



U.S. Citizenship  
and Immigration  
Services

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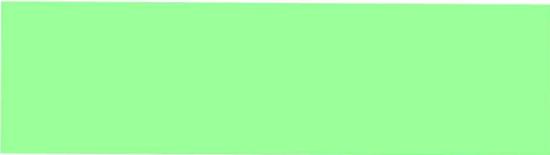
**AUG 13 2014**

DATE: OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an IT consulting services business established in 2007. In order to employ the beneficiary in what it designates as a systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish: (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) that the beneficiary is qualified to perform services in the specialty occupation. On appeal, counsel for the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

Upon review of the documentation, we found the petitioner's signature visibly different throughout the record and issued a request for evidence (RFE) on February 25, 2014. The petitioner responded to our RFE on April 21, 2014.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the director's RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) our RFE; and (7) the petitioner's response to our RFE. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on March 21, 2013, the petitioner indicated that it is seeking the beneficiary's services as a systems analyst on a full-time basis at the rate of pay of \$35 per hour. In addition, the petitioner indicated that the beneficiary will work at [REDACTED]

In the March 25, 2013 letter of support, the petitioner stated that the beneficiary "will be working on the [REDACTED] In addition, the petitioner claimed that the beneficiary will be responsible for the following duties:

[The beneficiary] will be responsible for responsible [*sic*] for the design, develop, test and install various client-server, web-based software application systems. On a day to day basis, he will gather and interpret functional specifications and user requirements (10%); communicate with end users and define requirements, develop design specifications and complete technical development and documentation for end user training (15%); analyze software requirements to determine feasibility of design within

time and cost constraints (10%); analyze, design, develop and support [REDACTED] Reporting software (10%); design logical and physical [REDACTED] structures using relational databases, on networked PCs and workstations (15%); assist in developing user interfaces and systems features and create internet/intranet technology (10%); create and maintain applications, and create dashboards and reports for the sales team (10%); perform software integration and testing, and develop enhancements and modifications (10%); forecast sales and allocate resources (5%); perform user training and technical documentation for applications and reports, as needed (5%).

The petitioner also stated, "Due to the focus on this particular position, a Bachelor [*sic*] degree in Computer Science, Engineering, or another technical field is required."

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Science in Engineering diploma and transcript from [REDACTED] in Ohio. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, however, the petitioner did not submit an educational evaluation of the beneficiary's foreign academic credentials.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Software Developers, Applications" – SOC (ONET/OES Code) 15-1132, at a Level I (entry level) wage. The beneficiary's place of employment is listed as [REDACTED]

In further support of the petition, the petitioner submitted: (1) printouts from the petitioner's website; (2) an offer of employment letter, executed on March 13, 2013; (3) an Employment Contract between the petitioner and the beneficiary, executed on March 21, 2013; (4) an email correspondence from [REDACTED] Software Development Manager – [REDACTED] dated March 22, 2013; (5) a memorandum to the petitioner's human resources (HR) staff regarding the performance review overview; and (6) an organizational chart.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 28, 2013. The director outlined the specific evidence to be submitted.

On July 5, 2013, counsel responded by submitting additional evidence. Specifically, counsel submitted: (1) a letter from [REDACTED] Software Development Manager at [REDACTED] dated June 14, 2013; and (2) a credential evaluation from [REDACTED] which indicated that the beneficiary's foreign education "is equivalent to a Bachelor's Degree in Biomedical Engineering and also equivalent to a Bachelor's degree in Computer Information Systems (CIS) from an accredited college or University in the United States of America."

The director reviewed the record of proceeding and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on July 16, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal brief, the petitioner submits copies of the documentation previously submitted with the initial petition and in response to the RFE, along with

additional evidence.<sup>1</sup>

## II. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

### A. Employer-Employee Relationship with the Beneficiary

We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss an issue, beyond the decision of the director that precludes the approval of the petition.<sup>2</sup> We find that the petitioner has not established that it meets the regulatory definition of a United States employer. *See* 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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

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

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

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, we need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, we have reviewed the documentation and as will be discussed in this decision, the evidence submitted on appeal does not assist the petitioner in establishing eligibility for the benefit sought.

<sup>2</sup> We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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.

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion

over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

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

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<sup>3</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>4</sup>

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).<sup>5</sup>

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where,

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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).

<sup>4</sup> 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))).

