



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **APR 14 2014** OFFICE: CALIFORNIA SERVICE CENTER [REDACTED]

IN RE: [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:

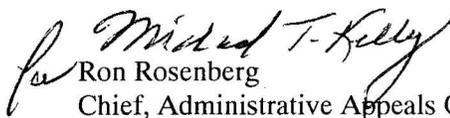
[REDACTED]

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 Director, California Service Center ("the director"), denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a "Software Development" business that was established in 1996 and employed 162 persons in the United States at the time of the petition's filing. The petitioner filed this petition to classify the beneficiary as an H-1B 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) for a position to which the petitioner assigned the job title "Systems Analyst."

The director denied the petition on each of two separate and independent grounds, namely, her determinations that the petitioner failed to establish (1) an employer-employer relationship between it and the beneficiary, as required to establish the petitioner as a United States employer, and (2) that the proposed position qualifies for classification as a specialty occupation.

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, Notice of Appeal or Motion (Form I-290B), and the petitioner's brief.

For the reasons to be discussed below, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

* * *

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

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

* * *

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

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

Id. at 375-76.

Again, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determinations in this matter were correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. GENERAL OVERVIEW

As noted above, the petition form, the Labor Condition Application (LCA) submitted with the petition, and the petitioner's evidentiary submissions assert that the proffered position belongs to the Computer Systems Analysts occupational category, as identified by the SOC (O*NET/OES) Code 15-1121.

The factual scenario in this record of proceeding involves the petitioner ([REDACTED] Consultants) and two other business entities. They are [REDACTED], both of which appear to be in the IT consulting business. There is also a fourth entity, namely the State of Connecticut, which has an IT project to which the petition claims the beneficiary will be assigned to perform his services.

According to a March 28, 2013 letter from [REDACTED] Director of HR & Operations, writing from [REDACTED] Connecticut, the beneficiary "is an employee of [the petitioner] working through [REDACTED] pursuant to our preferred vendor agreement with our client [REDACTED]." According to the petition, the beneficiary would participate in the State of Connecticut's "[REDACTED]." However, there appears to be no contract or formal agreement between the petitioner and the State of Connecticut with regard to this project.

According to that [REDACTED] letter, the beneficiary will be, as phrased above, "working through" it, as a Systems Analyst, on what the letter's author refers to as the "[REDACTED]" project. The letter describes the project as follows:

[REDACTED] for the State of Connecticut Department of Social Services to provide a self-service application that includes pre-screening for programs such as Supplemental Nutrition Assistance Programs (SNAP), Temporary Assistance For Needy Families (TANF)[,] and Medical assistance (MA). It also includes functionalities such as document management, IVR, online application, change reporting, re-determination and benefits status checking.

Nowhere in the record does the petitioner or [REDACTED] describe the substantive terms and conditions that constitute the "working through" arrangement. Thus, the particulars as to how [REDACTED] and the beneficiary would relate to each other in the context of the beneficiary's work as per whatever contractual agreements exist between [REDACTED] and the petitioner are not provided.

The [REDACTED] letter also appears to disclaim any substantial business relationship between [REDACTED] and the beneficiary, as it states, in part, that the beneficiary's "employer [REDACTED] retains the ability to direct and control the performance of his duties and the terms of his employment," and that [REDACTED] bears no responsibility for [the beneficiary] as [REDACTED] is not employing, controlling, paying, or supervising [him]." Further, this [REDACTED] officer also states: "Sole responsibility for [the beneficiary] remains with his employer, I [REDACTED] [(i.e., the petitioner)]." As we shall later discuss, however, the credibility of this pronouncement is undercut by the following aspect of the [REDACTED] "Exhibit A[:]" Form Work Order, which is submitted, for the first time, on appeal: that document expressly lists the beneficiary, by name, as "Subcontractor [(i.e., [REDACTED]²) Personnel Assigned to Perform Services."

² The document identifies [REDACTED] "Subcontractor" (as well as the beneficiary's employer).

III. FACTUAL AND PROCEDURAL HISTORY

In the March 21, 2013 letter in support of the petition, the petitioner stated that it is "largely involved with product development and providing services by rendering analysis, development, and maintenance in software projects." The petitioner noted that it "focus[es] on providing project analysis and design, systems integration, custom application development, web application development, and e-commerce solutions to [its] clients." The petitioner noted further that it is offering temporary employment to the beneficiary to perform duties as a systems analyst in Dayton, Ohio and Camp Hill, Pennsylvania. That March 21, 2013 support letter also listed the duties which the beneficiary would perform as follows:

- Analyze computer problems of existing and proposed systems.
- Initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients.
- Gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems.
- Plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients' business processes.
- Design and/or add hardware or software applications that will better harness the power and usefulness of our clients' computer systems.
- Employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems.
- Analyze subject matter operations to be automated.
- Specify the number and type of records, files, and documents to be used, and format the output to meet user's needs.
- Develop complete specifications and structure charts that will enable computer users to prepare required programs.
- Coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

[Paraphrased and bullet points added for clarity.]

