



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: SEP 05 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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 a software consulting and application development firm established in 2004. In order to employ the beneficiary in what it designates as a programmer 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 it will have a valid employer-employee relationship with the beneficiary in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

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 May 1, 2012, the petitioner indicates that it wishes to employ the beneficiary as a programmer analyst on a full-time basis at the rate of pay of \$60,000 per year. In addition, the petitioner states that the beneficiary will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought. The petitioner indicates that the beneficiary will work at

With the initial petition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131, at a Level II wage. The LCA lists the places of employment as the following:

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

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In addition, the petitioner submitted (1) documentation relating to the beneficiary, including a copy of his passport and evidence regarding his academic credentials; and (2) the petitioner's 2011 tax returns.

The AAO observes that the petitioner did not provide a description of the duties of the proffered position. Furthermore, the petitioner did not state that the proffered position has any particular academic requirements.² Additionally, the petitioner did not submit any evidence to establish that it had H-1B caliber work for the beneficiary for the requested period.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 14, 2012. The petitioner was asked to submit additional information, including (1) a complete itinerary of services or engagements with the dates and locations of the services; (2) documentation to clarify the petitioner's employer-employee relationship with the beneficiary; and (3) probative evidence that it has specialty occupation work available for the entire requested H-1B validity period. The director outlined the specific evidence to be submitted.

On October 23, 2012, in response to the director's RFE, the petitioner provided additional supporting evidence, including the following documentation:

- A letter from the petitioner. In the letter, the petitioner claims (for the first time) that the position "normally and customarily requires at least a Bachelor's degree in Science/Engineering/Commerce or Equivalent."
- A copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2011. The Form W-2 indicates that beneficiary's address is [REDACTED]
- A copy of the pay statement issued to the beneficiary on September 17, 2012.³ Notably, the pay statement indicates that the beneficiary's address is [REDACTED]. The pay statement contains an entry for [REDACTED] withholdings for this pay period. The pay statement shows prior [REDACTED] and [REDACTED]. The document does not indicate any [REDACTED].

² The petitioner does not claim that the position 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, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

³ It must be noted for the record that the beneficiary's salary as stated by the petitioner on the Form I-129 and the salary rate on the pay statement do not correspond. No explanation for the variance was provided.

- A letter from [REDACTED]⁴ The letter does not provide Ms. [REDACTED] job title. The letter is dated March 2, 2012. In the letter, Ms. [REDACTED] states that "[t]his letter is to verify that [the beneficiary] has been placed as a consultant with us to work on a large project to perform the following duties as a Sales force Developer for the long term project named 'Sales force CRM development' and we expect the need of [the beneficiary's] services for 3 years." Ms. [REDACTED] further states that "I will be manager for [the beneficiary] regularly, and as such I have the first-hand knowledge of the above duties [the beneficiary] performs on a daily basis."

Ms. [REDACTED] provided the following description of the beneficiary's duties:

- Used [REDACTED] developer toolkit including Apex Classes, Apex Triggers and Visual force Pages to develop custom business logic.
- Customized user Roles, Role hierarchies, Profiles and Sharing settings to ensure that the protected data is available only to the authorized users[.]
- Designed, and deployed the Custom objects, Custom tabs, validation rules, Workflow Rules, Auto-Response Rules, Page layouts, to suit the needs of the application[.]
- Involved in migrating data from Oracle to [REDACTED] using Data loader[.]
- Maintained data cleanliness and accuracy by adding custom validation rules, custom formulas[.]
- Created and deployed several Custom Reports using salesforce.com platform[.]

Notably, Ms. [REDACTED]'s address is listed as [REDACTED]

[REDACTED] The agreement in the record of proceeding, as well as the website indicate that the company is located at [REDACTED]

[REDACTED] No explanation was provided.

- An Agreement between [REDACTED] and the petitioner. The AAO observes that the Agreement indicates that "the parties hereto have executed this Agreement on the dates set forth opposite their respective names." However, the AAO notes the Agreement is not dated. In addition, the documentation indicates that "[i]n response to specific requests by Company [REDACTED] Consultant [the petitioner] shall perform services for Company as set forth in **Exhibit A** attached hereto ('Services')." The documentation further indicates that "[t]his Agreement shall remain in effect for the term of the project set forth in **Exhibit A**, unless sooner terminated as provided in Section 8 below." Notably, Exhibit A was not included with the Agreement.

⁴ With the appeal, the petitioner and counsel submitted a new letter from [REDACTED] dated November 16, 2012. Notably, there are discrepancies in the letters and the AAO notes that Ms. [REDACTED]'s signature varies significantly from letter to letter.

The Agreement does not contain any information regarding projects with [REDACTED] (or other companies), the beneficiary, his position, job title or duties.

