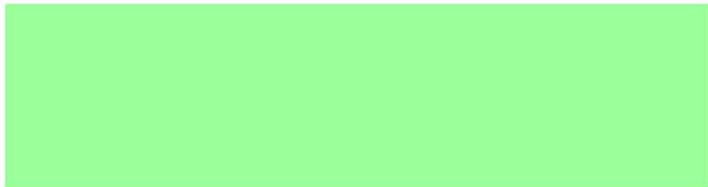


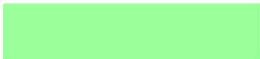
(b)(6)

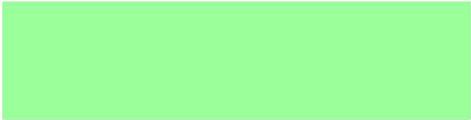


U.S. Citizenship
and Immigration
Services



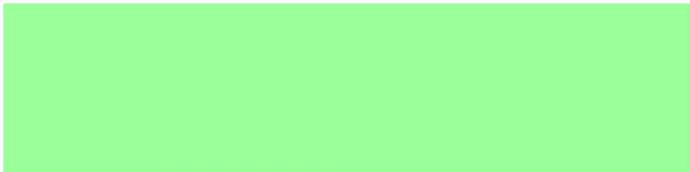
DATE: JUL 30 2013

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:

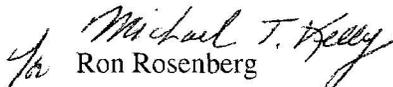


INSTRUCTIONS:

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on May 22, 2012. On the Form I-129 visa petition, the petitioner describes itself as a consulting, software development, networking, and real estate development business with 17 employees, established in 1997. In order to employ the beneficiary in a position to which it assigned the job title "Programmer Analyst," 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 (1) to establish that it will have a valid employer-employee relationship with the beneficiary; and (2) to establish that the job offered qualifies as a specialty occupation. The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO finds that the director's decision to deny the petition on each of the two separate grounds specified in his decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified Labor Condition Application (LCA) that corresponds to the petition. 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 exercise of this function that the AAO identified this additional ground which precludes approval of the petition. The AAO will address this aspect towards the end of the decision, after first discussing the two grounds upon which the petition was denied.

At the outset, the AAO will first address some aspects of this record of proceeding that bear materially on the outcome of this appeal.

The Form I-129 identified the job title of the proffered position as "Programmer Analyst." The LCA which the petitioner submitted in support of the petition was certified for a job prospect titled "Computer Programmer/Programmer Analyst," corresponding to the occupational classification of "Computer Programmers" – SOC (ONET/OES Code) 15-1131.00, at a Level I (the lowest of the four assignable levels) prevailing-wage level.

The Form I-129 and its supporting documentation indicate that the petitioner seeks the beneficiary's services in the proffered position to work on a full-time basis at a salary of \$35,000

per year. In addition, the petition and the LCA assert that the beneficiary will be employed at [REDACTED] (described as the petitioner's headquarters location) or [REDACTED] (described as the petitioner's software development center). The petitioner further indicated that the beneficiary will not work offsite.

Among the documents submitted with the Form I-129 is a May 17, 2012 letter by the petitioner that was submitted in support of the petition. This letter is on the petitioner's letterhead and is signed by the petitioner's president. The letter's "Requirements for Professional Positions and Policy" section states the following:

[The] beneficiary will work as a Computer Programmer/Analyst on projects of designing and developing customized computer programs, enhance and modify existing programs and systems. The position requires review [of] programs, upgrade for advanced technical features, consider available solutions or alternatives [sic] methods, ensure accuracy of reports, and results derived through the programs and document procedures in a systematic manner.

The letter's "Duties and Responsibilities" section introduces the following list as the duties of the proffered position:

- Review and analyze systems specifications to determine whether all required elements have been included. Consult with clients to gather information about program needs, objectives, functions, features, and input and output requirements.
- Analyze, define and documents [sic] requirements for data, workflow, logical processes, hardware and operating system environment, interfaces with other systems, internal and external controls.
- Use programming languages to code computer instructions from the systems documentation. Utilize any special programming techniques necessary to achieve the most effective program.
- Test and debugs [sic] computer programs. Modify existing programs to conform to system changes or to make improvements in the existing program.
- Work on projects of computer programming and systems analysis for accounting/payroll systems using Oracle 11, PL/SQL, SQL* plus, Developer 2000 using windows 2000, NT, XP, Vista systems.
- Advise users to resolve computer applications, capabilities, alternative programming approaches, limitations, etc. Work with user departments to resolve specific problems or make changes in programs.
- Train end users in any specific procedures necessary to enter data into

terminals for computer processing.