The AAO finds that no document submitted from any of the entities involved with the services to be provided by the beneficiary affirms or adopts the above description as an accurate synopsis of the work that the beneficiary would perform.

The petitioner stated that the "usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field." As will be

reflected in this decision's analysis, the evidence of record does not substantiate this as an accurate statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof: the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also stated that the beneficiary "will be a direct employee of our company, and as such, our company retains supervisory control of the Beneficiary, including the right to hire and fire him and to receive periodic reports from him." At this juncture we will enter our finding that the evidence of record partially supports this statement – but only partially.

That is, upon reviewing the entire body of the evidence of record, it appears that the petitioner has assumed responsibility for the social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and any other work-related benefits to which the beneficiary may be entitled. Further, we consider these aspects of the petitioner/beneficiary relationship as relevant factors in determining the employer-employee issue. That is to say, they are some indicia of an employer-employee relationship under the common-law standard that we shall discuss later.

However, upon weighing all of the pertinent evidence of record we also find that the petitioner has not submitted relevant, probative, and credible evidence sufficient to establish that the petitioner's asserted "supervisory control" over the beneficiary would in actual practice translate into any substantive control over either (1) determining and assigning the beneficiary's day-to-day tasks at the [REDACTED] project, (2) providing specific assignment-and-task supervisory guidance during the beneficiary's actual day-to-day work, or (3) evaluating the efficiency, quality, and acceptability of the beneficiary's work on a day-to-day basis.

Further, with regard to this aspect of control over the beneficiary and the substantive, day-to-day work that the beneficiary would perform, the AAO points to the content of the group of e-mail copies that the petitioner submitted as part of its RFE response. We specifically find that those e-mails evidence no obvious involvement of the petitioner in the control over the beneficiary's day-to-day workflow that those e-mails reflect. Further, as part of the evidence tending to affirmatively show that the petitioner is not so involved, we point to the apparent assignment-giving and team-leading roles of the person appearing in those e-mails as [REDACTED]" and also to the team-supervisory role that the person named [REDACTED] appears to play. There is no evidence that either of those persons has any connection to the petitioner; and [REDACTED]

Also relevant to our consideration of the petitioner's claimed "supervisory" role is the fact that the petitioner has submitted no evidence of e-mails or other documentary footprints of any day-

to-day involvement that it may have in supervising, directing, or in any way controlling the project work that the beneficiary would be performing.

In the same regard, we also find that, although given the opportunity, the petitioner has not outlined the supervisory chain operating over the beneficiary during his project work. Nor has the petitioner provided evidence describing how the relevant terms of various contractual arrangements whose existence is indicated by the record of proceeding manifested themselves in terms of control over the beneficiary and the performance of the project work that is presented as the core of this petition.

Also weighing against the credibility of the petitioner's exercising any substantive control over the beneficiary's work is the clear implication of the evidence that the beneficiary is involved in a team effort wherein he appears to function as a member of a team which is neither provided nor controlled by the petitioner. In this regard, we particularly refer the petitioner to the content of the aforementioned project e-mails and to the March 28, 2013 letter's reference to the beneficiary as a participant, rather than as an independent actor, in the project work that the letter describes.

The petitioner also stated that it "retains the right to control the beneficiary's daily activities and the manner and means of his work, if required," and that it evaluates its employees' work. In this regard we find first that the evidence of record fails to identify and describe any part of the agreements related to the beneficiary and the project that supports the petitioner's claimed right to participate in actually controlling the beneficiary's daily activities on the project. Likewise, the AAO finds no evidence of record of the petitioner providing means or instrumentalities used in the project. Further, we see that these claims are not corroborated by any of the record's documents originating from – or from the State of Connecticut Department of Social Services, the contracting entity that is the prime mover of the entire project. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the proffered position is "Computer Systems Analysts" SOC (ONET/OES) Code 15-1121, at a Level I (entry level) wage.

The petitioner provided an itinerary of services for the beneficiary. The itinerary showed that the beneficiary would perform services at in Camp Hill, Pennsylvania and that the "[s]uccession of contracts [is] [the Petitioner] - (The petitioner makes no mention of the State of Connecticut agency that has generated the project and determined the scope and requirements of the project.)

The petitioner indicated that the beneficiary shall perform the work during normal business hours (8:00 am to 5:00 pm) although the beneficiary may be expected to work some nights and weekends.

Next, we will address the copies of (1) the "Subcontractor Agreement" executed by [REDACTED] and the petitioner (as the Contractor) on April 25, 2012; and (2) the [REDACTED] letterhead document entitled "Schedule 1," which was submitted as a "Schedule 1" document pursuant to the terms of that [REDACTED] Petitioner agreement.

