



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: DEC 11 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). We reviewed the record of proceeding in its entirety and find that it does not establish eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

I. PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 5, 2013. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as an information technology (IT) services company that was established in [REDACTED]. In order to employ the beneficiary on a full-time basis in what it designates as a programmer analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 2, 2014 and certified the decision to this office for our review. The director determined that (1) the petitioner failed to establish that it will be a "United States employer" having an employer-employee relationship with the beneficiary as an H-1B temporary employee; (2) the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (3) the petitioner submitted the H-1B petition more than six months prior to the date of actual need for the beneficiary's services. The petitioner was afforded thirty days to submit a brief to us in response to the director's certification as permitted by 8 C.F.R. § 103.4(a)(2). As of today, more than thirty days have passed, and we have not received any additional documentation from the petitioner.

The record of proceeding before this office contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; and (4) the director's decision combined with the Notice of Certification (Form I-290C). We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director's decision that the petitioner failed to establish eligibility for the benefit sought.¹ Accordingly, the director's decision will not be disturbed. The decision certified to this office will be affirmed, and the petition will be denied.

II. STANDARD OF PROOF

As a preliminary matter, it is noted that in the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence

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

that he or she is eligible for the benefit sought.

* * *

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

* * *

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

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

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. THE PETITIONER AND THE PROFFERED POSITION

In the Form I-129 petition, the petitioner states that it is an IT services company located in [REDACTED], Pennsylvania. The petitioner reports that it entered into a contract with [REDACTED] (the end-client) to provide personnel for projects at [REDACTED] office in [REDACTED] California. According to the petitioner, [REDACTED] requested a programmer analyst "to work on design, develop, test, and maintain [REDACTED] web interface," with the beneficiary serving in this position.

In a letter dated March 30, 2013, the petitioner provided the following description of the proffered position:

As a Programmer Analyst, the Beneficiary's duties will include:

- Responsible for developing prototypes and performs complex application coding and programming.
- Interpret end-user business requirements to develop and/or modify technical design specifications for off-the-shelf and/or custom-developed applications.
- Analyze and review software requirements to determine feasibility of a design within time and cost restraints.
- Monitor information management processes for completeness, consistency and accuracy; identify problems[.]
- Maintains and modifies programs; make approved coding changes per director of technical architect.
- Codes software applications to adhere to designs supporting internal and external customer needs.
- Codes, tests, and troubleshoots programs utilizing the appropriate hardware, database, and programming technology.
- Works with testers and architects to resolve issues[.]
- Troubleshoots, resolves or escalates project issues in a timely manner[.]
- Maintains standards compliance[.]
- Submit weekly reports regarding the work that has been completed for that week as well as work that will be completed in the coming week.

The petitioner did not state in this letter that the proffered position has any particular academic requirements or any other requirements.

IV. LACK OF STANDING TO FILE THE PETITION

We will now address whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

More specifically, 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 (emphasis added):

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

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

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). 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 U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

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

² 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

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 318-319.³

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

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;

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-845 (1984).

³ 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))).

⁴ 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).

see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

The petitioner claims that it will have an employer-employee relationship with the beneficiary.⁵ We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 375-376. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. 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)). For the reasons explained in detail below, the record does not establish that the petitioner will be a "United

⁵ Counsel makes various assertions regarding the proffered position, as well as the petitioner's relationship with the end-client and the beneficiary. However, counsel's letter was not endorsed by the petitioner, and counsel does not provide the source of his information to demonstrate a sound factual basis for his conclusions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."⁶

A. Itinerary

According to the petitioner, the beneficiary will work off-site as a programmer analyst. With the initial H-1B submission, the petitioner provided an itinerary, indicating that the beneficiary will be assigned to work at [REDACTED] office in [REDACTED], California.⁷ The itinerary does not include a start date, and the project end-date is designated as "TBD [to be determined]." Thus, according to the petitioner, the duration of the beneficiary's employment had not been established on or before the date the instant petition was filed.

