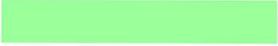


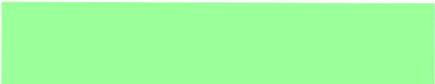


U.S. Citizenship  
and Immigration  
Services

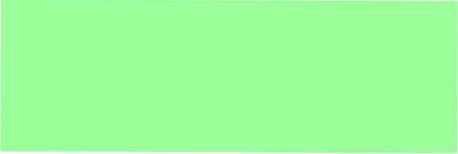
(b)(6)



DATE: **AUG 28 2014** 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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as fifty-employee IT consulting business<sup>1</sup> established in 2008. In order to employ the beneficiary in what it designates as a full-time programmer analyst position at a salary of \$60,000 per year,<sup>2</sup> 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, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Beyond the decision of the director,<sup>3</sup> we will enter an additional basis for denial, i.e., the petitioner's failure to establish an employer-employee relationship with the beneficiary. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 8, 2013. On the Form I-129, the petitioner listed its business address as [REDACTED] Texas. The petitioner indicated that it is a fifty-employee IT consulting business established in 2008. With regard to the beneficiary, the petitioner indicated on the Form I-129 that it seeks to extend the beneficiary's employment as a programmer analyst. The petitioner acknowledged that

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 30, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Programmers" occupational classification, SOC (O\*NET/OES) Code 15-1131, and a Level II prevailing wage rate.

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

the beneficiary will be working off-site at the address of [REDACTED] Ohio.

In support of the H-1B petition, the petitioner submitted, *inter alia*, a letter from the claimed end-client, [REDACTED] dated March 20, 2013. This letter states that the beneficiary is, and has been since October 2012, working at [REDACTED] located at [REDACTED] Ohio. The letter states that the beneficiary has been performing services as "part of developing [its] [REDACTED]" which it described as "an automation tool which is used in [sic] manufacturing environment, which is extensively developed in Pnut scripting," and for which Java and Oracle are also utilized. The letter explains that [REDACTED] contracted from [REDACTED], which in turn contracted the beneficiary from the petitioning company. This letter further states that [REDACTED] are not responsible for the following tasks, and that it is solely the responsibility of the petitioner to take the following actions:

- Filing the H-1B visa and taking care of all immigration-related matters;
- Filing tax returns;
- Review and evaluation of progress;
- Responsible for all necessary insurance; and
- Any and all other employee benefits according to relevant rules.

This letter concludes that [REDACTED] "intends to continue the services of [the beneficiary] as Programmer, since he has a [sic] good comprehension of the application and the work in progress." The letter is signed by [REDACTED] Manager, who is the "manager for implementation of [the [REDACTED] project]."

The petitioner submitted a Supplier Purchase Order – Staffing Services (PO) between [REDACTED] and the petitioner ("supplier"), authorizing the named supplier personnel, i.e., the beneficiary, to provide services to the client, i.e. [REDACTED]. The PO describes the services the beneficiary is to provide as simply "Java J2EE Development." The term of the PO started on September 24, 2012 and terminated on September 30, 2013.

The petitioner submitted the Subcontractor Services (For Suppliers) Agreement, dated April 15, 2010, between [REDACTED] and the petitioner ("supplier"). Under "Type of Agreement," it states:

[REDACTED] is in the business of locating temporary personnel with information technology and other technical skills for its and its affiliates' various clients . . . This Agreement allows Supplier to introduce its personnel to a Client under a specific [REDACTED] Client services agreement and to provide the services of Supplier

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<sup>4</sup>The petitioner submitted documentation confirming that [REDACTED] was formerly known as [REDACTED].

<sup>5</sup> See *supra* footnote 4.

Personnel (defined below) to such Client. This Agreement is not a purchase commitment or request for delivery by [REDACTED] of any Supplier personnel or service.

The subcontractor agreement further specifies that "a purchase order . . . shall be executed by Supplier and [REDACTED] prior to the commencement of Supplier's services or the assignment of Supplier's personnel for a Client." Attached to this agreement was an Amendment to Subcontractor Services Agreement between the petitioner and [REDACTED] ("client").