<sup>5</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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. Further, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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

In the instant case, the petitioner claims that it will pay the beneficiary's salary. We acknowledge that the method of payment of wages can be a pertinent factor in determining the petitioner's relationship with the beneficiary. However, while items such as wages, contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

With the initial petition, the petitioner provided an offer of employment letter and an Employment Contract for the beneficiary that was executed on May 21, 2013. We note that the documents fail to

adequately establish several critical aspects of the beneficiary's employment. For example, the offer of employment letter and Employment Contract do not provide specific information regarding where he will work. We observe that the offer of employment letter states that the beneficiary "will also be required to work at any of our client(s) locations, as assigned." According to the offer letter, the beneficiary may be placed at various locations and not necessarily in [REDACTED] Michigan as indicated on the Form I-129 and LCA.<sup>6</sup> The offer of employment letter and Employment Contract also do not provide the requirements for the position. While an offer of employment letter and employment agreement may provide some insight into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

Additionally, we consider information regarding who will provide the instrumentalities and tools required to perform the duties of the position. In the March 25, 2013 letter of support, the petitioner states that "we will not necessarily be providing the tools or instrumentalities to perform the job duties." Further, in the letter from [REDACTED] submitted in response to the RFE, Mr. [REDACTED] states that "we will provide the tools and instrumentalities to perform the duties." Thus, it appears that the client will be providing the instrumentalities and tools for the work to be performed, rather than the petitioner.

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013, to September 9, 2016. As previously mentioned, the petitioner stated on the Form I-129 and supporting documents that the beneficiary will work at [REDACTED]. Notably, the record of proceeding does not contain written documentation between the petitioner and [REDACTED] establishing any contracts or agreements for specific projects between the parties for any duration of time.

With the initial petition, the petitioner submitted an email correspondence from [REDACTED] Software Development Manager at [REDACTED] dated March 22, 2013. In the email, Mr. [REDACTED] stated that "[w]hile, our contracts are renewed on a 6-month basis, we anticipate that we would require [the beneficiary's] contractual services for an extended period of time since the tasks are ongoing." He further stated that "[t]he duration of the [REDACTED] project is approximately 3 years." In response to the RFE, the petitioner provided a letter from Mr. [REDACTED] dated May 29, 2013. In this letter, Mr. [REDACTED] stated that the beneficiary "will be working on our [REDACTED] this is an ongoing project, with no anticipated end date at this time." Mr. [REDACTED] did not acknowledge that he previously stated in the March 22, 2013 email that the duration of the project is approximately three years. In addition, he does not provide any further information regarding the [REDACTED] project in the email correspondence or letter.

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<sup>6</sup> In the Form I-129 and LCA, the petitioner states that the beneficiary will be employed off-site at a client's facility, specifically at [REDACTED]. The petitioner does not claim that the beneficiary will be employed at its own business location or at any other work sites.

The petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. Although the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013, to September 6, 2016, there is a lack of substantive documentation regarding specific work for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner claimed that the beneficiary would be working on the [REDACTED] project. However, the petitioner did not submit sufficient consistent, probative evidence substantiating that it had entered into contracts or other agreements for any particular projects with [REDACTED] or that it had any other specific work for the beneficiary for the duration of the requested employment period. Thus, there is a lack of probative evidence substantiating that the petitioner has H-1B caliber work for the beneficiary for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, without contracts or other agreements between the petitioner and [REDACTED] detailing any conditions or restrictions on the beneficiary's employment and the impact of those conditions or restrictions on the relationship between the petitioner and the beneficiary, the petitioner has not established its right to control the beneficiary and the performance of his work, even if he works on the [REDACTED] project.

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. In that regard it must be noted that the record indicates that the beneficiary will be physically located at [REDACTED]. The petitioner is located approximately 780 miles away in [REDACTED] Georgia.

In the March 25, 2013 letter of support, the petitioner indicated that [REDACTED] Director-Accounts for the petitioning company will be the beneficiary's in-house supervisor. However, we observe that in the May 29, 2013 letter from Mr. [REDACTED] submitted in response to the RFE, he stated that he "will be [the beneficiary's] on-site supervisor." Thus, the day-to-day work of the beneficiary appears to be supervised by Mr. [REDACTED].

