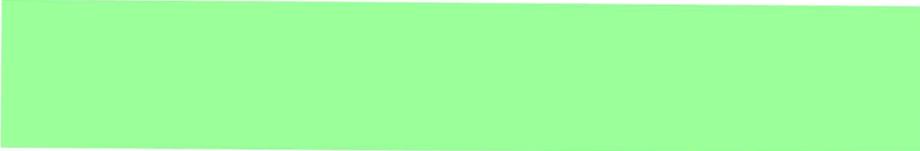




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 04 2013**

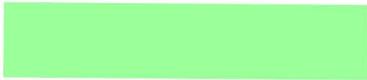
OFFICE: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

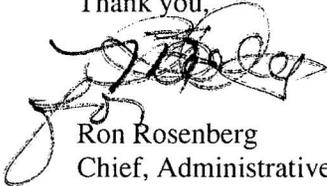


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an IS/IT consultancy services company established in 1995. In order to employ the beneficiary in what it designates as a systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it 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 that the beneficiary is qualified to perform the services in a specialty occupation. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record of proceeding, the AAO notes that in the instant case, there are additional issues, not addressed by the director, which preclude the approval of the H-1B petition.¹ As will be discussed later in the decision, for these additional reasons the petition also may not be approved. They are considered independent and alternative bases for denial of the petition.

In the petition signed on April 19, 2012, the petitioner indicates that it wishes to employ the beneficiary as a systems analyst on a full-time basis at the rate of pay of \$56,600 per year. In the April 20, 2012 letter of support, the petitioner states that it "seeks to directly employ a qualified individual in the specialty occupation position of System Analyst to work on a project for [the petitioner's] client [REDACTED]". The petitioner reports that the project name is "[REDACTED]". The petitioner indicates that the beneficiary will work off-site at [REDACTED] Wisconsin [REDACTED]. The petitioner did not indicate that the beneficiary would work on any other projects or any other worksites. In the petition, the petitioner listed the dates of intended employment as October 1, 2012 to September 30, 2015.

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

In addition, the petitioner claims that the beneficiary will perform the following duties in the proffered position:

- Gather requirements and build the solutions as per [REDACTED] COE guidelines.
- Initiate design discussion with [REDACTED] COE team for the approval[.]
- Facilitate Sprint planning with [REDACTED] Product owners.
- Validate the design document with product owners[.]
- Monitor the CRP, ITEST build process for the Integration of the peripheral system with Oracle.
- Consulting the different team involved in the integration such as Middleware and Siebel.
- Consulting with various Oracle track leads of [REDACTED] to get the approval on design[.]
- Monitor the defect and provide the solution for the testing team.
- Reconcile gaps, overlaps, and inconsistencies in policy, standards, or requirements.

* * *

As a Systems Analyst of [the petitioner], [the beneficiary] will be required to test, maintain and monitor computer programs and systems, including coordinating the installation of computer programs and systems. He will develop, document and revise system design procedures, test procedures and quality standards. Therefore, it is imperative that [the] candidate for this position not only possess, but also be an expert to review and analyze computer performance indicator to locate code problem and correct errors by correcting codes. This position also requires the ability to coordinate and link the computer systems within an organization to increase compatibility so that information can be shared. He is also required to read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements. In addition, he will consult management to ensure agreement on systems principles. [The beneficiary] will confer with clients regarding the nature of the information processing or computation needs. He will use his practical knowledge of various software languages, tools and platforms and implement various client server applications such [as] Oracle RDBMS 9i, XML Publisher, PLSQL, SQL*PLUS, SQL*Loader, & Oracle Reports 6i and Oracle Forms 6i, Sterling GENTRAN 5, Visual Basic, V.S Flex grid 7.0, Crystal Report 8.0, SQL Server 7, MS Access 2000, Toad 7.1, Linux amongst other techniques under a supervision of an experience team leader.