The petitioner submitted a letter, dated March 14, 2013, entitled "Re: Support Letter for I-129 Application [*sic*] for [the beneficiary]." This letter provides the following description of computer programmer analyst positions for its company:

Computer Programmer Analyst for our Company gathers, analyze, develop and test software packages developed in any platforms before it goes to the production and distribution. They Develop it using programming languages such as Java, J2EE, .NET, C#, VB, PHP, Java Scripts, Perl, Shell, SQL, PL/SQL, C++, C, TSQL, Python, HTML, XML, Ajax, SharePoint in environment such as Linux, UNIX and Windows and TEST that software in various automated tools, as well as manually. Software Analyst<sup>6</sup> also provide database analysis using Business Object, Cognos, SQL Server, Oracle, Crystal Report and ongoing support for any application that are running from the breaks and fixes on timely manner. [] Computer Programmer Analyst also converts requirement specification of projects to an application. They design flowchart, and translate it to the programming language, develop and write programming languages to develop website, retrieve data from databases, and develop costume application for any information to store in company database, web, data warehouse or SharePoint. Computer Programmer Analyst also covers to the areas of managing databases, administering databases, Organizing Database, and any database related topics and problem solving issues and solutions using Oracle, SQL Server, DB2, MySQL Database environments [*sic*].

This letter confirms that the beneficiary "is currently engaged in to deliver his service for the [REDACTED] . . . on [REDACTED] project to different manufacturing plant, where he uses Pnuts scripting with Java [*sic*]." Under "Employment Terms," this letter states that the beneficiary is to "work in continuing basis with [the petitioner] until the expiration of Visa [*sic*]" as a Computer Programmer Analyst. It also states that the beneficiary "will be paid by [the petitioner], his actual employer," at an annual salary of \$72,800 with medical benefits on a full-time basis, and that the company will deduct all applicable federal and state taxes from the beneficiary's earnings. The letter is signed by [REDACTED] HR Manager.

The petitioner submitted another letter, also dated March 14, 2013, entitled "Re: Employer and Employee: - [the beneficiary]." This letter confirms that the beneficiary is "an active employee of

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<sup>6</sup> We note that the petitioner's letter lists job duties for a software analyst, even though the proffered position is described in the petition as that of a programmer analyst.

[the petitioner] and currently providing his consulting responsibilities for [redacted] located at [redacted] OH." The letter summarizes the beneficiary's salary and employee benefits, such as holidays and health insurance. It states that the petitioner "as an employer is responsible for all employment related tax, W2, State Taxes, and unemployment related wage, insurance and taxes for [the beneficiary]." It states that the petitioner "reviews all its employees' performance on [*sic*] yearly basis," based upon the following components:

- Employee's contribution in project performance and adaptability[;]
- Employee's contribution in [the petitioner's] revenue growth through consistent project deliverables[;]
- Employees Emphasis in Cultural and Work Place Contribution toward diversity [*sic*][;] [and]
- Employee's motivation toward new technologies, and training programs.

This letter further states that the beneficiary will report to [redacted] at the petitioner "for his project and technology related topics," and will perform the following additional responsibilities that he is required to discuss with [redacted]

- Provide up to date project progress on weekly basis[;]
- Provide timesheet and attendance[;]
- Provide vacation plan, any off days, and sick day reporting[;]
- Yearly performance evaluation, and benefit discussion[;]
- Training needs, that is directly related to the current job responsibility[;] [and]
- Any other questions that are related to the job growth and employment related [*sic*].

The petitioner submitted the Employment Agreement between it ("employer") and the beneficiary ("employee") as a Computer Programmer Analyst, and a renewal offer dated March 24, 2013. In pertinent part, the Employment Agreement and renewal offer discuss the beneficiary's salary and benefits, and specifies the following duties for the beneficiary: "devote utmost knowledge and best skill to the performance of his/her duties;" "devote his/her full business time to the rendition of such services;" and "not engage in any other gainful occupation that interferes with or creates a conflict of interest with his/her job responsibilities under this Agreement."

The petitioner submitted an undated letter entitled "Re: Job Itinerary," in which the petitioner confirms that the beneficiary is an active employee and "currently providing his consulting responsibilities as a Programmer Analyst for [redacted]" This letter states that the beneficiary is "involved with [redacted] project that is provided by the [redacted] to different manufacturing plants using Pnuts scripting along with java [*sic*]." The letter then provides the following description, with percentages of time, of "[j]obs and responsibilities for the current project for [the beneficiary]:"

- Requirement analysis and full SDLC Process (15%);
- Information gathering and documentation using Microsoft tools and technologies (10%);

- Application Design and coding using Java/J2EE, Pnuts, JUnit, Jboss platform implementing Oracle, Spring, Hibernate, JSP, AJAX, CSS, HTML and other tools and technologies (45%);
- Testing and debugging of application in Junit (10%); and
- Deployment, maintenance of production support of application (20%).