- Write, maintain documentation to describe program development, logic, coding, changes, and corrections.
- Monitor performance of programs after implementation. Cross-train for personal computer and terminal operations and maintenance. Maintains relationships with other departments and agencies.

The letter's "Qualification and Experience" section states that "[t]he beneficiary possesses a Master[']s Degree in Computer Science from [the] University [redacted]"

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

A copy of the employment offer letter from the petitioner's president to the beneficiary, dated April 30, 2012, for the full-time position of "Programmer Analyst" at a salary of \$35,000 per year, and listing the same job duties as the May 17, 2012 letter of support.

While the petitioner appears to use the job titles "programmer analyst" and "computer programmer/analyst" interchangeably throughout the record of proceeding, it should be noted that computer programmers and computer programmer analysts belong to separate and distinct occupational groups, and that, as such, they are distinguishable both by materially different constellations of duties and tasks and also by different prevailing-wage levels.

As already noted, the petitioner submitted an LCA certified for a job belonging to the "Computer Programmers" occupational group – SOC (ONET/OES Code) 15-1131.00.

Further, the AAO finds that, though very broadly described and not illuminative of any particular work that the beneficiary would perform on any particular project that may be assigned to her, the generalized descriptions of duties that the petitioner ascribes to the proffered position appear to generally comport with the Computer Programmers occupational group as described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative resource on the duties and educational requirements of the wide variety of occupational groups that it addresses.¹

It should be noted, however, that if a position's substantive duties comprise those of programmer analysts and comport with the Computer Systems Analysts occupational group as described in the *Handbook*, that position would be classifiable within the Programmer Analysts subcategory

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

of the Computer Systems Analysts occupational group², SOC (ONET/OES Code) 15-1121.00, and an H-1B petition for such a position would have to be supported by an LCA certified for a position within that occupational group, which is not the case here.

In any event, as will now be discussed, the information in the *Handbook* does not support a conclusion that entry into either occupational group normally requires at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupational category:

Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields,

² The following section of the *Handbook's* chapter "Computer Systems Analysts" places Computer Programmer Analysts as an occupational subgroup within the Computer Systems Analysts occupational group:

The following are examples of types of computer system analysts.

Systems analysts specialize in developing new systems or fine-tuning existing ones to meet an organization's needs.

Systems designers or systems architects specialize in helping organizations choose a specific type of hardware and software system. They develop long-term goals for the computer systems and a plan to reach those goals. They work with management to ensure that systems are set up to best serve the organization's mission.

Software quality assurance (QA) analysts do in-depth testing of the systems they design. They run tests and diagnose problems to make sure that certain requirements are met. QA analysts write reports to management recommending ways to improve the system.

Programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging the code than other types of analysts, although they still work extensively with management to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers. For more information, see the profiles on computer programmers and software developers.

such as healthcare or accounting, may take classes in that field in addition to their degree in computer programming. In addition, employers value experience, which many students get through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree also gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and many other tasks that they will do on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

Certification

Certification is a way to demonstrate a level of competence and may provide a jobseeker with a competitive advantage. Certification programs, generally available through product vendors or software firms, offer programmers a way to become certified in specific programming languages or for vendor-specific programming products. Some companies may require their computer programmers to be certified in the products they use.

Advancement

Programmers who have general business experience may become computer systems analysts. Programmers with specialized knowledge of, and experience with, a language or operating system may become computer software developers. They also may be promoted to managerial positions. For more information, see the profiles on computer systems analysts, software developers, and computer and information systems managers.

Important Qualities

Analytical skills. Computer programmers must understand complex instructions in order to create computer code.

Concentration. Programmers must be able to work at a computer, writing lines of code for long periods of time.