In addition, the itinerary does not indicate an intention by the petitioner to employ the beneficiary at the [REDACTED] facility for the duration of the requested H-1B period. We further note that the itinerary indicates that the beneficiary's supervisor, [REDACTED] is located at the petitioner's [REDACTED] Pennsylvania office (thus, approximately 2,815 miles from the beneficiary's work site).⁸ Aside from the itinerary, the record of proceeding does not contain any documentation that Mr. [REDACTED] will supervise the beneficiary or direct his work.

B. Offer of Employment Letter

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). With the Form I-129 petition, the petitioner submitted an offer of employment letter dated March 30, 2013. Thus, the letter was prepared just a few days prior to the submission of the Form I-129 petition; however, the petitioner did not provide the dates of the beneficiary's employment. Further, the letter does not support the petitioner's claims within the record of proceeding with regard to the beneficiary's services.

⁶ Furthermore, as will be discussed, there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to several aspects of the beneficiary's claimed employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. 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. 582, 591 (BIA 1988).

⁷ [REDACTED] website states that the company's business operations are based in [REDACTED], California. The company's address, as provided on its website, does not correspond to the beneficiary's work site. No explanation was provided.

⁸ Mr. [REDACTED] phone number is provided as [REDACTED]. This phone number also appears on the petitioner's letterhead for its office in [REDACTED], Pennsylvania. The petitioner did not provide other evidence to establish that Mr. [REDACTED] is located or will work at the [REDACTED] facility in California.

More specifically, the letter states that the beneficiary will be assigned to work at [REDACTED] in [REDACTED] California for his "first assignment" to design, develop, test, and maintain the company's website. The letter also states, "Upon the completion of this project, we will assign you to another client project, but this assignment will be based on your availability and the circumstances at that time." The letter indicates that the beneficiary will not serve exclusively on the project for [REDACTED] for the duration of his employment, but rather that he will be assigned to additional projects. Thus, the letter does not denote an intention by the petitioner to retain the beneficiary at the [REDACTED] office for the duration of the requested H-1B period.

According to the offer of employment letter, the beneficiary will be placed with various clients, only one of which has been identified. The employment letter makes no representations regarding the length of time the beneficiary will be assigned to the [REDACTED] project, and does not assure the availability of continued, non-speculative employment after the initial project.⁹

The employment letter references "benefits" for the beneficiary, but does not provide any description of the benefits, or eligibility requirements to obtain them. Instead, it refers the beneficiary to the petitioner's employee handbook for "more detailed information regarding [the petitioner's] policies and procedures." A copy of the petitioner's employee handbook was not provided to USCIS.¹⁰ Accordingly, a substantive determination cannot be made or inferred regarding any "benefits" that

⁹ The agency made clear long ago that speculative employment is not permitted in the H-1B program. The H-1B classification is not intended to be utilized to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. 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).

¹⁰ In response to the RFE, counsel repeatedly references the petitioner's employee handbook, suggesting that it is relevant to this proceeding. However, no explanation was provided for why the petitioner did not submit the employee handbook to USCIS to review.

may or may not be available to the beneficiary, as information regarding them, including eligibility requirements, was not submitted.

Moreover, the offer of employment letter states that the beneficiary will serve as a programmer analyst, but it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. In addition, the offer of employment letter references the beneficiary's immediate supervisor but does not further identify this individual (i.e., name, job title, role, or location). While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

C. Performance Review Process

We also reviewed the record of proceeding with regard to how the beneficiary's performance would be evaluated. The petitioner provided an undated document entitled "Summary of our Performance Review Process for All our W-2 Employees." The petitioner claimed that it undertakes performance reviews of all employees at one year intervals. The petitioner briefly provided the steps for its review process, but it did not provide any information in the letter that is specific to the beneficiary.

With regard to this general process, the petitioner stated that the manager conducts a review of the employee's performance based upon seven criteria: timely arrival, absences, performs his/her work satisfactorily, technical competency, works well with others, understands and follows direction, and any other relevant factors. According to the letter, the manager then speaks to the employee's supervisor, reviews any written materials concerning the employee, and finally speaks with the employee.