In the instant case, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the letter of support, the petitioner also states that the proffered position requires "at a minimum, the functional equivalent of a four year Bachelor of Computer Science, Engineering, Management Information Systems, Computer Information Systems or related field." Furthermore, the petitioner states that "[w]e require at least two years of experience in software development and consulting."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign academic credentials and employment verification letters. The AAO observes that the petitioner did not submit an educational evaluation of the beneficiary's academic credentials.

In addition, the petitioner submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Systems Analyst" - SOC (ONET/OES Code) 15-1121, at a Level 1 (entry level) wage. The beneficiary's place of employment is listed as 9900 W Innovation Drive, Wauwatosa, Wisconsin 53226.
- A purchase order.
- A document entitled "[REDACTED] STANDARD TERMS AND CONDITIONS" that is dated September 9, 2006. The petitioner is not mentioned in the document.
- A Scope of Work (SOW) for [REDACTED] CRM Platform. The SOW is between [REDACTED] (the "Company") and the petitioner's office in India (the "Contractor"), effective February 1, 2011. The document indicates that the project will "go-live" in July 2012 and that post-production support will continue "Till September 2012."

The SOW provides information on the "support and Project execution team" as well as the roles, responsibilities and requirements for the team members. Although the petitioner stated in its letter of support that the beneficiary would serve as a system analyst, the AAO observes that this position is not mentioned in the SOW. No information was provided as to whether the system analyst is referred to in the SOW by a different title. Moreover, the job description provided by the petitioner for the proffered position is not in the SOW. Thus, without further information, the AAO cannot conclude that proffered position is included in the SOW. Notably, the SOW does not specify any particular academic requirements for the positions. While some

of the positions require certification, training and/or experience (the maximum of which appears to be 7+ years of experience), none of the entries indicate that there are any degree requirements. Upon review, the petitioner has not established the source of the duties, responsibilities and requirements that it attributes to the proffered position.

The submission includes a document entitled "Addendum – Software License Usage Approval Agreement." The document is not dated and it is not signed by either party. The document includes the following information:

| PO Ref # | Project Name | Project Location | Start Date | End Date |
|----------|----------------------------|------------------|---------------------------|----------------------------|
| | [REDACTED] CRM Platform | [REDACTED] | 1 st Feb. 2011 | 31 st Dec. 2012 |

Notably, the project location (in the United States) is in Milwaukee rather than in Wauwatosa, WI as stated by the petitioner. Moreover, the software license usage granted to the petitioner for the project ends on December 31, 2012 (a few months after the petitioner's requested start date for H-1B employment).

- An Information Technology Services Agreement between [REDACTED] and the petitioner's office in India, effective August 5, 2009. The AAO notes that this agreement indicates that it "is applicable for three years from 1st January 2010." The AAO also observes that portions of the agreement (including the entire section 3.5 of the agreement and a portion of a paragraph of section 3.2 regarding workers and staffing) have been redacted and that only pages 1-6 and page 47 were provided (that is, pages 7 to 46 were not provided). No explanation was provided by the petitioner.
- The beneficiary's resume.² The beneficiary indicates that he is "[c]urrently working with [the petitioner] as an Oracle Applications SR Software Engineer (Oct 2007 to Till Date)."
- Certificates in the beneficiary's name. The documentation does not contain specific information regarding the criteria for issuance of the certificates.

² The AAO notes that the resume represents a claim by the beneficiary regarding his credentials, rather than evidence to support that claim.