Detail oriented. Computer programmers must closely examine the code they write because a small mistake can affect the entire computer program.

Troubleshooting skills. An important part of a programmer's job is to check the program for errors and fix any they find.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 14, 2013).

The *Handbook* states that most computer programmers have a bachelor's degree, but the *Handbook* does not report that it is an occupational, entry requirement.³ The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree.

Similarly, the "How to Become a Computer Systems Analyst" section of the Computer Systems Analysts chapter of the *Handbook* indicates that possession of at least a bachelor's degree, or the equivalent, in a specific specialty, is not normally a minimum requirement for entry into this occupational group, as follows:

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

Education

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

³ The statement that "most computer programmers have a bachelor's degree" does not support the view that all computer programmer positions qualify as a specialty occupation. The statement does not indicate that most employees in this occupation have a bachelor's degree *in a specific specialty*, or its equivalent, that is directly related to the duties and responsibilities of the position. Although a general-purpose bachelor's degree 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 147.

Furthermore, the term "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, 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 employees in this occupation have a bachelor's degree, it could be said that "most" of the individuals have such a degree. It cannot be found, therefore, that a statement that "most" employees possessing such a degree in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a Level I low, entry-level position relative to others within the occupation). 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." § 214(i)(1) of the Act.

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

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

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

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

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

Id., Computer Systems Analysts , available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited July 14, 2013).

The *Handbook* does not report that, as an occupational group, "Computer Systems Analysts" require at least a bachelor's degree in a specific specialty. The *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field," but "many analysts have technical degrees," and "[s]ome analysts have an associate's degree and experience in a related occupation."

In any event, regardless of whether the proffered position should be analyzed as falling within the Computer Programmers occupational group as the petitioner categorized it, or within the Computer Systems Analyst occupational group, the *Handbook's* information indicates that the proffered position's inclusion in either group would not in itself be sufficient to establish the position as one for which the normal entry requirement would be a bachelor's or higher degree in a specific specialty. That being said, the AAO finds – as will be discussed below – that the evidence within this record of proceeding fails to establish that, at the time of the petition's filing, the petitioner had secured for the beneficiary any work within the scope that the petition asserts for the proffered position. As will also be evident in the remainder of this decision, the AAO also finds that the petitioner fails to establish the substantive nature of any work that the beneficiary would perform if this petition were approved. It follows that the director's determinations to deny the petition for failure to establish an employer-employee relationship with the beneficiary and also for failing to establish the proffered position as a specialty occupation were correct.

On August 21, 2012, in response to the director's RFE, the petitioner provided additional supporting evidence, including, *inter alia*, the following:

- A copy of the petitioner's "Quarterly Federal Tax Return," for the fourth quarter of 2011.
- A copy of the petitioner's "NYS-45 WEB, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return," for the fourth quarter of 2011, indicating the number of employees on the petitioner's payroll.
- Photographs of the petitioner's work premises.
- A copy of the "Office Service Agreement," between the petitioner and [REDACTED] dated May 24, 2010, for lease of the premises at [REDACTED], for one person, for a monthly office fee of \$751.00, from June 1, 2010 to May 31, 2012, as amended by the "Addendum to Service Agreement," dated May 25, 2010.
- A copy of an e-mail, dated March 30, 2012, from [REDACTED] Center Manager, [REDACTED] to the petitioner's president stating that the petitioner's "account has already been renewed."
- A copy of a "Commercial Lease," between the petitioner and [REDACTED], signed on April 1, 2008, for lease of the premises in [REDACTED] New Jersey, for a term of five years, from April 1, 2008 to March 31, 2013.
- Copies of various agreements between the petitioner and other companies for information technology (IT)-related support services (1) mostly for periods that appear to have expired (as no renewal documentation was provided); and/or (2) for other consultants of the petitioner (other than the beneficiary).
- Copies of various agreements between the petitioner and other companies for other services that are not applicable to the services that the beneficiary would perform under this petition, including construction-related services, graphic design-related services, business product analysis services, sales and marketing development program services, marketing analysis services, and advertising and promotion services.
- A copy of the "Employment Agreement" between the petitioner and the beneficiary, dated April 30, 2012.
- A copy of the petitioner's "Form 1120S, U.S. Income Tax Return for an S Corporation for 2010," in which the petitioner lists, on page 2, in Schedule B, its business activity as "Computer/IT related Services & Construction" and its product or service as "Consulting/Web Designing/Construction."