This letter further states that the beneficiary will report to [REDACTED] at the petitioning company, and repeats the same responsibilities as listed in the letter entitled "Re: Employer and Employee: - [the beneficiary]" that the beneficiary is required to discuss with [REDACTED]

The petitioner submitted a sample performance appraisal template used by its company. This document states that the employee appraisal and performance review are based on the following three components: "client review;" "employees [*sic*] components;" and "internal review." Under "client review" are the following criteria: timely completion of the tasks, and projects; communication; leadership and team spirit; and overall performance. Underneath this component is a space for the "client reporting manager" to sign and date. Under "employees [*sic*] components" are the following criteria: time and duration contributed toward the company; contribution toward diversity; contribution toward organizational growth; contribution toward client's satisfaction and company image building; and self-training and growth aspect for career advancement and employee goals. Under "internal review" are the following criteria: revenue and cost factors; employee's current technology expertise and market analysis; employee's goals appraisal; client feedback; and other comments.

The petitioner provided copies of pay statements and a 2012 Form W-2, Wage and Tax Statement, that it issued to the beneficiary.

The petitioner submitted its company organizational chart as of 2013, depicting a total of 29 employees.<sup>7</sup> This chart does not list the beneficiary as an employee. The chart depicts [REDACTED] Human Resources Manager, as directly overseeing a Business System/Management Analyst, who in turn oversees numerous employees. While unclear, the chart appears to indicate that [REDACTED] is jointly overseen by the President, [REDACTED] and the Sr. Vice President-Business, [REDACTED]

The director issued a Request for Evidence (RFE) requesting additional documentation to establish an employer-employee relationship for the duration of the requested validity period, including, *inter alia*, copies of signed contractual agreements between the petitioner and the end-client, with a detailed description of the duties that the beneficiary will perform for the end-client, the qualifications and educational background required to perform the job duties, and a description of who will supervise the beneficiary and their duties. The director acknowledged the documentation establishing [REDACTED] as the vendor through whom the beneficiary works to provide services to the end-client [REDACTED] but observed that the petitioner provided documentation for a different end-client, [REDACTED]. The director also requested additional evidence pertaining to the proffered

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<sup>7</sup> In contrast, the petitioner indicated on the Form I-129 that it has fifty employees.

position, including a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity, and evidence satisfying at least one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In a letter dated June 3, 2013 submitted in response to the RFE, the petitioner explained that the beneficiary is and has been working at the end-client location in F-1 OPT status, and that its prior submission of the Amendment to Subcontractor Services Agreement between the petitioner and [REDACTED] was a mistake and should be discarded.<sup>8</sup>

In response to the RFE, the petitioner resubmitted copies of previously submitted documents, as well as new documentation. Specifically, the petitioner submitted Weekly Review Reports, which bear the petitioner's company letterhead, identifying the employee as the beneficiary and his supervisor as [REDACTED]. These forms further identify the current project name as [REDACTED], the end-client's name as [REDACTED], the contact person at the client site as [REDACTED], and provide for other information such as current project updates, work assigned, new assignments, and supervisor remarks. These forms were signed and dated by both the beneficiary and [REDACTED] on May 12, 2013, May 5, 2013, April 28, 2013, April 21, 2013, April 14, 2013, April 7, 2013, March 31, 2013, March 24, 2013, March 17, 2013, and March 10, 2013.<sup>9</sup> The petitioner also submitted copies of additional pay statements to the beneficiary.

In response to the director's request for additional evidence regarding the proffered position, the petitioner submitted copies of the following job advertisements:

1. The petitioner's advertisement for a programmer analyst position, which requires a master's degree in computer science, engineering, business administration, or a related field;
2. The petitioner's advertisement for a computer system analyst – quality test analyst position, which requires a bachelor's degree;
3. The petitioner's advertisement for a computer system analyst position, which requires at least a master's degree;
4. The petitioner's advertisement for a computer programmer position, which requires at least an MBA [master's of business administration] degree;
5. An advertisement for a programmer analyst position at [REDACTED] which requires a bachelor's degree;
6. An advertisement for a programmer analyst position at [REDACTED] to be placed at a health care client, which requires a bachelor's degree, but allows for additional experience to be substituted for education;
7. An advertisement for an apps programmer/analyst lead – Java position at [REDACTED] which requires a bachelor's degree in computer science, computer engineering,

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<sup>8</sup> As will be discussed further *infra*, while the petitioner explained that the Amendment to Subcontractor Services Agreement between the petitioner and [REDACTED] was mistakenly submitted, the petitioner did not submit an Amendment to Subcontractor Services Agreement between the petitioner and [REDACTED].

<sup>9</sup> We note that all of these dates fell on a Sunday.