- A line-and-block organizational chart. The beneficiary is listed as "Systems Admins." The organizational chart indicates that all of the systems admins, programmer analysts, and computer systems analysts report to two individuals, [REDACTED] (President/CEO) and [REDACTED] (IT Manager/Supervisor).⁵ Thus, according to the chart, over 120 individuals report directly to Mr. [REDACTED] and Mr. [REDACTED].
- Copies of the petitioner's Performance Plan and Evaluations for the beneficiary. Notably, the documents indicate "Class Title: Sales force Developer" and cover the periods from November 1, 2011 to April 30, 2011 and May 1, 2011 to October 31, 2011.
- Copies of the petitioner's Employee Weekly Status Reports for the beneficiary.
- An Employee Agreement between the petitioner and the beneficiary, dated June 8, 2012. The document indicates that the beneficiary will be employed as a programmer analyst.
- Documentation regarding the petitioner's business operations, including a copy of its lease agreement, a copy of its deed, printouts from its website, photographs of its offices, and corporate documents regarding its name change.

Notably, the lease agreement indicates that the petitioner's place of business is approximately 1,100 square feet. The photographs show a small conference room, several cubicles, and an office with a desk, chair and computer.

- Documents pertaining to the beneficiary's academic credentials, along with a copy of a lease agreement he signed for an apartment in Virginia.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on October 31, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted copies of previously submitted documents and new evidence.⁶

⁵ Furthermore, additional individuals (various directors and vice presidents) report to [REDACTED] (President/CEO).

⁶ With regard to the new 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

The AAO notes that on appeal, counsel claims that "[t]he Director's denial is erroneous because there appears to have been no consideration of the fact that the requested contract was unavailable due to specific business customs and practices of the end-client, as well as certain confidentiality laws and agreements." The AAO notes in the petitioner's response to the RFE, the petitioner stated "[p]lease find attached a contract between our organization and bluewolf which will evidence [the beneficiary's] job duties for the project at [REDACTED]" The petitioner and its counsel did not previously claim that any documentation was unavailable for any reason.

Moreover, while the petitioner did not specifically claim that the contract was privileged, the petitioner does claim that the contract was confidential. While a petitioner should always disclose when a submission contains confidential 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.⁷ Although a petitioner may always refuse to submit confidential 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).

Further, the AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

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. 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 consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal.

⁷ 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).

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

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

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition.⁸ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

⁸ In the appeal brief, counsel claims that the petitioner submitted "more than 90 pages" of evidence in response to the RFE and claims that the petitioner should be approved. The AAO notes that it is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. Moreover, the breakdown (approximately) of the documentation submitted in response to the RFE is as follows:

- 1 page – Form W-2
- 1 page – Pay statement
- 1 page – Letter from [REDACTED]
- 5 pages – Agreement with [REDACTED]
- 4 pages – Organizational chart
- 10 pages – Performance plan and evaluation
- 12 pages – Weekly status reports
- 7 pages – Employment agreement with the beneficiary
- 17 pages – Petitioner's lease agreement and extension
- 2 pages – Warranty deed for leased property
- 5 pages – Printouts from the petitioner's website
- 5 pages – Copies of photographs
- 3 pages – Documents relating to the petitioner's name change
- 18 pages – Documents relating to the beneficiary (including, student identification and lease agreement)

The primary issue for consideration 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." *Id.*

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 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 an 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.⁹

⁹ 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).

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 318-319.¹⁰

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

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

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

¹⁰ 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))).

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).¹¹

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

¹¹ 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).

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 response to the director's RFE, the petitioner submitted a copy of the beneficiary's Form W-2 for 2011 and a pay statement dated September 17, 2012.¹² 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, the petitioner must establish that it has an "employer-employee relationship" with the beneficiary and that its role is not limited to invoicing and proper payment for the hours worked by the beneficiary. That is, in some instances, the petitioner's role is limited to essentially the functions of a payroll administrator, and the beneficiary is even paid, in the end, by the client or end client. *See Defensor v. Meissner*, 201 F.3d at 388. Moreover, while items such as wages, tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In response to the RFE, the petitioner submitted an Employment Agreement between itself and the beneficiary. Notably, the Employment Agreement was signed prior to the submission of the Form I-129 petition. However, the petitioner did not include the Employment Agreement in its initial submission. No explanation was provided.

The AAO observes that the Employment Agreement indicates that the "[e]mployee shall be eligible for health and life insurance coverage through [the petitioner's] insurance carriers based on their rules and regulations." However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plans, including eligibility requirements, was provided to USCIS.