- The petitioner's company brochures.

The AAO notes that on page four of the letter in response to the RFE, counsel states, “[b]elow is a list of some of the petitioner’s major clients for whom the *petitioner* will perform duties from [the] petitioner’s principal place of business.” (Emphasis added.) The evidence in the record of proceeding fails to provide any substantive evidence that any business or contractual relationships between the petitioner and any of these listed clients - or any other clients, for that matter - would generate the work that the petitioner claims that the beneficiary would perform if this petition were approved. Additionally, the AAO notes that many of the contractual documents submitted into the record appear to have expired (and no renewal documentation was submitted into the record), that the nature of some of the contracts does not relate to computer programming or programming analysis, and /or that the submitted contractual documents pertain to other named consultants and do not specify the beneficiary’s name.

Also, the AAO notes that there are inconsistencies within the petition’s documents that bear negatively upon the overall credibility of the petition.

The AAO notes, for instance, that on the last page of the letter in response to the RFE, counsel refers to the beneficiary by the male pronoun⁴ and states the following:

The beneficiary[,] Mr. [name of individual other than the beneficiary of the instant petition] possesses that talent and skills. He has worked with this organization for over four years and his performance has been rated excellent by this organization⁵. . . . Copy [sic] of [the] beneficiary’s certificates and foreign credential evaluation report⁶ have been submitted earlier.

The AAO also notes that in the brief on appeal, dated October 24, 2012, counsel also indicates that the beneficiary has previously worked for the petitioner in H-1B status, although the record does not corroborate that statement.⁷

The AAO notes that the documents filed in response to the RFE also include a letter from counsel for the petitioner, entitled, “Response to Request for Evidence,” dated August 17, 2012. On the third page of the letter, counsel states that the “[p]etitioner has three offices in the United States,” and later, on page seven of the same letter, counsel states that the petitioner “has two offices in the United States and one overseas in India.” Also, in the letter, counsel states the

⁴ The AAO notes that the beneficiary of this petition is a female.

⁵ The AAO notes that the beneficiary of the instant petition was previously in F-1 status and has not previously worked for the petitioner.

⁶ The AAO notes that the beneficiary of the instant petition has a U.S. Master’s Degree and that no credential evaluation report was submitted into the record of proceeding.

⁷ Specifically, in the brief on appeal, counsel states that “the Petitioner had maintained an employee – employer relationship with the Beneficiary for his previous H-1B validity period and continues to maintain the same relationship.”

following:

[The] [p]etitioner's office is located on the 12th floor of the building known as [REDACTED] where there are several other companies doing their business. Each floor has a capacity of ranging from 250 to 300 persons. Also[,] many of the services and facilities on the same floor are shared by various companies.

Later, on the same page and a few paragraphs down, counsel states, "Each floor has a capacity to accommodate 300 to 400 persons to be able to work. . . ."

On appeal, counsel for the petitioner asserts that the beneficiary's "business background" is an important aspect of her ability to serve as a programmer analyst, and, the AAO further notes that the Form I-129 (at part A, item 3, of the H-1B Data Collection Supplement) identifies the beneficiary's Major/Primary Field of Study as "Business Administration." However, the AAO finds that the diploma and transcript copies that the petitioner submitted into the record establish that the beneficiary's qualifications relate to a U.S. Master's Degree in Computer Science, a foreign "Bachelor of Education" degree "with selected subject: Mathematics & Science," and a foreign "Bachelor of Science (Special) with special subject: Mathematics." The AAO also notes, that, contrary to those educational attainments that the submitted documentation ascribes to the beneficiary, not only does the Form I-129 cite Business Administration as the beneficiary's Major/Primary Field of Study, but it also cites a Bachelor's (not a Master's) degree as the beneficiary's highest level of educational attainment (at part A, item 2f, of the H-1B Data Collection Supplement).