- computer applications, electrical engineering, or electronics engineering, or a related field;
8. An advertisement for a programmer/analyst position at [REDACTED] which requires a bachelor's degree in computer science or the equivalent in education and experience;
  9. An advertisement for a program analyst position at [REDACTED] to perform "complex administrative and analytical tasks," which requires a bachelor's degree in business administration or a related discipline; and
  10. An advertisement for a program control analyst position at [REDACTED] to perform duties of monitoring cost and performance and schedule performance, and performing related analyses, which requires a bachelor's degree.

The petitioner also submitted summary reports for computer programmer positions from the *Occupational Outlook Handbook (Handbook)* and the Occupational Information Network (O\*NET OnLine).

The director denied the petition, concluding that the evidence does not demonstrate that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the proffered position "qualifies as a specialty occupation because it meets one or more of the standards criteria for a specialty occupation [*sic*]." Specifically, the petitioner asserts that it "normally requires a minimum of a bachelor's degree for the job positions to all its candidates as well as other similar companies in the industry." The petitioner further states that "[t]he [j]ob duties for programmer analyst are specialized and require the theoretical and practical application of knowledge associated with attainment of a bachelor's degree." The petitioner asserts that it has also provided evidence that the beneficiary qualifies for the visa classification, and possesses "the skills and education necessary for this specialized position that a candidate with just an associate degree cannot perform." In another letter submitted on appeal, the petitioner asserts that the "offered position requires the application of knowledge gained through completion of a bachelor's degree in Computer Science, or a closely related field, or the equivalent."

In support of the appeal, the petitioner submits, *inter alia*, an opinion letter from Dr. [REDACTED] Professor of Computer Applications and Information Systems in the School of Business at the [REDACTED]. Dr. [REDACTED] opines that the duties of the proffered position are "so specialized and complex that knowledge required to perform these duties is usually associated with the attainment of a Bachelor's Degree in this field [of Computer Science or related area, or the equivalent]." Dr. [REDACTED] states that "[a] student completing a Bachelor's Degree in Computer Science or related area obtains knowledge of the various theories and methods necessary for performing these daily tasks" through specific required courses such as Introduction to Computer Programming, Data Structures, and Principles of Programming Languages. Dr. [REDACTED] also opines that it is "standard for a company such as [the petitioner] to hire a Computer Programmer Analyst and require that individual to have attained at least a Bachelor's Degree." He states:

The success of [the petitioner], as of similarly situated companies, is largely dependent upon the ability and expertise of a Computer Programmer Analyst or someone in a similar professional position, as the specialized duties of this individual

directly and indirectly affect the company's operations, revenues and profits, and ultimately the overall success of the company. Therefore, the industry standard for a position such as Computer Programmer Analyst for [the petitioner] is to be filled through recruiting a college graduate with the minimum of a Bachelor's Degree in Computer Science or a related area, or the equivalent.

The petitioner submits a letter, dated July 9, 2013, entitled "Re: Support Letter for I-129 Application for [the beneficiary]," in which the petitioner lists the names, job titles, degrees and legal status of its claimed employees.

The petitioner submits a letter from [redacted] an IT staffing and consulting company, attesting that as part of its business, it "routinely hire[s] individuals with similar backgrounds as [the beneficiary] for similar positions as the one requested in the immediate position [sic]." The letter further states that it "routinely and only hire[s] individuals with at least a bachelor's degree and that qualify for a specialty occupation," and that it has been the company's practice "to hire individuals with various educational backgrounds in the computer background, including computer science, for programmer analyst positions." The letter states that it is "normal in our industry for our clients to request individuals with these backgrounds for their projects." The letter concludes that "[t]he projects could not be performed by anyone with less than a bachelor's degree" and that it is "the normal process for most if not all IT staffing companies to routinely hire individuals with a bachelor's degree for positions such as these."

The petitioner submitted a letter from [redacted] an IT consulting, software development, and recruitment firm, also attesting that it "routinely hire[s] individuals with similar backgrounds as [the beneficiary] for similar positions as the one requested in the immediate position [sic]." The letter further attests that it hires "candidates with various educational backgrounds like computer science, information technology for Computer Programmer Analyst positions." The letter states that this is "a procedure for [its] company or any other IT staffing company to hire candidates with at least Bachelor's degree to perform the duties required by the Programmer Analyst positions."