We note and have considered in our deliberations, that the Schedule 1 document identifies the beneficiary as the "Vendor Company Employee" and indicates that the referenced services shall be performed for [REDACTED] in Camp Hill, Pennsylvania. The project start date is identified as March 25, 2013 and the project term is listed as consisting of 12 months with anticipation that the project will be complete on March 24, 2014.

The evidentiary value of the Schedule 1 document is minimal. The document does name the beneficiary, although as "Vendor [(not Contractor)] Company Employee," but it relates to [REDACTED] [that] shall be performed for [REDACTED] (Client)" – a term that is nowhere defined. Furthermore, this Schedule 1 document identifies neither the beneficiary's position nor the associated duties. Accordingly, this document conveys no substantive information about the nature of the work to be performed, or about the beneficiary's role with regard to the whatever the referenced "[REDACTED] [that] shall be performed for [REDACTED] of CT (Client)" may be, or about the role, if any, that the petitioner would play in controlling the work that the beneficiary would perform pursuant to this document.

We further note that the reference to "the [REDACTED] without any definition reasonably suggests that there is likely an understanding between the petitioner and [REDACTED], in some form, as to what the "[REDACTED]" are and what they would involve in terms of the beneficiary and the petitioner's role, if any, in directing the beneficiary.³ In any event, because the petitioner has not explained the "[REDACTED]," we accord no probative weight to this Schedule 1 document towards either establishing the requisite employer-employee relationship or satisfying the requirements for classifying a position as an H-1B specialty occupation. In doing so, we have taken into consideration the fact that the document seems to identify the beneficiary as the petitioner's employee; but we find little significance in that fact, in light of the document's void of information about the [REDACTED]. In this context, we cannot discern what particular indicia of control would vest in the petitioner in terms of the beneficiary's unnamed responsibilities and unnamed position in the unexplained "[REDACTED]" to which he would be assigned.

³ The possibility is suggested by the fact that the first paragraph of the Subcontractor Agreement indicates that the "particulars of any specific project" shall be designated in a Schedule (which does not appear to be fully the case here) or in a succession of Schedules. The specific language reads:

[T]he particulars for any specific project shall be such additional terms as are contained in the Schedules, each substantially in the form attached as Schedule One, to this Agreement.

However, we also into consideration the fact that the Schedule document indicates that the pay rate noted in it is subject to change by the client (" [REDACTED] "). Based upon that fact, we find that, whatever the agreement may be between [REDACTED] and the petitioner, it is ultimately subject to control beyond [REDACTED] and the petitioner, and that amounts to be paid by the [REDACTED] project during its performance does not depend upon the petitioner's input.

The petitioner further provided copies of its March 21, 2013 Employment Offer document to beneficiary, a copy of an Employee Handbook, the petitioner's organizational chart, and a blank performance appraisal form, among other items. The petitioner's organizational chart showed the systems analyst reporting to the "SDG Manager," who in turn reported to the "SDG Applications & Technology Head," who reported to the "President/CEO/CTO."

Upon review of the initial record, the director requested additional information from the petitioner to demonstrate that it had an employer-employee relationship with the beneficiary and had the right to control the beneficiary's work. The director also suggested, as among documents that the petitioner might wish to submit, copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed, as well as a detailed description of the duties the beneficiary will perform and the qualifications that are required to perform the job duties. The director further requested a description of who would supervise the beneficiary.

The petitioner elected to not provide the spectrum of contract documents that the director suggested.

The petitioner's RFE response included a revised version of the beneficiary's duties, stating the following as "specialized and complex" duties that the beneficiary would perform:

- Actively participating in requirements gathering, analyzing and interacting with architect, other software developers to implement the efficient and scalable system. Roughly 10% of the Beneficiary's time will be spent on this duty.
- Developing backend services for Renew my benefits (RMB) and Report my changes (RMC) modules using design patterns, Java APIs and developing web application with mvc architectural design pattern by implementing custom mvc framework. Roughly 30% of the Beneficiary's time will be spent on this duty.
- Working with Java server pages and java script frameworks such as jquery to implement the user friendly presentation (GUI). Roughly 30% of the Beneficiary's time will be spent on this duty.
- Followed test driven development to ensure the quality and testable code. Deploying into local development server for testing developed functionality. Roughly 5% of the Beneficiary's time will be spent on this duty.
- Fix bugs identified in the testing phase and code reviews with peers. Roughly 5% of the Beneficiary's time will be spent on this duty.

- Working with db2 database using JDBC framework APIs for data insertion and retrieval. Required tables and/or columns creation by ensuring relationships between the tables. Roughly 5% of the Beneficiary's time will be spent on this duty.
- Performing code reviews and participating in weekly developer meetings to catch up with new trends in development. Roughly 10% of the Beneficiary's time will be spent on this duty.

In its June 24, 2013 letter responding to the RFE, the petitioner emphasized that the beneficiary will work at the office of [REDACTED] in Camp Hill, Pennsylvania; that [REDACTED] is the end-client using the beneficiary's services; and that the beneficiary will not work on in-house projects.