- A certificate entitled "Champion for the Month," dated November 2009.
- Certificate of Completion of training conducted from December 14, 2007 to December 18, 2007.
- Certificate of Proficiency in Computer Applications, dated July 25, 2000.
- Certificate of Appreciation (no date).
- Letters from the petitioner's prior employers. Upon review of the letters, the AAO finds that they provide insufficient information regarding the beneficiary's work history and duties (e.g., specific tasks and responsibilities, complexity of the job duties, the level of judgment, supervisory duties (if any), the amount and level of supervision, and the level of understanding required to perform the job duties). Additionally, the letters do not indicate whether the beneficiary was employed on a full-time or part-time basis. The letters do not provide information regarding the requirements (if any) for the positions held by the beneficiary. The letters are also devoid of information regarding the academic credentials of the beneficiary's peers, supervisors and/or subordinates.
 - A letter dated June 1, 2004 entitled "Experience Certificate" from an unnamed person at Ashritha. The signatory line states "For Ashritha," has a illegible signature and states "Managing Partner." The letter states that the beneficiary worked from March 1, 2002 to May 25, 2004 in the capacity of trainee programmer. The letter continues by stating that "[d]uring the course of his employment with us, [the beneficiary] was working on various client projects on V B6i, Oracle, Crystal reports." The AAO notes that the period of employment overlaps with the dates of the beneficiary's academic transcripts for his degree in commerce.
 - A letter dated November 10, 2005 entitled "Experience Certificate" from an unnamed person at [REDACTED]. The signatory line states "For Resilent Softech Pvt. Ltd.," has a illegible signature and states "Authorized Signatory." The letter states that the beneficiary worked from June 1, 2004 to November 10, 2005 in the capacity of technical consultant. The letter continues by stating that "[d]uring the course of his employment with us, [the beneficiary] was working on various client projects on Oracle Application technical Consultant on an extendable Contract basis (errors in original)."
 - A letter dated November 10, 2005 from [REDACTED] for [REDACTED]. The letter indicates that the beneficiary served from June 1, 2004 to November 10, 2005. Notably, although this letter and the above referenced letter have the same date and same signatory, the style of the letters and font size vary from each other.
 - A letter dated October 5, 2007 from [REDACTED] Managing Director of [REDACTED]. The letter states the beneficiary's designation as

programmer analyst and indicates that he joined on November 28, 2005 and left on October 5, 2007.

- Another letter dated October 5, 2007 from [REDACTED] Managing Director of [REDACTED]. The letter references the beneficiary's resignation and indicates that he will be relieved from his services on October 5, 2007.
- An appointment letter, along with Annexures 1 and 2, from the petitioner's office in India to the beneficiary. The letter is dated October 8, 2007 and indicates that the beneficiary will serve as a "Sr. Software Engineer." Notably, the letter is not signed by the beneficiary.
- A copy of the petitioner's Consolidated and Financial Statements as of March 31, 2011 and 2010.
- A copy of the petitioner's Certificate of Incorporation.
- A document entitled "Corporate Fact Sheet."

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on September 26, 2012. The petitioner was asked to submit probative evidence to establish that the beneficiary is qualified to perform services in a specialty occupation. The director provided a detailed outline of the evidence to be submitted.

On October 22, 2012, the petitioner responded by submitting a credential evaluation from [REDACTED] of the [REDACTED]. Notably, the petitioner's letter states "please find attached the Education Evaluation conducted by [REDACTED] Maryland." Notably, while the petitioner submitted an evaluation, there is no indication that it is from [REDACTED].

Mr. [REDACTED] states that the evaluation is based upon copies of documents provided by the beneficiary, however, he did not attach copies of these documents to the evaluation for USCIS to also review. Presumably, the documentation is identical to the evidence provided with the H-1B petition by the petitioner with regard to the beneficiary's academic and professional qualifications. However, the AAO notes that Mr. [REDACTED] states that "[i]n 2004, [the beneficiary] completed examinations and was awarded a Bachelor Commerce." He further specifically indicates that the beneficiary was awarded a Bachelor of Commerce in 2004. Upon review of the previously submitted evidence, the AAO notes that while an examination was held in 2004, the convocation was held on January 24, 2005 and the diploma is dated April 23, 2005. No explanation for the variance was provided.

In the evaluation, Mr. [REDACTED] states, in part, the following:

As detailed in this section, [the beneficiary's] work experience clearly meets these requirements.

From March 2002 through May 2004, [the beneficiary] was employed by [REDACTED] As a Trainee Programmer.

From June 2004 through November 2005, [the beneficiary] was employed by [REDACTED] as a Technical Consultant.

From November 2005 through October 2007, [the beneficiary] was employed by [REDACTED] as a Programmer Analyst.