Finally, the petitioner provides additional job advertisements, as follows:

11. An advertisement for a computer programmer/analyst position at [redacted] a software consulting, development, and training company, which requires a "[m]inimum Bachelor Degree in any field;"
12. An advertisement for a programmer/analyst position at [redacted] which requires a bachelor's degree in computer science or a related field;
13. An advertisement for a systems programmer/analyst position at [redacted] which is in the business of rebuilding heavy duty off road powertrain components and hydraulic containers, specifying the minimum requirements as a bachelor's degree in computer science or a related field;
14. An advertisement for a programmer analyst position at the [redacted] which requires a bachelor's degree with an emphasis in computer information systems or a related field;

15. An advertisement for a programmer analyst position at [REDACTED] which requires a bachelor's degree in computer science, information systems, or a related field; and
16. An advertisement for a programmer analyst position at [REDACTED] which requires a "Bachelor's degree in related field or equivalent number of years [sic] experience."

### III. ANALYSIS

#### A. Employer-Employee Relationship

Before addressing the director's determination that the proffered position is not a specialty occupation, we will first discuss our own finding, made beyond the decision of the director, that the evidence of record does not establish that the petitioner is a "United States employer" who will have "an employer-employee relationship" with the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

##### 1. The Law

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

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

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

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

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

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

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." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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>10</sup>

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>11</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

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<sup>10</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).

<sup>11</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))).

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>12</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, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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<sup>12</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).

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).

## 2. Discussion

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."

The petitioner asserts that it has an employer-employee relationship with the beneficiary because the petitioner is responsible for paying all employment related taxes, salary, and employee benefits on behalf of and to the beneficiary. The petitioner submitted copies of pay statements to the beneficiary, a 2012 Form W-2 that it issued to the beneficiary, as well as other evidence of employee benefits the beneficiary receives. We acknowledge that the method of payment of wages, the payment of taxes, and other benefits, can be pertinent factors to determining the petitioner's relationship with the beneficiary. However, while items such as wages, 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., 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.

Here, it is critical to note that the beneficiary is, and has been since October 2012, performing services for the end-client, [REDACTED] at the end-client's location. However, the record of proceeding contains no explanation or documentary evidence establishing who oversees and directs the beneficiary's work on a regular basis at [REDACTED] which is located in Ohio, approximately 1,200 miles from the petitioner's business location in Texas.

Specifically, the letter from [REDACTED] does not provide any explanation as to who regularly oversees and directs the beneficiary's work onsite at [REDACTED] premises. Instead, the letter states that [REDACTED] is not responsible for the actions that the petitioner is responsible for, such as filing the instant H-1B visa, filing tax returns, and "[r]eview and evaluation of progress." As discussed earlier, while such items such as wages and taxes are relevant factors in determining who will control the beneficiary, other incidents of the relationship, such as who will oversee and direct the work of the beneficiary, must also be assessed and weighed. The letter's vague assertion that the petitioner, not [REDACTED] has responsibility for "[r]eview and evaluation of progress" falls short of establishing that the petitioner actually oversees and directs the beneficiary's work at the end-client's worksite. We note that the letter identifies [REDACTED] as the manager for implementation of the [REDACTED] project, but there is no explanation of what responsibilities and authority Mr. [REDACTED] has with respect to overseeing and directing the beneficiary's work on the [REDACTED] project.

The petitioner submitted an Employment Agreement between the petitioner and the beneficiary dated March 14, 2013, as well as several letters from the petitioner summarizing the terms of the beneficiary's employment. The record also contains the beneficiary's "Weekly Review Reports" submitted to the petitioner. However, upon review of these documents, we find these documents insufficient to adequately establish who oversees and directs the work of the beneficiary on a regular basis at the end-client's worksite.

The Employment Agreement is silent with regards to who will oversee and control the beneficiary's work. The Employment Agreement does not provide any level of specificity as to the beneficiary's duties. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, 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.

The petitioner's letter entitled "Re: Employer and Employee: - [the beneficiary]" does not provide any meaningful explanation of who regularly oversees and directs the beneficiary's work at the end-client's worksite. Significantly, this letter states that the petitioner "reviews all its employees' performance on [*sic*] yearly basis," based upon components such as the employee's "contribution in project performance and adaptability" and "contribution in [the petitioner's] revenue growth through consistent project deliverables." It is not evident how the petitioner could exercise actual oversight and control of the beneficiary's work through a *yearly* performance review. Moreover, even though this letter indicates that the petitioner evaluates the beneficiary's "contribution in project performance," the letter does not explain how this evaluation is conducted for projects, such as [redacted] that do not occur on the petitioner's worksite. The letter also states that the beneficiary is required to "[p]rovide up to date project progress on weekly basis" to the petitioner. However, the vague assertion that the beneficiary is required to provide weekly updates to the petitioner falls short of asserting that the petitioner oversees and directs the work of the beneficiary; to the contrary, it suggests that the petitioner does *not* exercise regular oversight of the beneficiary's work.