The petitioner claimed – without any supporting documentation and therefore without substantiating the accuracy of the claim - that, "[d]ue to its confidentiality policies, [REDACTED] Consulting is unable to provide an end client letter about the Beneficiary's assignment." Because of the lack of corroboration, we accord no weight to the claim. Further, the petitioner should realize that a petitioner's burden to establish eligibility for the benefit sought neither diminishes nor shifts because the petitioner is unable to produce material evidence that bears upon its claim.

Also, the petitioner reiterated its claim that, although the beneficiary would be located offsite, he would be supervised by the petitioner and would remain directly employed by the petitioner. The petitioner stated that "the Petitioner can establish that it will retain all supervisory control over the Beneficiary and will be responsible for directing the manner in which the Beneficiary's work will be accomplished." The petitioner did not further explain these claims, however.

The petitioner indicated that the beneficiary's assignment at Deloitte is expected to last for the entire requested validity period – but did not provide evidence substantiating a factual foundation for that estimation. (This aspect of the petition will be addressed at greater length in this decision's section on speculative employment.)

In the earlier mentioned March 28, 2013 letter signed by [REDACTED] Director of HR & Operations, [REDACTED] provided another description of the beneficiary's duties for [REDACTED] [REDACTED] stated that "[a]s part of his responsibilities as a Systems Analyst on the [REDACTED] Consulting project, [the beneficiary's] project [REDACTED] requires him to participate in the following activities":

- Develop and implement new functionality and enhancements to existing applications using JAVA/JEE techniques.
- Interact with the business users to gather requirements.
- Work with other software developers to ensure coordination and consistency of development efforts and standards.
- Work on the complete life cycle of development using technologies like Java, Custom JEE framework, JSP, Servlets, EJB, Web Services and DB2 database.

- Implemented MVC architecture using custom framework and JSPS as GUI development and Model as persistence layer using DB2.
- Using WebSphere Application Server and RAD for application deployment and JavaScript for client input validation through expression language.
- Fix defects in code and perform unit testing.

█ indicated that the petitioner retains the ability to direct and control the beneficiary's performance and that █ bears no responsibility for "employing, directing, controlling, paying, or supervising" the beneficiary.

The petitioner also included a copy of a one-page "Subcontractor Agreement" document, which appears to be the signature page of an agreement executed by █ on November 14, 2012. As such, it has no substantive content; and it does not reference the beneficiary, the petitioner, or any work to be performed.

The record also includes an affidavit, sworn and signed on May 14, 2013 by a person named █, attesting that he was then "currently working at the office of █ in the position of Systems Analyst"; that as such he was "a colleague" of the beneficiary; that the beneficiary "has been working on [the] █ as a consultant," and that the beneficiary's "position is Systems Analyst."

The petitioner also submitted a copy of its employment agreement with the beneficiary dated March 21, 2013, and signed by both parties April 2, 2013. The petitioner points out, in part, that the employment agreement states:

Duties rendered away from the Employer's premises will not alter the nature of the employment relationship and Employee will remain under the supervision of Employer and subject to the Employer's policies and procedures.

If Employee is directed to render services away from Employer's business premises, Employee shall report back to Employer 4 time(s) per month for an evaluation of progress, performance, and goals. Employee will also be required to maintain timesheets of worked [sic] performed at other premises and will provide the timesheets to Employer.⁴

This document carries little weight towards establishing the requisite employer-employee relationship. By signing the document, the beneficiary (1) agreed to the petitioner's characterization of itself as the beneficiary's "employer," (2) agreed that the petitioner's status as "employer" would continue unaltered, regardless of the "[d]uties rendered away from the petitioner's premises," (3) and agreed that he, as the petitioner's "Employee," would remain under the petitioner's "supervision" and "subject to [the petitioner's] policies and procedures."

⁴ Although the next sentence in this paragraph indicates "Employer contact for such reporting is," the employment agreement does not provide a name or title identifying to whom the employee should report.

The agreement, however, does not itemize any elements of supervision that the petitioner would exercise other than the beneficiary in his remote work site for the [REDACTED] project, other than timesheet review and four-times-per-month "evaluation of progress, performance, and goals."

There is no indication that the timesheet review is other than an administrative, bookkeeping activity regarding work already performed. Likewise, there is no evidence that the periodic evaluation would have any substantive role in the day-to-day supervision of the beneficiary's [REDACTED] project-work. In fact, there is no evidence of record that [REDACTED] and/or the State of Connecticut officials ultimately in charge of [REDACTED] made any provision for the performance reviews or any other aspect of the petitioner/beneficiary agreements to play any role in the day-to-day supervision and control over the beneficiary as a worker on the [REDACTED] project. Additionally, the record does not provide completed copies of reviews so as to demonstrate the content and frequency of the reviews.