From October 2007 through the present, [the beneficiary] has been employed by [the petitioner's office in India] as a Senior Software Engineer.

Throughout his career, [the beneficiary's] professional responsibilities have included working on client projects with Oracle Application, designing modules, gathering requirements, developing interfaces, running test scripts, preparing documents, performing functional setups, coding Shell scripts, creating AIM documentation, defining Oracle rules, loading data, developing programs for business systems, and other related training.

Additionally, [the beneficiary] completed specialized training in Computer Information Systems. In 2000, he earned a Certificate of Proficiency in Computer Applications from [REDACTED]. In 2002, he earned an Honors Diploma in Web-Centric Computing from [REDACTED].

The foregoing summary of [the beneficiary's] professional experience itemizes his responsibilities during a period of at least ten years of employment and experience and training in the concentration of Computer Information Systems.

After accessing the specifics of [the beneficiary's] work experience, it becomes apparent that the responsibilities throughout [the beneficiary's] career are indicative of university level course work in Computer Information Systems, and related subjects. The knowledge obtained during [the beneficiary's] work experience directly corresponds to the knowledge obtained by a student completing a Bachelor's Degree program in Computer Information Systems Additionally, the length of time along with the nature and quality of [the beneficiary's] work experience demonstrate that his experiential history includes the theoretical and practical application of specialized knowledge required at the professional level in the field of Computer Information Systems.

Further, [the beneficiary's] ten-plus years of employment reflect experience and training in positions of progressively increasing responsibility. His achievement further illustrates his application of relevant and specialized skills and training by superiors and peers that demonstrate the equivalent of university level training in Computer Information Systems and related areas.

Mr. [REDACTED] concludes that the beneficiary's foreign education, work experience, and professional training amount to "the equivalent of a Bachelor's Degree in Computer Information Systems from an accredited institution of higher education in the United States."

The director reviewed the record of proceeding and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on November 12, 2012. The petitioner submitted an appeal of the denial of the H-1B petition. With the appeal brief, the petitioner submitted copies of the documentation previously submitted with the initial petition and in response to the RFE, along with additional evidence.³

As a preliminary matter, the AAO will discuss some findings that are material to the determination of the petitioner's eligibility for the benefit sought that are beyond the decision of the director.

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

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

³ 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 requested by the director in the RFE but submitted for the first time on appeal.

Moreover, the AAO notes that the new letters and affidavits provide insufficient information regarding the beneficiary's work history and duties (e.g., specific tasks and responsibilities, complexity of the job duties, the level of judgment, supervisory duties - if any, the amount and level of supervision, and the level of understanding required to perform the job duties). Additionally, the documentation does not indicate whether the beneficiary was employed on a full-time or part-time basis. The documents do not provide information regarding the requirements (if any) for the positions held by the beneficiary. The letters are also devoid of information regarding the academic credentials of the beneficiary's peers, supervisors and/or subordinates. Moreover, the affidavit from the beneficiary, similarly to his resume, represent a claim by him regarding his credentials, rather than evidence to support that claim. Furthermore, the copy of the beneficiary's affidavit is partially illegible. Moreover, several of the affidavits state vaguely that the beneficiary worked "with me" but provide no further information as to the basis of the knowledge.

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 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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2,1991). In the instant case, 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 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.⁴

⁴ 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).

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 318-319.⁵

Accordingly, 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).⁶

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).

⁵ 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))).

⁶ 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).

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

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

In the April 20, 2012 letter of support, the petitioner states that "[w]e will pay [the beneficiary], the prevailing wage or the actual wage, whichever is greater" and that "the beneficiary will be eligible for the usual Company provided employee benefits." In the section of the Form I-129 petition regarding "other compensation," the petitioner indicated that the beneficiary would receive "standard benefits." However, no further information was provided regarding these "benefits" such as what these benefits entail and eligibility requirements. Thus, a substantive determination regarding the claimed "benefits" cannot be made. 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 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 beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

* * *

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

With the initial petition, the petitioner provided an appointment letter from the petitioner's office in India, dated October 8, 2007. The AAO observes that the appointment letter is dated over four years prior to the filing of the H-1B petition and indicates that the position offered to the beneficiary is a senior software engineer. In the Form I-129 petition and supporting documents, the petitioner claims that the beneficiary will be employed as a systems analyst and lists the commencement of his employment in the United States as October 1, 2012. It does not appear that the appointment letter encompasses the work that the petitioner claims that the beneficiary will perform if the H-1B petition is approved. Moreover, the letter is not signed by the beneficiary.