Significantly, the petitioner's sample performance appraisal strongly suggests that it is the client, not the petitioner, who oversees the beneficiary's project-specific performance. Specifically, the appraisal form indicates that the client, through the "client reporting manager," is responsible for evaluating the beneficiary's project-specific performance under the component for "client review," which includes the beneficiary's timely completion of the tasks and projects, communication, and overall performance. In contrast, the criteria the petitioner utilizes to evaluate the beneficiary are either not project-specific, such as "revenue and cost factors," or are dependent upon client feedback.

Furthermore, the record contains conflicting evidence as to who the beneficiary's actual supervisor is at the petitioning company. The petitioner's letter entitled "Re: Employer and Employee: - [the beneficiary]," as well as its letter entitled "Re: Job Itinerary," both identify the beneficiary's supervisor over all matters as [redacted] the petitioner's Human Resources Manager.<sup>13</sup>

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<sup>13</sup> It is not readily apparent why the beneficiary would directly report to the Human Resources Manager for technology and project-related matters.

However, the Weekly Review Reports identify the beneficiary's supervisor as [REDACTED] who, according to the organizational chart, is the petitioner's Sr. Vice President-Business. In addition, the petitioner's organizational chart does not depict [REDACTED] as overseeing the beneficiary or any other computer programmer analysts; in fact, the organizational chart does not even list the beneficiary as an employee. Not only do these discrepancies regarding the beneficiary's supervisor raise doubt as to who actually oversees and directs the beneficiary's work, but they also undermine the credibility of the petitioner's claims and evidence.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Further regarding the Weekly Review Reports, these documents do not identify the individual who prepared them. In particular, it is unknown who completed the information for "work assigned" and "new assignments," as well as from and to whom these reports were transmitted. The documents also do not identify who assigned the beneficiary the stated work. Notably, each document is signed by both the beneficiary and his supervisor on the same day, all on a Sunday, thus raising additional questions about the preparation and transmittal of these reports.

The record of proceeding contains no explanation or documentary evidence establishing who provides the instrumentalities and tools utilized by the beneficiary in the course of his work at [REDACTED]. As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, the petitioner did not provide any information on this matter, even though it was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary.

Upon complete review of the record of proceeding, we find that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the petition must be denied on this basis.

Furthermore, 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), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>14</sup> The record contains no evidence that H-1B caliber work exists for the beneficiary for the duration of the requested period. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 5, 2016. The supporting documents indicate that the beneficiary would be working at the [REDACTED] client site in Ohio specifically to work on the [REDACTED] project. No other work locations or projects were provided. However, the Supplier Purchase Order between the petitioner and [REDACTED] the vendor through whom the end-client contracted the beneficiary from the petitioner, terminated on September 30, 2013 (assuming the purchase order was not terminated earlier). The record does not contain any subsequent purchase orders or other evidence establishing that the Supplier Purchase Order which ended on September 30, 2013 has been renewed.<sup>15</sup> In addition, the letter from [REDACTED] states only that it "intended [*sic*] to continue the services of [the beneficiary] as Programmer," but provides no anticipated end date. The record contains no written agreement between the petitioner and the end-client, [REDACTED] or other evidence establishing the anticipated length of the [REDACTED] project and/or [REDACTED] need for the beneficiary's service, if shorter. We note that while the petitioner

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<sup>14</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, 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 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).

<sup>15</sup> While the petitioner submitted the Subcontractor Services Agreement between it ("Supplier") and [REDACTED] this agreement merely allows the petitioner "to introduce its personnel candidates to [REDACTED] in order that [REDACTED] may propose the services of such personnel to a Client." The agreement specifically states that it is "not a purchase commitment or request for delivery." Moreover, the agreement specifies that a purchase order must be executed prior to commencement of the Supplier's services or the assignment of Supplier's personnel for a client.

previously submitted an Amendment to Subcontractor Services Agreement between the petitioner and [REDACTED] and acknowledged in its response to the RFE that this document was submitted in error, the petitioner has not submitted an Amendment to Subcontractor Services Agreement or other similar, reliable documentation between the petitioner and [REDACTED]

Based on the above, we find no reliable evidence in the record 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.

### B. Specialty Occupation

We will now address the director's finding that the proffered position is not a specialty occupation.