With the initial petition, the petitioner submitted an organizational chart depicting its staffing hierarchy. Notably, the proffered position is not included in the organizational chart. The chart shows Analyst/Developer(s) and Lead Developer(s) reporting to the Director Accounts and the Director Accounts reporting to the President. The petitioner did not provide any further information regarding the supervision of the beneficiary for this project (or any other projects).

Additionally, the petitioner submitted a memorandum to its HR staff regarding the performance review overview.<sup>7</sup> The document does not establish the specific methods for assessing and evaluating the beneficiary's performance and/or the criteria for determining bonuses and salary adjustments.

The evidence submitted is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the petitioner exercises

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<sup>7</sup> Notably, HR is not included in the petitioner's organizational chart. No explanation for this omission was provided by the petitioner.

control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. On the contrary, the evidence indicates that the petitioner will not control the beneficiary or the performance of the beneficiary's work. The beneficiary will not work at the petitioner's location and the beneficiary will not use the tools and instrumentalities of the petitioner. Further, the evidence indicates that the day-to-day work of the beneficiary will be supervised and overseen by [REDACTED] with the petitioner's role likely limited to invoicing and proper payment for the hours worked by the beneficiary.

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

#### B. Itinerary Requirement

Also beyond the decision of the director, the petition must also be denied due to the failure of the petitioner to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

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

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

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a systems analyst at [REDACTED]'s facility for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until September 9, 2016, the petitioner failed to provide consistent information substantiating the proposed employment at [REDACTED] for the duration of the period requested. Thus, it appears that the beneficiary will work at multiple locations at some point during the requested period of employment and the petitioner failed to provide an itinerary reflecting the multiple locations when it

filed the Form I-129 in this matter. Accordingly, the petition must also be denied on this additional basis.<sup>8</sup>

### III. REVIEW OF THE DIRECTOR'S DECISION

#### A. Specialty Occupation

We will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

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<sup>8</sup> On page 4 of the Form I-129 petition, the petitioner indicated that an itinerary was included with the petition. However, upon complete review of the record of proceeding, we find that the petitioner did not submit an itinerary with the employment dates and locations of the beneficiary's employment for the duration of the requested validity period.

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

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

The petitioner asserted that the beneficiary would be employed as a systems analyst. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor

an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent, as the minimum for entry into the occupation, as required by the Act.

In the instant case, we observe that in the March 25, 2013 letter of support, the petitioner stated that the proffered position requires "Bachelor [sic] degree in Computer Science, Engineering, or another technical field." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, for example, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

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

Again, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering, or another technical field. This statement is insufficient to establish that the proffered position requires a degree in a specific specialty, or its equivalent. For instance, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to 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.

On appeal, counsel provides a letter from [REDACTED]. The letter is dated July 7, 2013. In the letter, Mr. [REDACTED] states, "I believe that an Engineering Degree can absolutely provide an appropriate and directly relevant foundation of technical and quantitative knowledge; and that the completion of an Engineering degree, *when taken together* with the requisite working experience, can fully qualify an individual for such PERM occupations."<sup>9</sup> He further states that "[w]ithin academia as

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<sup>9</sup> It must be noted that if the requirements to perform the duties and job responsibilities of a proffered position

well as professional industry, the field of engineering is viewed as related to that of computer science . . ."

Upon review, we note that Mr. [REDACTED] has not provided evidence to establish a factual basis for his opinion that "the field of engineering is viewed as related to that of computer science." Mr. [REDACTED] asserts a general educational standard, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, his opinion does not relate his conclusion to specific, concrete aspects of engineering degree programs and he does not provide a substantive, analytical basis for his opinion and ultimate conclusion.

The petitioner, who bears the burden of proof in this proceeding, fails to provide sufficient evidence to establish that (1) computer science and engineering (including any and all engineering specialties) are closely related fields, or (2) a degree in engineering (including any and all engineering specialties) is

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are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). This does not mean, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. Furthermore, we do not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, Mr. [REDACTED] claims that "an Engineering Degree can absolutely provide an appropriate and directly relevant foundation of technical and quantitative knowledge; and that the completion of an Engineering degree, *when taken together* with the requisite working experience, can fully qualify an individual for such PERM occupations." Upon review, however, Mr. [REDACTED] has not asserted and the record of proceeding does not support the conclusion that the claimed requirement of a general degree plus "requisite working experience" is equivalent to a bachelor's or higher degree in a specific specialty.

directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Further, 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.