The AAO finds that the above-noted inconsistencies and incorrect information render the associated attestations unreliable because of their mistaken or conflicting nature. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

However, that being said, the AAO finds that the most critical and decisive evidentiary aspect of this record of proceeding is its lack of evidence establishing what work the beneficiary would actually perform, for whom, according to what terms and conditions, subject to whose supervisory directions regarding the actual work to be performed, and pursuant to what particular contractual arrangements and specifications, if any. In this regard, the AAO finds that, while the petitioner claims that there would be plenty of work to engage the beneficiary based upon the vitality of its business and the broadness of its customer base, the record of proceeding does not contain any documentary evidence establishing a particular contract pursuant to which the beneficiary would be engaged in providing any computer-related services, let alone the services that the petitioner ascribes to the proffered position. Further, the AAO observes that nowhere within this record of proceeding is there any document wherein any of the petitioner's clientele adopt or endorse any claim or suggestion of the petitioner or its counsel that the beneficiary would perform any specific type of work for them at any time or for any period.

Consequently, as the record of proceeding lacks substantive evidence establishing what work, if any, the petitioner had actually secured for the beneficiary for the period requested in the petition, the petitioner's claim to an employer-employee relationship with the beneficiary must fail, and so too, then, must the petitioner's assertion of status as a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

Adopting and incorporating the above comments and findings as part of the rest of this decision's analyses, the AAO will continue, addressing first the employer-employee issue, then the specialty occupation issue, and, finally, the LCA issue which the AAO is raising as part of its *de novo* review.

The first 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 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).

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2011). 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) (2011). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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.⁸

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 318-319.⁹

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).¹⁰

⁸ 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).

⁹ 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))).

¹⁰ 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

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d at 388 (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 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."

Upon review of the documentation provided by the petitioner, the AAO notes the lack of specificity and supporting documentation regarding any specific project(s) on which the beneficiary would work; the absence of any documentation from any client(s) on whose project(s) the beneficiary would work; and the absence of any documentation from any client(s) corroborating the job duties, nature of the work to be done, location of the work, duration of the work, and the specifications or performance requirements of the actual work to be performed by the beneficiary, and specifying the measure of control to be exercised by such client(s) over the beneficiary and her work.

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

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. Moreover, the record does not contain a written agreement between the petitioner and any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period.

Moreover, the AAO notes that the petitioner did not submit probative evidence establishing any specific work for the beneficiary.

Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2012 to September 30, 2015, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, counsel for the petitioner simply claimed in response to the RFE that "the beneficiary will work on clients['] projects" and that the "[p]etitioner has contracts with several business clients for

providing IT, Customized Software Development, Maintenance, Training and Upgrade services.” Also, while counsel provided a list of some of the petitioner’s clients, there is no documentation in the record specifying that the beneficiary would work for any of those clients. Also, as noted earlier, some of the agreements appear to have expired and no renewal documentation was provided, or they appear to be for non-IT-related services. In addition, the “Subcontractor Agreement,” dated August 19, 2010, between the petitioner and [REDACTED] is missing some pages (including the signatory page) and is thereby incomplete.

The AAO accords no probative weight to the counsel’s statement, in the brief on appeal, which states: “[p]lease note that the beneficiary will work for [the] petitioner who has procured contracts or order[s] for services to be performed for its clients. . . . Due to client’s proprietary concerns, and restrictions from the client, the petitioner is not in a position to reveal more details about the projects, business plans, reports, presentations, designs, [and] blue prints.” First of all, the AAO notes that the record of proceeding lacks documentary evidence substantiating or corroborating counsel’s claim, and that, therefore, as so standing by itself, counsel’s assertion merits no evidentiary weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Also, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Next, while the petitioner never specifically claimed that the evidence was privileged, the AAO notes that the petitioner states that “[d]ue to client’s proprietary concerns, and restrictions from the client, the petitioner is not in a position to reveal more details about the projects, business plans, reports, presentations, designs, [and] blue prints.” While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner’s failure to provide such a document if that document is material to the requested benefit.¹¹ Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Thus, the record does not demonstrate that the beneficiary would even be working, let alone maintaining an employer-employee relationship with any entity during the period requested in the petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm’r 1978).

¹¹ Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner’s confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, “Predisclosure Notification Procedures for Confidential Commercial Information.” Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

Based on the 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). Accordingly, the appeal will be dismissed and the petition will be denied.