Further, while the beneficiary's signature to the agreement signifies that he agreed to its full content, there is no evidence of record that, when he signed, he was privy to any of the terms and conditions of the contracts related to the [REDACTED] project or was actually appraised of how his work at the [REDACTED] project would be supervised. This fact evaporates the weight of the document towards establishing the requisite employer-employee relationship.

The petitioner also provided copies of the beneficiary's timesheets signed by both the beneficiary and [REDACTED] as the beneficiary's supervisor.⁵ There are, however, no indications in the record that [REDACTED] was involved with day-to-day supervision or control over the beneficiary and his performance of the project work.

Further, the totality of the evidence does not indicate that the petitioner reserved any right to reassess or curtail the beneficiary's services during his work on the [REDACTED]

The petitioner's RFE response also included a June 11, 2013 submission prepared for the petitioner prepared by [REDACTED] listed the same duties of the proffered position as the duties the petitioner listed in its initial letter in support of the petition. [REDACTED] ultimately opined that "the position of Systems Analyst requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of Computer Science, Electronics Engineering, or a closely related field, which requires the attainment of at least a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation." [REDACTED] listed several skills as required to perform the duties of a systems analyst and indicated that these skills are learned in courses such as computer science, electronics engineering, systems analysis, data warehousing, computer architecture, software engineering, computer programming, computer security, managing network servers, and information technology. [REDACTED] opined that "[c]ompleting a Bachelor's degree in

[REDACTED] is identified as the vice-president in the petitioner's letters submitted in support of the petition. The organizational chart does not depict the vice president as supervising any technical positions, although it appears the vice president does supervise a human resources department.

Computer Science, Electronics Engineering, or a related field, prepares students for a variety of careers, including those as a System Analyst, Programmer Analyst, Network Systems Administrator, Computer or Software Computer Programmer, and Database Administrator." Dr. [REDACTED] concluded: "[b]ased on the complex job duties listed above and the intense coursework needed to complete the degree, it is clear that the position of Systems Analyst would require a candidate with a Bachelor's degree in Computer Science, or a closely related field."

The record also included the beneficiary's [REDACTED] identification badge and a number of electronic mail transmissions between the beneficiary and [REDACTED], and other persons who appear to be working for [REDACTED] – but not for the petitioner. The e-mail traffic suggests that control of the beneficiary in the day-to-day work that is the core of this petition resides in a [REDACTED] supervisory framework and team process. That impression is also confirmed by the fact that the [REDACTED] identification card's Emergency Procedure's statement indicates that the beneficiary has a "function or administrative leader" to which he reports; and there is no indication that such official is connected with any entity other than [REDACTED]. However, the record of proceeding does not include similar evidence regarding the petitioner's role – if indeed the petitioner had any role other than supplying the beneficiary to supplement [REDACTED] staff during the [REDACTED]

Upon review of the record, the director denied the petition for the reasons stated above.

On appeal, the petitioner asserts that the Service erred in finding that the totality of evidence provided does not demonstrate that it will maintain control over the beneficiary's work. The petitioner repeats its previous claims and references to previously submitted documents. The petitioner notes that the evidence submitted "demonstrated the Petitioner's right to control the Beneficiary while on assignment at a client location."

The petitioner submitted, for the first time on appeal, a work order form between [REDACTED] dated November 14, 2012. The work order identified the beneficiary as one of the subcontracted personnel working on Contract number [REDACTED]. The work order stated, among other things: [REDACTED] shall have the right to hire, without any compensation to Subcontractor, any individual who has continuously performed Services for a period of at least six months for [REDACTED] Consulting under a Work Order subject to this Agreement;" and "[i]f a Subcontractor personnel does not meet the expectations of Deloitte Consulting project management within the first two weeks (10 business days) of their assignment, s/he will be removed from the project immediately upon [REDACTED] consulting's request." The work order also described the services to be performed as:

Converts a design into a complete information system. Includes acquiring and installing systems environment; creating and testing databases; preparing test case procedures; preparing test files; coding, compiling, and refining programs.

It is worth noting, that the beneficiary appears to be encompassed within the work order's "Subcontractor personnel" – and in the context of the document that means [REDACTED] – not the petitioner's – personnel.

Regarding the petitioner's claim that the duties of the proffered position comprise the duties of a specialty occupation, the petitioner claims that documentation from the end-client is not required. The petitioner, however, refers to the work order submitted on appeal as evidence of the end-client's request and the duties the beneficiary will perform at the end-client site. The petitioner asserts that the matter at hand is different from *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) in that the petitioner is a consulting company, not an employment agency, and it is the petitioner who provides services, not workers, to its clients. The petitioner claims that it is the petitioner who determines what services are necessary at the end-client's site and then selects the employee who is best suited to carry out the performance of these services. The petitioner also claims that it controls the services provided to the end-client and it controls the beneficiary's duties performed.