#### 1. The Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

## 2. Discussion

As a preliminary matter and 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*, 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.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for its company. The letter from [REDACTED] states simply that the beneficiary is involved in the [REDACTED] project as a programmer; no further description of the beneficiary's duties is provided. Similarly, the Supplier Purchase Order between [REDACTED] and the petitioner ("supplier") simply states that the beneficiary was to provide the services of "Java J2EE Development," but provides no further explanation of his specific duties.<sup>16</sup>

We acknowledge the petitioner's letter entitled "Re: Job Itinerary," in which the petitioner lists the beneficiary's job duties at [REDACTED]. However, this letter, alone, is insufficient to describe the substantive nature of the work the beneficiary will perform at [REDACTED]. As discussed above, the petitioner has not established that it has an employer-employee relationship with the beneficiary. Without corroborating evidence from the end-client itself, the petitioner's letter, alone, is insufficient to establish the substantive nature of the beneficiary's work. 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)).

Regardless, the petitioner's letter describes the beneficiary's duties in generalized and vague terms, such as "[r]equirement analysis and full SDLC Process," "[i]nformation gathering and documentation," "[a]pplication Design and coding," and "[d]eployment, maintenance of production

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<sup>16</sup> It is uncertain whether "J2EE Development" is the same as the [REDACTED] project, which [REDACTED] described in its letter as "an automation tool . . . which is extensively developed in Pnuts scripting" and also utilizes Java.

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

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

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, we will nevertheless analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make a determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>17</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "computer programmers" occupational category.

In relevant part, the *Handbook* states the following with regard to the duties of computer programmers:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

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<sup>17</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. References to the *Handbook* are from the 2014-15 edition available online.

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing[.]

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited July 30, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the field: "Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree."

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 30, 2014).

Here, although the *Handbook* indicates that most computer programmers have a bachelor's degree in computer science or a related subject, it also indicates that some employers hire workers with a lower degree, i.e., an associate's degree. The *Handbook's* recognition that an associate degree is sufficient for entry into the occupation strongly suggests that a bachelor's degree in a specific specialty, or the equivalent, is not a normal, minimum entry requirement for this occupation. Accordingly, the *Handbook* does not support the proffered position as being a specialty occupation.

The materials from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a

position would require. For all of these reasons, the O\*NET OnLine excerpt submitted by the petitioner is of little evidentiary value to the issue presented on appeal.<sup>18</sup>

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within any of these occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the evidence does not satisfy the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the evidence of record does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

While the petitioner has submitted two letters from companies in the petitioner's industry attesting to their hiring and recruiting practices, these letters are insufficient to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Both letters identically state that the companies "routinely hire individuals with similar backgrounds as [the beneficiary] for similar positions as the one requested."<sup>19</sup> Both letters similarly state that they hire individuals with "various educational

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<sup>18</sup> Even if we were to consider the O\*NET OnLine excerpt, it states under "Education" that computer programmer occupations "may" require a background in computer science.

<sup>19</sup> The use of identical language and phrasing across the letters suggests that the language in the letters is not the authors' own. Cf. *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye*

backgrounds" in computers, such as computer science and information technology, for computer programmer analyst positions. However, these are conclusory statements and do not relate any specificity or details for the basis of the claims. These letters are also not supported by any corroborating evidence. 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)).

Nor do the job-vacancy announcements submitted satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, many of these advertisements are discounted because the evidence of record does not establish that the companies conduct business within the petitioner's industry. For instance, there is no information in the record establishing in which industry or industries [REDACTED] conduct business. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations." Second, the petitioner has not established that the posted positions in the advertisements are all "parallel" to the proffered position, such as the advertisements from [REDACTED] for a program analyst, and [REDACTED] for a program control analyst. Third, several of the positions advertised do not require a bachelor's degree in a specific specialty or the equivalent. Specifically, the advertisements from [REDACTED] all require a general purpose bachelor's degree, or its equivalent, but do not mandate that the degree be in a specific specialty. Fourth, the petitioner did not submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised. Simply 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.

On appeal, the petitioner submits an opinion letter from Dr. [REDACTED] Professor of Computer Applications and Information Systems in the School of Business at the [REDACTED], who opines that it is "industry standard for a position such as Computer Programmer Analyst for [the petitioner] is to be filled through recruiting a college graduate with the minimum of a Bachelor's Degree in Computer Science or a related area, or the equivalent." Dr. [REDACTED] explains that the "success" of the petitioner and similarly situated companies is dependent upon a Computer Programmer Analyst or someone similarly employed, as such individual will "directly and indirectly affect the company's operations, revenues and profits, and ultimately the overall success of the company." Beyond these conclusory assertions, however, Dr. [REDACTED] does not provide any further explanation or the factual basis for his conclusions, such as what 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. The

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*v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

opinion letter from Dr [REDACTED] contains little more than conclusory statements and is thus entitled to little weight. 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).