Although the petitioner provided this brief description of its performance review process, it must be noted that the letter lacks information regarding how the petitioner determines and rates an employee on these criteria, as well as whether the petitioner measures the details of how the work is performed or the end result. Further, the petitioner did not clarify the identity of the beneficiary's manager or supervisor.

While the previously discussed itinerary indicates that [REDACTED] will serve as the beneficiary's supervisor, it is not apparent how Mr. [REDACTED] (who is located over 2,815 miles away) would have direct knowledge of the listed evaluation criteria, or be in a position to direct or assess the beneficiary's day-to-day work. The petitioner did not submit a description of Mr. [REDACTED] duties and responsibilities, nor did it address how he supervises the beneficiary's duties. There is a lack of information regarding what the role of supervisor actually entails.

Further, the performance evaluation does not establish how the submission of weekly reports by the beneficiary would be incorporated into the process. That is, the petitioner's job description indicates that the beneficiary self-reports to the petitioner on a weekly basis regarding the tasks that have been completed and "the work that will be completed in the coming week." The petitioner did not explain how such weekly reports would translate to performance standards, how they are used for

assessing and evaluating the beneficiary's work, and/or the criteria for determining bonuses and salary adjustments.

The record does not contain any further specific information from the petitioner regarding if and when the reports are reviewed or analyzed and, if so, by whom; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the reports; the consequences, if any, of failing to prepare the reports; etc. Thus, the petitioner has not demonstrated the probative value and relevance of its claim regarding the weekly reports to the question presented here, i.e., whether the petitioner will have the requisite employer-employee relationship with the beneficiary. It appears that if the petitioner were controlling the work of the beneficiary, then the petitioner would be directing the work to be completed, not requesting a report from the beneficiary regarding his own or the end-client's plans for the work to be performed.

D. Letter from [REDACTED]

The record contains a March 27, 2013 letter from [REDACTED], who is the operations director for [REDACTED]. Mr. [REDACTED] states that the petitioner has been contracted to provide IT professionals. According to Mr. [REDACTED], the project will last 3 to 5 years; however, he does not provide any specific information with regard to the beneficiary (e.g., identify the beneficiary, state his role, or stipulate the duration that his services will be used).

Mr. [REDACTED] further states that the work will take place at [REDACTED] office in [REDACTED], California, but that the petitioner's team will be supervised by on-site and off-site team leads. However, no further information or documentation has been provided to USCIS regarding the team lead to be located at the end-client site in California. Rather, the itinerary provided by the petitioner indicates that the relevant project personnel are (1) Mr. [REDACTED], who is identified as the "project coordinator"; and (2) Mr. [REDACTED] who is located at the petitioner's office in [REDACTED] Pennsylvania.

E. Master Services Agreement

In its initial submission with the Form I-129, the petitioner provided a "Master Services Agreement," dated May 29, 2012 (approximately a year prior to the H-1B submission) between itself and [REDACTED]. The agreement states that [REDACTED] will utilize the services of the petitioner commencing on October 15, 2012 and ending on October 15, 2015. The agreement indicates that only a written instrument duly executed by or on behalf of [REDACTED] and the petitioner may amend the agreement.

Under the heading of "Services," the agreement states that the petitioner "shall perform the Services as outlined on the RFP [Request for Proposal] and any programming services required from time to time by the officers and managers of [REDACTED]." The RFP, however, was not provided to USCIS. We note that the agreement specifically states that programming services will be provided "from time to time" suggesting that the services will be sporadic.

F. Purchase Order

The petitioner submitted a "Purchase Order," issued by [REDACTED] to the petitioner for services, including three programmer analysts.¹¹ Although the document was issued a few days before the H-1B submission, it does not identify the beneficiary or name anyone as his supervisor or team lead. Moreover, while the Purchase Order is for several positions, we note that none of the job descriptions include supervisory or managerial duties. Thus, the Purchase Order does not indicate that the petitioner will supply an employee who will oversee or direct the work of the beneficiary.