The record on appeal also includes five job-postings for systems analyst positions, including postings issued by (1) [REDACTED] which specifies a preference for a bachelor's degree in information systems/technology or a related field; (2) by [REDACTED] Inc. which requires an undergraduate degree in computer science, information science, business administration, or a related field with two years of experience in personal computing business systems administration or five years of experience with business systems and no degree; (3) by [REDACTED] which lists the qualifications for the proffered position as five-plus years of successful delivery of systems analysis and indicates a preference for a degree in information science and technology, management information systems, computer science or a related discipline; (4) by [REDACTED] College of Medicine which lists a bachelor's degree with at least 2-3 years of experience as required; and (5) by National Engineering Service Corporation, a staffing company which specifies a bachelor's of science degree in a related field, five years of human resource systems experience in a business environment, and two years of experience with [REDACTED] applications in a global environment.

The petitioner also submitted a number of United States Citizenship and Immigration Services (USCIS) approval notices for its petitions for other H1B beneficiaries.

IV. LAW AND ANALYSIS

A. Preliminary Comments

The preceding comments and findings with regard to record of proceeding the AAO hereby incorporates into the analyses which will follow in this decision.

B. Employer-Employee Relationship

As reflected our review of the record of proceeding at section II of the decision, the evidence of record is not sufficiently comprehensive to establish enough common-law indicia of control for us to conclude that the requisite employer-employee relationship more likely than not exists between the petitioner and the beneficiary.

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)

[Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee:* and
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

The AAO reiterates that although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." *See* 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." See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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.⁶

⁶ 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

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." See 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 318-319.⁷

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).

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)).

"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).

There are also 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).

⁷ 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))).

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).

Moreover, 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."

Again, we here incorporate into our analysis the detailed comments and findings that we have already made about the various pieces of evidence and their implications for this issue. The following comments are to be considered in conjunction with those earlier comments and findings.

The petitioner stated that the beneficiary will work offsite in Camp Hill, Pennsylvania and that his work will be for the ultimate end-client, [REDACTED]. The petitioner repeatedly claims that the beneficiary will be in its direct employ and that it will maintain supervisory control over the beneficiary, including retaining "the right to control the beneficiary's daily activities and the manner and means of his work, if required." However, the evidence of record simply does not substantiate the claim.

Recall for instance that the e-mail transmissions between the beneficiary and [REDACTED] personnel demonstrates [REDACTED] as the entity from whom the beneficiary receives instructions and who sets who sets the beneficiary's daily assignments. That e-mail traffic reflect that, at least in matters there addressed, the beneficiary is acting independently from any substantive supervision from the petitioner. The petitioner presents no comparable documentation about its own activities with regard to the [REDACTED] project.

In addition, the record indicates that the beneficiary is not being assigned to provide services in any areas where he would be basically applying or using any materials, services, or instrumentalities that belong exclusively to the petitioner. Rather, it appears that [REDACTED] and the State of Connecticut's Social Services Department would likely provide the means, instrumentalities, and tools for the beneficiary's daily work. In this regard we also note that it appears that the State of Connecticut's providing access to its pertinent Informational Technology systems is essential to the work that the beneficiary would perform.

We also note that the supervisor who signs the beneficiary's timesheets is an individual shown on the petitioner's organizational chart as being over the petitioner's Human Resources Department as well as the Legal, Recruitment, and Sales departments. Thus, it appears that this individual signs the beneficiary's timesheets as a resource manager and not as an individual who directs, manages, or controls the actual technical duties that the beneficiary performs on a daily basis. That is, the record does not include evidence that any of the petitioner's claimed personnel identified as involved in software development actually review, supervise, and/or manage the beneficiary's daily work.

In addition, that Work Order Form, submitted on appeal, that had been executed by [REDACTED] and [REDACTED] has the right to hire any subcontractor who had worked at [REDACTED] Consulting for six months pursuant to the work order. Moreover, [REDACTED] retained the right to terminate any subcontractor personnel who did not meet [REDACTED] expectations within the first 10 days. Further still, the totality of the evidence of record indicates that [REDACTED], in coordination with appropriate State of Connecticut officials would be running the [REDACTED]. There is however, no documentary evidence that the petitioner would be involved in assigning particular work to the beneficiary, or in supervising the beneficiary during his work performance, or in assessing the efficiency, quality, and acceptability of that work, or in determining whether, ultimately, the beneficiary's work merited pay. These aspects, too, undermine the petitioner's claim that it is the entity that directly supervises and controls the beneficiary's actual day-to-day work.

Further, as the submissions into this record do not at least identify the material aspects of the various contractual relationships among the [REDACTED] and the petitioner that would be indicia of the common-law employer-employee relationship test, the record of proceeding it is not sufficiently comprehensive for a reasonable assessment that the petitioner would more likely than not have the requisite employer employee relationship.