The AAO will now address the director’s second ground for denying the petition, namely the director’s determination that the petitioner had failed to establish the proffered position as a specialty occupation.

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), 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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner stated that the beneficiary would be employed in a programmer analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical

application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

Qualification as a specialty occupation is not determined by the position's title or how closely a petitioner's unsubstantiated job and duty descriptions approximate the narrative about an occupational category in the *Handbook* or any other reference material. Rather, specialty occupation classification is dependent upon the extent and quality of the evidence of record, about the actual work to be performed in the particular position that is the subject of the petition, about the associated performance requirements, and about the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such specific performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its clients, the AAO focuses on whatever documentary evidence the client entities generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, in which the court accepted and applied the analytical approach of the former INS of examining the ultimate employment of the beneficiary, as determined by the requirements of the organization to which the beneficiary would be assigned by the petitioner, in order to determine whether the particular position proffered in the petition constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the former 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.*

Although the petitioner here indicates that it would not be acting as a staffing agency, the record of proceeding makes clear that any work that the beneficiary would perform in the proffered position would be dependent upon and subject to the particular performance requirements of the petitioner's clients. Thus, here too, documentary evidence of both the existence of work that the beneficiary specifically would perform for client entities and the specific terms, conditions, and performance requirements set by those entities to which the beneficiary's services would be subject, is critical, but missing in this record of proceeding.

It is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition – and even whether the beneficiary would be providing services

described in the petition - would be determined by the specific requirements generated by entities contracting for the beneficiary's services. In this situation, the outcome of USCIS's adjudication of the specialty occupation issue depends upon the extent and quality of documentary evidence that the petitioner submits from the end-clients that would receive the fruits of the beneficiary's services. The end-clients ultimately determine what the beneficiary would do, and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. Here, however, the record of proceeding contains no probative evidence from any client regarding the beneficiary and the services to be performed by her.

The AAO further finds that the record of proceeding lacks any probative evidence establishing any in-house project or projects that would require the beneficiary's services as specified in the petition.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary 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's 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.

As earlier noted, beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition.

The general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1), in pertinent part, as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In the instant matter, the petitioner filed the Form I-129 with USCIS on May 22, 2012. The LCA provided at the time of filing was certified on April 30, 2012, (1) for the job title of computer programmer / programmer analyst; (2) pursuant to occupational code, 15-1131.00 – Computer Programmers; (3) for a position in the city of New York, in New York County, in the state of New York [REDACTED] at a Level I prevailing wage of \$52,478 per year; and (4) for a position in the city of [REDACTED] in Morris County, in the state of New Jersey ([REDACTED]) at a Level I prevailing wage of \$59,030 per year.

According to the Foreign Labor Certification Data Center's Online Wage Library, under the "All Industries database for 7/2011 - 6/2012," for the [REDACTED] Metropolitan Division, the prevailing wage for the occupation "Computer Programmers" at a Level I wage is \$52,478 per year for full-time employment. This reflects a difference of over \$17,000 from the prevailing wage of \$35,000 per year that was listed on the certified LCA.

Moreover, according to the Foreign Labor Certification Data Center's Online Wage Library, under the "All Industries database for 7/2011 - 6/2012," for the [REDACTED] Metropolitan Division, the prevailing wage for the occupation "Computer Programmers" at a Level I wage is \$59,030 per year for full-time employment. This reflects a difference of over \$24,000 from the prevailing wage of \$35,000 per year that was listed on the certified LCA.

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states, in pertinent part, that the petitioner must offer wages that are at least the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage for the position in the area of employment, whichever is greater. Here, as mentioned above, the prevailing wage for the proffered position is \$52,478 per year for full-time employment at the New York location and \$59,030 per year for full-time employment at the New Jersey location. The petitioner attested on the Form I-129 petition, however, that it would only pay the beneficiary \$35,000 per year to work full-time for the petitioner. Therefore, as the petitioner has failed to offer a wage that is equal to or greater than the prevailing wage, the petition must be denied for this additional reason.

Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA at the prevailing wage level for the requested employment for the beneficiary. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1) by providing a certified LCA that corresponds to the instant petition. For this additional reason, the petition may not be approved.

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

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

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

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