Furthermore, upon review of the Employment Agreement, the AAO notes that it fails to adequately establish several critical aspects of the beneficiary's employment. For example, in the August 28, 2012 letter, submitted in response to the RFE, the petitioner claims that the beneficiary is assigned to work on a project for the end-client, [REDACTED] Ohio. However, the Employment Agreement does not mention the [REDACTED] project or the beneficiary's place of employment. Thus, the

¹² In the instant case, the petitioner claims that the beneficiary "is presently working at Office of [REDACTED] . . . [and his] project location is the end-client's [REDACTED] s location at [REDACTED] Both the 2011 Form W-2 and September 17, 2012 pay statement provide an address in Virginia for the beneficiary. Further, the pay statement for the beneficiary reflects [REDACTED] withholdings (along with prior [REDACTED] withholdings within the year).

Employment Agreement lacks information about the beneficiary's specific role in the [REDACTED] project and where he will work. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In the August 28, 2012 letter, submitted in response to the RFE, the petitioner states that it "provides all required managerial and technical guidance/ expertise to the beneficiary if additional guidance is required for a given technical issue. Our employee also has access to a laptop." The petitioner did not provide any further information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to fully address or submit probative evidence on the issue.

In the August 28, 2012 letter, the petitioner stated that "[the beneficiary's] project location is the end-client's [REDACTED]'s location at [REDACTED] which again, is work contracted through our vendor bluewolf." In addition, the petitioner stated that "[t]he beneficiary's assignment on the [REDACTED] project is expected to last for the entire duration requested in the H-1B petition." The petitioner further stated that "[i]n the event that the project is terminated earlier than anticipated, [the beneficiary] will be relocated to work at our Tampa office." In addition, the petitioner claimed that it "would continue to have sufficient work for [the beneficiary] for any remaining duration and the tasks we have accumulated." The AAO notes that the organizational chart lists over 130 individuals, while the lease agreement indicates that the petitioner's office space consists of just 1,100 square feet. Thus, it is questionable whether the petitioner has the work space and capacity for the petitioner to relocate the beneficiary to its Tampa office.

Notably, the record of proceeding does not contain written documentation between the petitioner and Bluewolf establishing any contracts or agreements for specific projects between the parties for any duration of time. In response to the RFE, the petitioner provided an undated Agreement between [REDACTED] and the petitioner. The Agreement indicates that "[i]n response to specific requests by Company [REDACTED], Consultant [the petitioner] shall perform services for Company as set forth in **Exhibit A** attached hereto ('Services')." The documentation further indicates that "[t]his Agreement shall remain in effect for the term of the project set forth in **Exhibit A**, unless sooner terminated as provided in Section 8 below." However, the petitioner failed to provide Exhibit A. In the response to the RFE, the petitioner did not provide an explanation for failing to include the exhibit.

In addition, the petitioner submitted a letter from [REDACTED] dated March 2, 2012. In the letter, Ms. [REDACTED] states that "[t]his letter is to verify that [the beneficiary] has been placed as a consultant with us to work on a large project to perform the following duties as a Sales force Developer for the long term project named 'Sales force CRM development' and we expect the need of

[the beneficiary's] services for 3 years." She does not provide any further information regarding the "Sales force CRM development" project. Ms. [REDACTED] also does not indicate that the beneficiary is serving in the proffered position of programmer analyst but rather she states that the beneficiary is a "Sales force Developer" rather than a programmer analyst as stated by the petitioner on the Form I-129 petition and in the Employment Agreement. Moreover, the letter does not indicate the requirements necessary to perform the duties of the "sales force developer" position. Additionally, the AAO notes that Ms. [REDACTED]'s signature on this letter varies considerably on the letter submitted on appeal dated November 16, 2012.¹³

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested the beneficiary be granted H-1B classification from October 1, 2012 to October 1, 2015, there is a lack of substantive documentation regarding specific work for the duration of the requested period.¹⁴ Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner claimed that the beneficiary would be working on the [REDACTED] project, and that if the [REDACTED] project ended, the beneficiary would "be relocated to work at [the petitioner's] Tampa office." However, the petitioner did not submit sufficient probative evidence substantiating any particular projects with [REDACTED] or any other specific work for the beneficiary. There is a lack of probative evidence substantiating that the petitioner has H-1B caliber work for the beneficiary for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. For example, it must be noted that the petitioner claims that "[the beneficiary's] project location is the end-client's [REDACTED]'s location at [REDACTED]." The petitioner indicated that its office is located at [REDACTED]. These locations are approximately 910 miles apart from each other, raising serious questions as to who will supervise, control and oversee the beneficiary's work. The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit an organizational chart, a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. In the instant case, the petitioner states in its August 28, 2012 letter that "[the beneficiary] directly reports to our own

¹³ In the letter dated November 16, 2012, Ms. [REDACTED] states that "we normally require at least a bachelor's degree in a relevant field from the individual responsible for carrying out these action items." No further information regarding the requirements was provided by Ms. [REDACTED].