In this matter although the petitioner claims that it is the entity which determines what services are necessary at the end-client's site and that it is the entity which controls the services provided to the end-client, the record lacks documentary evidence sufficient to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The AAO finds materially significant the absence of any mention by [REDACTED] of any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED]

The evidence of record does not establish how the petitioner exerts any substantial control over the beneficiary and his work or over the means, manner, or instrumentalities of that work as it progresses and performed day-to-day at the [REDACTED] project worksite at the Camp Hill, Pennsylvania. This is not to say that there are not some common-law indicia of control that favor the petitioner. However, as we also earlier observed, there are substantial indicia that the requisite control resides elsewhere. We conclude that the record does not provide sufficient information about the constellation of control factors in play in the [REDACTED] project.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where the work will be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

In this matter the beneficiary will work at the [REDACTED] facility. In addition, as discussed above, the record reflects [REDACTED] personnel as supervising the beneficiary in his daily activities for the [REDACTED] project's actual daily work.

The petitioner's claim that it exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

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." See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the appeal will be dismissed and the petition denied.

C. Specialty Occupation

The petitioner's failure to establish the requisite employer-employee relationship is decisive and precludes approval of the petition. Nevertheless, we shall also address the other independent ground upon which the director denied the petition, namely, the petition's failure to establish the proffered position as a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

To 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.

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

The AAO reviewed the record in its entirety and concurs with the director's determination that the record is insufficient to establish the proffered position as a specialty occupation. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Counsel's assertion that *Defensor v. Meissner, supra* does not apply to this matter is unpersuasive. In brief, when a beneficiary is providing services for a third-party, it is necessary to understand what the third-party requires. Only with this information can USCIS review the actual duties of the proffered position to determine whether the beneficiary will be performing specialty occupation duties. We note that the State of Connecticut provided no information about the [REDACTED] project and its requirements. Likewise, [REDACTED] provided a perfunctory description of services that included work which we find is not in itself indicative of a requirement for any particular educational level of knowledge in any specific specialty – and the petitioner provides no credible evidence that remedies this material deficiency.

An equally fundamental problem are the petitioner's claims about supervising and controlling the beneficiary's project work. If this were the case, we would expect, but do not see in this record, some documentation from [REDACTED] confirming the extent and substantive nature of the duties claimed by the petitioner. Additionally, the record lacks any statement from [REDACTED] or the State of Connecticut regarding whatever minimal educational requirements was perceived as necessary for the work that the beneficiary would perform. Given these factors and the overall content of the record as discussed in this decision's Factual and Procedural History section, we cannot determine the substantive nature and the associated educational or education-equivalent requirements of the actual work that the beneficiary would perform.

Also, as the record does not establish that it is the petitioner who is determining the services to be performed, the petitioner's uncorroborated claims are insufficient to establish that the petition is approvable for H-1B classification.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position proffered, location of employment, proffered wage, et cetera. The petitioner initially provided an overly broad description of the proposed duties of the proffered position. Although such a broad description could include the duties for a systems analyst occupation, such a description fails to convey an understanding of what the beneficiary will be required to do on a day-to-day basis. Accordingly, it is not possible to ascertain if the performance of the generally described duties actually require the theoretical and practical application of a body of highly specialized knowledge acquired through the attainment of a bachelor's or higher degree in the specific specialty.

In response to the director's RFE, the petitioner provided a revised description of duties, adding that the beneficiary would primarily work on particular design modules using Java APIs and working with Java server pages and script frameworks. In the [REDACTED] description of the beneficiary's duties, [REDACTED] also provided a general description and indicated that the beneficiary generally would work on the complete life cycle of development using specific technologies. Neither of these descriptions provides sufficient information regarding the specific project or the role the beneficiary would play on a development team. In other words, from the descriptions provided it is not possible to ascertain whether the beneficiary would be required to apply, practically and theoretically a body of highly specialized knowledge attained by a bachelor's or higher degree in the specific specialty.

Finally, [REDACTED] description of the beneficiary's duties is brief and general. [REDACTED] does not specify the particular role the beneficiary will play on its development team. Rather, [REDACTED] describes the services as converting a design into a complete information system. The description covers acquiring and installing a systems environment, creating and testing databases, preparing test case procedures and test files, coding, and compiling and refining programs. As this description does not identify the beneficiary's actual duties associated with the end-client's project, it is not possible to discern whether the beneficiary would primarily code, refine, install or test the end-client's programs. Again, it is not possible to conclude that the duties require the theoretical and practical application of a body of highly specialized knowledge acquired through the 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.

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Even if we take on face value the position and duty descriptions submitted by the petitioner to establish the proffered position as a specialty occupation, they would not succeed in establishing the proffered position does not establish the proffered position is a specialty occupation. For instance, assuming *arguendo* that the proposed duties constitute those of a systems analyst, we observe that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, does not identify such an occupation as normally requiring a bachelor's degree or higher in a specific discipline to perform the duties.⁹

Regarding the education and training of a computer systems analyst, the *Handbook* reports:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

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

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

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

⁹ The AAO recognizes the Handbook as an authoritative source on the duties and educational requirement of the wide variety of occupations that it addresses. All AAO references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Mar. 21, 2014).