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 September 30, 2015. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED] Wisconsin [REDACTED]. No other work locations were provided. The petitioner submitted an Information Technology Services Agreement between [REDACTED] and the petitioner's office in India, effective August 5, 2009. The agreement is signed by [REDACTED] GDC Director for [REDACTED] [REDACTED] SVP for the petitioning company. The AAO observes that this agreement

states that it "is applicable for three years from 1st January 2010." Thus, the period would end on January 1, 2013 – over two years prior to the date stated on the H-1B petition and LCA.

In addition, the petitioner submitted an SOW between [REDACTED] and the petitioner's office in India, effective February 1, 2011. The SOW is signed by Erin Moser, Indirect Sourcing for [REDACTED] and [REDACTED] Director – Business Relations for the petitioning company. The SOW states that it "is made pursuant to and in accordance with that certain Information Technology Services Agreement between [REDACTED] (the 'Company') and [the petitioner's office in India] ('Contractor'), dated August 5, 2009 (the 'Agreement')." While the SOW contains information regarding various positions on the project, the AAO notes that the position of systems analyst is not identified in the SOW. No explanation was provided. Moreover, the SOW indicates that the project (including post-production support) will end in September 2012, which is prior to the start date requested by the petitioner in the Form I-129 petition. No explanation was provided by the petitioner. In addition, the SOW indicates that the project location (in the United States) is [REDACTED] rather than [REDACTED] Wisconsin as stated by the petitioner in the H-1B petition. The petitioner did not address the discrepancy in locations.

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 September 30, 2015. However, the documentation indicates that the Americas Services CRM Platform project will end prior to the beneficiary's requested start date. The record of proceeding is devoid of documentation establishing that the project had been extended. Thus, the petitioner has not provided probative evidence to establish that it has work for the beneficiary from October 1, 2012 to September 30, 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).

Further, 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. It must be noted that the record indicates that the beneficiary will be physically located at [REDACTED] Wisconsin. The petitioner is located approximately 882 miles away in [REDACTED] New Jersey. The record is devoid of any additional information on this issue. The petitioner did not address or provide probative documentation to establish that it would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary. The petitioner also failed to provide any specific information regarding the beneficiary's supervisor (e.g., supervisor's name, role, location, employer). The petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the criteria for determining bonuses and salary adjustments.

Moreover, 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 duties, the beneficiary's role in hiring and paying assistants, and whether the petitioner would have the

right to assign additional projects to the beneficiary. In the instant case, the petitioner did not specifically address these issues.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has 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). That is, 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).

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that it would employ the beneficiary in a specialty occupation position.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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 April 20, 2012) that its minimum educational requirement for the proffered position is a "four year Bachelor of Computer Science, Engineering, Management Information Systems, Computer Information Systems or related field." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

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

Again, the petitioner states that its minimum educational requirement for the proffered position is a "four year Bachelor of Computer Science, Engineering, Management Information Systems, Computer Information Systems or related field." The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

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

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more

than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree 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 at 147.⁷

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 sufficient corroborating 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

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

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

Moreover, the AAO will now address another basis for denial of the petition. More specifically, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a systems analyst at [REDACTED]'s facility for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until September 30, 2015, the petitioner failed to substantiate the proposed employment at [REDACTED] for the duration of the period requested. Thus, it appears that the beneficiary will work at multiple locations at some point during the requested period of employment and the petitioner failed to provide an itinerary when it filed the Form I-129 in this matter. Thus, the petition must also be denied on this additional basis.

Finally, the AAO will review the director's finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the beneficiary's qualifications meet the applicable statutory and regulatory requirements.