In response to the director's RFE, the petitioner submitted a letter dated May 29, 2013 from [REDACTED] who works for the end client (according to the petitioner), [REDACTED]. In the letter, Mr. [REDACTED] provided a list of the beneficiary's duties. In addition, Mr. [REDACTED] stated that the position required "the minimum of a Bachelor-level education (or the equivalent thereof) in Computer Science, Engineering, or another technical field of study."<sup>10</sup>

Here, we review the opinion letter prepared by [REDACTED] Ph.D, Associate Professor, School of Business [REDACTED] dated August 2, 2013, counsel submits on appeal. Dr. [REDACTED] listed the same duties for the beneficiary as those listed in Mr. [REDACTED] letter. However, Dr. [REDACTED] concluded

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<sup>10</sup> To reiterate, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). Again, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

these duties require and the industry standard for such a position is "[c]ompletion of a Bachelor's Degree program in Computer Information Systems or a related area, or the equivalent." Dr. [REDACTED] did not explain the difference in his assessment of the required degree and the end client's acknowledgment that the duties could be performed by an individual with a degree in Computer Science, Engineering, or another technical field of study.

In addition, upon review of the opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond the information provided by counsel. Dr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Moreover, Dr. [REDACTED] did not indicate that he visited the petitioner's or the end client's business, observed the petitioner's or end client's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Furthermore, there is no indication that Dr. [REDACTED] investigated or consulted any agreements leading to the assignment of the beneficiary at a third party. Finally, there is no indication that the petitioner and counsel advised Dr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level software developer, applications, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA).<sup>11</sup> It appears that Dr. [REDACTED] would have found this information relevant for his opinion letter.

Without this information, the petitioner has not demonstrated that Dr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities. Dr. [REDACTED] has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. He does not provide a sufficiently substantive and analytical basis for his opinion. Moreover, Dr. [REDACTED] has not established his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Dr. [REDACTED] provides his extensive resume and asserts that he is familiar with the qualifications required to attain the position of systems analysts and similar professional positions. However, without further clarification, it is unclear how Dr. [REDACTED] education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of companies engaged in information technology services (as designated by the petitioner in the Form I-129) or similar organizations, for parallel positions. Dr. [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative *on this particular issue*. Further, there is no indication that Dr. [REDACTED] has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on the specific recruiting and hiring requirements of companies such as the petitioner.

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<sup>11</sup> The Level I wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

In sum, we conclude that the opinion rendered by Dr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusion reached by Dr. [REDACTED] lacks the requisite specificity and detail pertinent to this specific position and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. There is an inadequate factual foundation established to support the opinion and the opinion is not in accord with other information in the record. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

While the petitioner has identified its proffered position as that of a systems analyst, and attested the position falls within the occupational category of software developers, applications on the LCA, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to a specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2;<sup>12</sup> (3) the level of complexity or uniqueness of the proffered position,

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<sup>12</sup> On appeal, counsel for the petitioner submits several job postings from various companies for various computer analysts positions. As the petitioner has not provided a substantive description of the actual duties to be performed in the proffered position, it is not possible to ascertain whether the job advertisements are for parallel positions. Moreover, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here. That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that

which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

#### B. Beneficiary's Qualifications

In the instant matter, the director found that the beneficiary would not be qualified to perform the duties of the proffered position. However, we do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined.

Nevertheless, we note that a degree in engineering alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *See e.g., Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968).

We also note that in support of its assertion that the beneficiary's degree in engineering qualifies him to perform duties in the proffered position, counsel provided the above referenced letter from Mr. [REDACTED]. In the letter, Mr. [REDACTED] states that "the field of engineering is viewed as related to that of computer science." However, as previously discussed in detail, Mr. [REDACTED] makes a general claim and did not provide sufficiently substantive and analytical bases for his opinion. Furthermore, he did not provide probative evidence to support his assertion.

We find that the petitioner did not submit sufficient evidence regarding the nature of the proffered position to make an assessment of whether the beneficiary obtained knowledge equivalent to at least a bachelor's degree in a specific specialty required by the particular occupation in which he will be employed. Accordingly, it is not possible to determine whether the beneficiary is qualified, overqualified, or unqualified to perform the duties of the position proffered here. The record of proceeding is insufficient to overcome the director's determination on this issue.

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"random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error"). Accordingly, the advertisements will not be further reviewed or discussed as the petitioner has not established the relevance of the advertisements here.

#### IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.