Here, although the *Handbook* indicates that most systems analysts have a bachelor's degree in a computer or information science field it also indicates that some employers hire workers with business or liberal arts degrees. Accordingly, a bachelor's degree in a specific discipline is not the minimum requirement necessary to enter into the occupation.

In addition, although most systems analysts get a degree in a computer or information science subject "most" is not indicative that a computer systems analysts position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)). The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer systems analysts positions require at least a bachelor's degree in computer or information science, it could be said that "most" computer systems analysts positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the generally described and limited position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

The AAO has also reviewed the five Internet job postings submitted by the petitioner. These advertisements confirm the *Handbook's* indication that entry into the Computer Systems Analysts occupational group does not normally require a bachelor's or higher degree in a specific discipline. One job posting indicates that a bachelor's degree and two to three years of experience is required. An additional posting indicates that a bachelor's degree and five years of experience in particular applications or environments are required. However, neither of these postings includes sufficient information to determine that the experience required is at a bachelor's level or must be in a specific discipline. Two of the postings state only that a bachelor's degree in information systems/science/technology or in management information systems or computer science is preferred. However, employer preference is not synonymous with normally required. Moreover, one advertisement requires an undergraduate degree in computer science, information science, business administration or five years of experience with business systems and no degree. Acceptance of a degree in business administration to perform the duties of a position is tantamount to an acknowledgment the position is not a specialty occupation. That is, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). The variety of types of degrees and the lack of a requirement for degrees in a specific discipline set

out in these advertisements confirm that a position's inclusion within the Computer Systems Analysts occupational category is not in itself sufficient to establish that particular position as one that normally requires at least a bachelor's degree in a specific specialty or the equivalent.

We also note, that, as clear in that criterion's language, to qualify for consideration under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the evidence must relate to the practice with the petitioner's industry.

Also, the petitioner stated that the "usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a 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 (or its equivalent)" 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 (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in "computers, engineering, or a 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, besides a degree in electrical engineering, 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 computer science 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, fails to establish either (1) that computer science and engineering in general 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.

We have also reviewed the opinion prepared by [REDACTED] and submitted in support of a finding that the proffered position is a specialty occupation. In his letter, dated June 11, 2013,

(1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position, (2) lists the duties as initially described by the petitioner, (3) claims that completing a bachelor's degree in computer science, electronics engineering or a related field prepares students for a number of computer-related positions, and (4) states his belief that a systems analyst position requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of computer science, electronics engineering, or a closely related field, at a bachelor's level.

As will now be discussed, the AAO finds that [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, [REDACTED] submission does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the petitioner's initial overview of the proffered position in bullet-point fashion with little analysis. As a result, the degree to which [REDACTED] analyzed these duties prior to formulating his letter is not evident.

Next the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Professor [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the professor would actually require. Nor does the professor's letter articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Professor [REDACTED] has done here.

Nor does Professor [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed.

Further, Professor [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the beneficiary would not perform the claimed duties for the petitioner. The professor nowhere discusses this aspect of the proffered position. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the professor's ultimate conclusion as to the educational requirements of the position upon which he opines.

Furthermore, the petitioner claims that its minimum requirement to perform the duties of the position is a bachelor's degree in "computers, engineering, or a related field." Whereas, Professor [REDACTED] restricts the minimum requirement to perform the duties of a systems analyst occupation to a bachelor's degree in computer science, electronics engineering or a related field. The petitioner does not address this material inconsistency. It is incumbent upon the petitioner to

resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also observe that the petitioner in this matter attested on the LCA that the proffered position is a Level I computer systems analyst. Thus, the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. Paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (rev. Nov. 2009), which is accessible at the DOL Internet site http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Additionally, given the *Handbook's* indication that computer systems analysts positions do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into those occupations, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.¹¹ Thus, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

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).

The petitioner also submitted a number of approval notices for other H-1B employees. However, in making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding, however, does not contain copies of the visa petitions that the petitioner claims were previously

¹¹ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Computer Systems Analysts," <http://flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=16740&year=13&source=1> (last accessed Mar. 21, 2014).

approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). Thus, the AAO is unable to determine if the petitions were approved in error.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Upon review of the totality of the record in this matter, the petitioner's evidence is insufficient to establish that the proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

D. Speculative Employment

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. 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. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.¹²

¹² The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under

The aforementioned Schedule 1 document stated that the [REDACTED] would be completed "on or before 03/24/2014." However, the petition specified the period of intended employment as October 1, 2013 to September 1, 2016. The petitioner has not included evidence of additional specialty occupation work for the beneficiary subsequent to March 24, 2014. This aspect of the petition would preclude approval of the petition for any part of the period of intended employment beyond March 24, 2014, as the evidence of record did not establish that, at the time of filing, the petitioner had established definite, non-speculative employment for the beneficiary for that period.

IV. CONCLUSION

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

The petition must be denied 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; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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

the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).