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

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation;
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and

- (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

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

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university

which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁸
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

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

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁹

⁸ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

⁹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

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

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

In response to the director's RFE and on appeal, the petitioner submitted credential evaluations from [REDACTED] Connecticut.¹⁰ The evaluations indicate that the beneficiary's foreign education, work experience, and professional training amount to "the equivalent of a Bachelor's Degree in Computer Information Systems from an accredited institution of higher education in the United States."

In the instant case, the petitioner submitted a letter from the [REDACTED] a dean the [REDACTED] Mr. [REDACTED] references a program entitled IDEAL – Innovative Degree Excellence in Accelerated Learning and states that additional information is available on a website.¹¹ He did not submit any further information regarding the program. If Mr. [REDACTED] wished for the director and the AAO to review the information, he should have provided printouts of the referenced material. The director and the AAO are not required to attempt to locate the information by searching the Internet for the link. Notably, the content of the link may have changed since Mr. [REDACTED] accessed the site. Furthermore, the director and the AAO are not required to access unknown sites, which may inadvertently result in computer security risks or viruses. Moreover, the letter from Mr. [REDACTED] is not dated contemporaneously with the letters produced by Mr. [REDACTED]. Thus, the documentation does not establish that at the time of the evaluations (1) the [REDACTED] had a program for granting college-level credit in the pertinent academic specialty for training and/or work experience in that specialty, and (2) this evaluator had authority for granting such credit based upon an individual's training and/or work experience. Accordingly, Mr. [REDACTED]'s evaluations do not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) for competency to render to USCIS an opinion on the educational equivalency of work experience.

¹⁰ The AAO hereby incorporates its earlier discussion regarding Mr. Todd's conclusion and the documentation regarding the beneficiary's credentials.

¹¹ Moreover, that according to the [REDACTED] admission to the IDEAL program is limited to United States citizens and permanent residents.

Aside from the decisive fact that the evidence of record does not establish Mr. [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate experience, the AAO finds that the content of the evaluation of the beneficiary's experience would merit no weight even if Mr. [REDACTED] was qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The evaluations basically summarize the beneficiary's resume and letters/affidavits regarding his work, which describe the beneficiary's experience only in generalized and generic terms. Mr. [REDACTED] concludes, without analysis, that the beneficiary's "responsibilities throughout his career are indicative of university level course work in Computer Information Systems, and related subjects." Mr. [REDACTED] further states that "[t]he knowledge obtained during [the beneficiary's] work experience directly corresponds to the knowledge obtained by a student completing a Bachelor's Degree program in Computer Information Systems consisting of a curriculum with the courses listed above." In addition, Mr. [REDACTED] states that "the length of time along with the nature and quality of [the beneficiary's] work experience demonstrates that his experiential history includes the theoretical and practical application of specialized knowledge required at the professional level in the field of Computer Information Systems." As the evaluations do not establish a substantive basis for its conclusion, it would have no probative value even if it were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the beneficiary has the equivalent of a degree in a specific educational field if he has a combination of education, specialized training, and/or work experience in areas related to this claimed specialty as well as recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. However, the instant record of proceeding does not support such a determination.

As stated above, the evaluations on record are not probative of the beneficiary's attainment, through education, training and/or work experience, of the degree-equivalency to which the evaluations attested, i.e., the Bachelor's Degree in Computer Information Systems. The AAO further finds that the record does not contain sufficient detail to establish that the beneficiary's work experience was gained while working with peers, supervisors, and subordinates who have at least a bachelor's degree in a specific specialty, or its equivalent. Finally, the record lacks the required showing of the beneficiary's recognition of expertise in the alleged specialty gained through progressively responsible positions directly related to that specialty. As such, the evidence does not establish that the beneficiary is qualified to perform a specialty occupation requiring a bachelor's or higher degree in a specific specialty.

For the reasons related in the preceding discussion, the AAO affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation requiring a bachelor's or higher degree in a specific specialty, or its equivalent. Thus, the appeal must be dismissed and the petition denied for this reason.

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.