¹⁴ It must be noted that on the Form I-129 and LCA, the petitioner indicates that the dates of intended employment are from October 1, 2012 to October 1, 2015. However, in the August 28, 2012 letter, the petitioner states that "[w]e intend to hire [the beneficiary] for a period of 3 years from 07/17/2012 to 07/17/2015." No explanation for the variance was provided.

IT Manager, an employee of the [petitioning company] on a telephonic basis, normally once a week, or as required, based on the project phase." Although the petitioner claims to supervise the beneficiary by telephone calls, the AAO notes that the record does not contain any telephone records. That is, the record is devoid of any evidence that the petitioner has supervised, directed, guided or even contacted the beneficiary via telephone.

Further, the AAO observes that in the March 2, 2012 letter from Ms. [REDACTED] she states that "I will be manager for [the beneficiary] regularly, and as such I have the first-hand knowledge of the above duties [the beneficiary] performs on [a] daily basis." Thus, Ms. [REDACTED] claims that she is regularly the beneficiary's manager.

In response to the RFE, the petitioner submitted an organizational chart. Notably, the chart shows the beneficiary as a systems administrator rather than a programmer analyst. No explanation for the discrepancy was provided. In addition, the chart shows the beneficiary reporting to [REDACTED] IT Manager/Supervisor and [REDACTED] President/CEO. Thus, according to the chart, over 120 individuals report directly to two individuals, one of which is also responsible for serving as President and CEO of the company.

Additionally, the petitioner submitted documents entitled "[The petitioner's] Employee Weekly Status Report" for the beneficiary. The list of accomplishments for each week is general and the beneficiary does not make any references to the petitioner. The record does not indicate how the documents were transmitted from the beneficiary to the petitioner. Further, there is no evidence that the petitioner responded to the beneficiary. Notably, the record does not contain any information from the petitioner regarding the specific purpose of the reports; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the documents; the consequences, if any, of failing to prepare the documents; etc. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the documents to the matter here.

The petitioner also submitted documents entitled "[The petitioner's] Performance Plan and Evaluation" for the beneficiary. Notably, the documents indicate "Class Title: Sales force Developer." Notably, in the Form I-129 petition and Employment Agreement, the petitioner claims that the beneficiary will serve as a programmer analyst. The plan contains general categories with "√" marks indicating exceeds expectations, meets expectations, or does not meet expectations. The documents contains references to footnotes that do not appear to be in order and are not included in the documents. Moreover, upon review of the documentation, the AAO observes that the document is not specific to the petitioner and that entire sections of the document have been taken verbatim from sources widely available on the Internet. Further, the documents do not establish the specific methods for assessing and evaluating the beneficiary's performance, the basis of the marks selected and/or the criteria for determining bonuses and salary adjustments.

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

of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that 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.

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

In the instant case, the AAO observes that in the August 28, 2012 letter, the petitioner states that the proffered position "requires at least a Bachelor's degree in Science/Engineering/Commerce or Equivalent." 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 two 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 bachelor's degree in science, engineering, commerce, or equivalent. This statement is insufficient to establish that the proffered position requires a degree in a specific specialty, or its equivalent. For instance, 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 science or commerce, 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. Further, the petitioner asserts that a degree

in science (without further specification) is sufficient for the proffered position. The statement does not establish that the position requires a degree in a *specific specialty*, or its equivalent. Absent further 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 139, 147 (1st Cir. 2007).

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

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

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

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 programmer analyst at [REDACTED]'s facility for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until October 1, 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.¹⁵

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree, or its equivalent. Therefore, the AAO need

¹⁵ On page 4 of the Form I-129 petition, the petitioner indicated that an itinerary was included with the petition. However, upon complete review of the record of proceeding, the AAO finds that the petitioner did not submit an itinerary with the employment dates and locations of the beneficiary's employment for the duration of the requested validity period.

not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of his foreign academic credentials or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty.¹⁶ As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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.

¹⁶ It must be noted that the petitioner submitted a copy of the beneficiary's Master of Science degree and transcript from the [REDACTED] issued on June 27, 2011. However, the AAO observes that the [REDACTED] is not accredited by an institutional accreditation organization recognized by the U.S. Department of Education. The Database of Accredited Postsecondary Institutions and Programs reports that the Accrediting Council for Independent Colleges and Schools terminated the [REDACTED]'s accreditation on August 6, 2008. *See* U.S. Dept. of Ed., *Database of Accredited Postsecondary Institutions and Programs*, available on the Internet at <http://www.ope.ed.gov/accreditation/Search.aspx> (last visited on June 17, 2013). The beneficiary's transcript indicates that he attended the [REDACTED] between 2009 and 2010, after the school's accreditation was terminated. Thus, the documentation does not establish that the beneficiary possesses a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).