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. To begin with and as discussed previously, the evidence does not sufficiently demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Rather, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "computer programmers" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions. Consequently, as the evidence fails to demonstrate how the proffered position is so complex or unique relative to other computer programmer positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) has been satisfied.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees

who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring a degree in a specific specialty, or the equivalent, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Here, the petitioner asserts that it "normally requires a minimum of a bachelor's degree for the job positions to all its candidates," and that the "offered position requires the application of knowledge gained through completion of a bachelor's degree in Computer Science, or a closely related field, or the equivalent." In support, the petitioner submitted several of its own advertisements for related positions. However, these advertisements are insufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In particular, the petitioner's advertisement for the "computer system analyst – quality test analyst" position required a bachelor's degree, but did not mandate that the degree be in a specific specialty. Similarly, the petitioner's advertisements for the "computer system analyst" and "computer programmer" positions required a master's degree and an MBA degree, respectively, but again, did not mandate that the degree be in a specific specialty.<sup>20</sup> In addition, the petitioner's job advertisements alone do not demonstrate the petitioner's actual hiring practices. The petitioner did not submit any corresponding evidence to demonstrate the qualifications of the individuals hired, if any, in response to the submitted advertisements.

On appeal, the petitioner submits a letter, dated July 9, 2013, entitled "Re: Support Letter for I-129 Application for [the beneficiary]," in which the petitioner lists the names, job titles, degrees and legal status of its claimed employees. However, this document is not sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Foremost, the record is devoid of any documentary evidence to corroborate the petitioner's letter, i.e., evidence that the petitioner actually employs the listed employees in the listed capacities, and that these employees possess the listed degrees.

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<sup>20</sup> Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). *See also Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (stating that a business administration degree is a general-purpose degree).

Again, simply 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. We note that the employees and job titles listed on this document differ significantly from the employees and job titles depicted on the petitioner's organizational chart, thus undermining the credibility of the petitioner's claims and evidence. Specifically, out of the forty-four purported employees listed on this document, thirty of them - including the beneficiary - are not listed on the petitioner's organizational chart.<sup>21</sup> Even among the individuals that appear on both this document and the organizational chart, several have differing job titles.<sup>22</sup> Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

Even assuming, *arguendo*, that the above document presents an accurate list of the petitioner's employees and their qualifications, the petitioner provided no evidence that the listed employees are employed in the same position as the proffered position. While several employees are listed as programmer analysts or computer programmer analysts, their job titles alone, without any description and evidence of the actual duties they perform, are insufficient to establish that these positions are the same as the proffered position. Accordingly, the evidence of record is insufficient to establish that the petitioner normally requires a bachelor's degree in a specific specialty or its equivalent *for the position*, as required by the plain language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "computer programmers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or

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<sup>21</sup> The employees listed on this chart that are not listed on the organizational chart are:

[REDACTED]

<sup>22</sup> For example, [REDACTED] is listed as a computer programmer in the aforementioned document, but the organizational chart depicts him or her as a database programmer. [REDACTED] is listed in the aforementioned document as a database programmer, but the organizational chart depicts him or her as a SQL server DBA/developer database programmer. [REDACTED] is listed as a computer systems analyst in the afore-mentioned document, but the organizational chart depicts him or her as an Oracle DBA.

the equivalent, is a standard, minimum requirement to perform the duties of such positions, and the record indicates no factors that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. With regard to the specific duties of the position proffered here, we reiterate our earlier discussion about the lack of evidence sufficiently establishing exactly what the beneficiary will do on a day-to-day basis such that the level of knowledge required to perform them can even be determined.

In support of this criterion, the petitioner submits the opinion letter from Dr. [REDACTED] who opines that the duties of the proffered position are "so specialized and complex that knowledge required to perform these duties is usually associated with the attainment of a Bachelor's Degree in this field [of Computer Science or related area, or the equivalent]." Beyond this conclusory statement, however, Dr. [REDACTED] does not provide any further explanation or the factual basis for his conclusion. It is not apparent whether Dr. [REDACTED] based his opinion on any objective evidence, or instead, merely restated the petitioner's assertions. Dr. [REDACTED] also provides a list of computer science related college courses that he asserts is "necessary for performing these daily tasks," but again, does not provide any additional explanation or the factual basis for his conclusion. As we discussed earlier, the opinion letter from Dr. [REDACTED] contains little more than conclusory statements and is thus entitled to little weight. 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.

Overall, the record of proceeding lacks sufficient, credible evidence establishing that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent. Accordingly, the evidence of record is insufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this additional basis.

#### IV. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also agree with the director's findings that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

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

(b)(6)

*NON-PRECEDENT DECISION*

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