

On appeal, counsel claims that "[t]he petitioner, as an employee [sic], will pay the beneficiary, withhold her taxes, provide her all the benefits as an employee of the company, and supervise her work." The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an employment agreement and an offer of employment letter between the petitioner and the beneficiary, dated May 3, 2012, and May 7, 2012, respectively. The AAO notes that the employment agreement reports that the beneficiary "shall be entitled to participate in vacation, major medical, and other employee benefits as established by Employer and in accordance with the

policies of the Employer." In addition, the offer of employment letter states that the beneficiary, as a full-time employee, will be entitled to "14 days paid vacation" and "[h]ealthcare and [d]ental insurance." However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plans was provided to USCIS.

Furthermore, upon review of the documentation, the AAO notes that it fails to adequately establish several critical aspects of the beneficiary's employment. For example, the employment agreement states that "[e]mployer renders computer and software consulting services by providing their employees, such as Employee, to third party end clients or users (individually a 'Client', and collectively the 'Clients'), whether directly or through one or more third party agencies." According to that agreement, the beneficiary may be placed at various locations and not necessarily in Dallas, Texas as indicated in the instant petition.

In addition, the AAO notes that the employment agreement and the offer of employment letter do not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While an employment agreement or an offer of employment letter may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to address or submit any probative evidence on the issue.

Further, upon review of the record, the petitioner has not established that the beneficiary will be employed in a specialty occupation during the entire period requested in the petition. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2012, to October 1, 2015. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [redacted] No other work locations were provided. The petitioner submitted a Master Services Agreement between the petitioner and [redacted] effective April 17, 2012, along with an SOW. The SOW is signed by [redacted]

[redacted] Director for the petitioning company, and [redacted] President for [redacted] The SOW indicates the following:

- Consultant : [redacted]
- Start date : 06/01/2012
- Project : Date [sic] Warehouse PLUS: Phase 1
- Duration : For the duration of the project period

Notably, the SOW does not indicate the proffered position of business analyst or Dallas, Texas, as the work location. Further, the SOW does not indicate the duration of the project.

The petitioner also provided a letter from [REDACTED] President of [REDACTED]. In the letter, [REDACTED] states that "we have contracted [the petitioner], a solutions provider in Dallas, Texas, to take over an IT project called Data Warehouse PLUS." In addition, [REDACTED] states that "[the petitioner] is to assign approximately 10 employees to the project. Individuals involved are software developers and IT managers." [REDACTED] further states that "[the beneficiary] is one of the employees assigned to the project." The AAO notes that [REDACTED] does not indicate that business analysts are involved in the project. Furthermore, the letter does not establish that the beneficiary will be working on Data Warehouse PLUS project for the duration of the requested period.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from October 1, 2012, to October 1, 2015. However, the documentation does not establish that the Data Warehouse PLUS project will continue through October 1, 2015. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The AAO notes that [REDACTED] (or any other client) is responsible for approving time sheets for the petitioner's "consultants." This is evidenced by the employment agreement, submitted with the initial petition, which indicates that "[e]mployee must send a [sic] timesheets signed by the appropriate representative of the Client to Employer." In addition, the time sheets, submitted on appeal, indicate that they were approved by [REDACTED]. The petitioner did not provide any further information regarding the supervision of the beneficiary for this project (or any other projects).

The petitioner also submitted a letter from the petitioner regarding the method of evaluating its employees. The letter provides a description of the levels of performance that are based on a number scale of 1-10. Notably, the record does not contain any information from the petitioner regarding the purpose of the performance reports; whether the reports are reviewed and analyzed; if so, by whom; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the performance reports; the consequences, if any, of failing to prepare the reports; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the documents to the matter here.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability

of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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)). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence indicates that [REDACTED] or possibly some other future client or end client will assign the beneficiary's projects. Moreover, the day-to-day work of the beneficiary appears to be supervised and overseen by [REDACTED], with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client or end client. *See Defensor v. Meissner*, 201 F.3d at 388.

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

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

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

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

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

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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific

specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

In the instant case, the AAO notes the petitioner stated in its letter of support (dated May 19, 2012) that its minimum educational requirement for the proffered position is a "degree in Business Administration."⁶ The petitioner's claim that a "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 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 demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. 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).⁷

⁶ As previously noted, the petitioner does not indicate the degree level (e.g., associate's degree, vocational degree, baccalaureate, master's degree) for the position.

⁷ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

Furthermore, the AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the legacy INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

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

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

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

[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.

Id.

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.

The AAO will now look at the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*), an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ In the instant case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the proffered position is "Business Operations Specialists, All Others." The AAO reviewed the *Handbook* regarding the occupational category "Business Operations Specialists, All Others." However, the *Handbook* simply describes this category as "[a]ll business operations specialists not listed separately." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Business Operations Specialists, All Others." More specifically, the *Handbook* does not provide the typical duties and responsibilities for this category. Moreover, the *Handbook* does not provide any information regarding the academic and/or professional requirements for these positions.

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited July 17, 2013).

⁸ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed. Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this 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 indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation. Upon review of the record, the petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational category "Business Operations Specialists, All Others" is at least a bachelor's degree in a specific specialty, or the equivalent.

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

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

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

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

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

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

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

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the petitioner designated the proffered position as a Level I (entry level) position. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁹ That is, in accordance with the relevant DOL explanatory information on wage levels,

⁹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁰

The AAO observes that the petitioner has indicated that the beneficiary's academic background and experience in the industry will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, as the petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement,

¹⁰ For additional information regarding the Level IV wage level as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

The petitioner stated in the Form I-129 petition that it has 40 employees and was established in 2006 (approximately six years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish

that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." It is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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

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

Finally, beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Even if the petitioner had established that the proffered position was a specialty occupation (which it has not), the beneficiary would not qualify to perform the duties of a specialty occupation based on her academic credentials, because it has not been demonstrated that the beneficiary possesses a degree in a specialized field of study.

Specifically, while the beneficiary possesses a Master of Business Administration degree, the beneficiary's degree and transcript fail to designate any specific business specialty. The AAO notes that a general degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved, because the petitioner failed to demonstrate that the beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business. For this additional reason, the petition must be denied.

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 (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.