The Purchase Order states that the work will begin on approximately October 15, 2013 and end on October 15, 2016.¹² The duties of the position of programmer analyst are listed as follows:

- Monitor information management processes for completeness, consistency and accuracy; identify problems[.]
- Maintains and modifies programs; make approved coding changes per direction of technical architect.
- Codes software applications to adhere to designs supporting internal and external customer needs.

While the above duties overlap with the petitioner's description, we note that the petitioner's description is significantly longer. The petitioner provides no explanation for the variance, and it remains unanswered under what circumstances the petitioner expects the beneficiary to perform the additional duties. Furthermore, in the Purchase Order, [REDACTED] provided the academic and experience requirements for the positions. As the record indicates the end-client makes these determinations, the petitioner's role appears to essentially be that of a staffing firm that locates suitable candidates for available positions.

G. Counsel's Letter in Response to the RFE

In response to the RFE, counsel submitted a brief in support of the petition. We note that evidence corroborating counsel's statements was not provided. As previously noted, this brief is not endorsed by the petitioner, and counsel does not provide the source of his information to demonstrate a factual basis for his conclusions. For instance, contrary to the petitioner's claims regarding its business operations and the proffered position, counsel claims that "the beneficiary will be designing and developing customized automotive engineering solutions which is what the petitioner's company does." Although counsel's statement varies considerably from the petitioner's assertions, no explanation was provided.

¹¹ The Purchase Order was printed on [REDACTED] letterhead, and was signed by both the petitioner and [REDACTED] on March 29, 2013.

¹² The Purchase Order states that the project end date is approximately October 15, 2016. However, the petitioner has not indicated the length of time it intends to keep the beneficiary on this particular project. Although the Purchase Order was signed on March 29, 2013 and was submitted to USCIS simultaneously with the itinerary, the itinerary does not confirm a specific end date, but rather indicates the end date is "TBD."

Further, we note a number of inconsistencies in the brief. For example, within the brief, counsel poses the same question twice, but he provides different responses.

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Question: If the supervision is off-site, how does the petitioner maintain such supervision i.e. weekly calls, reporting back to the main office routinely, site visits by the petitioner?

A: Not applicable.

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Question: If the supervision is off-site, how does the petitioner maintain such supervision i.e. weekly calls, reporting back to the main office routinely, site visits by the petitioner?

A: Yes. Besides on-site supervision, the beneficiary will be reviewed weekly.

No explanation for the inconsistency was provided by counsel.

Moreover, counsel's statements on a variety of the indicia does not correspond to other evidence in the file. For example, counsel repeatedly claims that the beneficiary will be supervised by the petitioner's "on-site" team leader. However, as previously noted, the "Itinerary" provided by the petitioner with the initial submission indicates that the beneficiary will be employed at the end-client's location in California, but allegedly supervised by an individual located at the petitioner's [REDACTED] Pennsylvania office.¹³

Counsel also attributes information to the petitioner's "offer letter" which does not appear in the March 30, 2013 letter to the beneficiary that was submitted to USCIS. For instance, counsel references employment benefits that are not discussed in the offer letter, as well as a designation of the beneficiary as a "W-2 employee of the petitioner." The offer letter does not make such statements. Moreover, according to counsel, "the petitioner [is] the only business entity that has completed an I-9 for this employee [the beneficiary]." The Form I-9 is used by employers to document verification of the identity and work authorization of new employees. USCIS records indicate that the beneficiary does not possess work authorization. Thus, we must question counsel's assertion that the petitioner has completed the Form I-9 for the beneficiary.

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 duties of

¹³ In addition, we reviewed the record of proceeding with regard to the beneficiary's discretion over when and how long to work. In its March 30, 2013 support letter, the petitioner indicates that the end-client is responsible for "coordinating and scheduling," and "prioritiz[ing]" the beneficiary's work. This statement indicates that, generally, the work is controlled by the end-client. The petitioner also states that [REDACTED] schedules and prioritizes the work assigned to the beneficiary, suggesting that it, rather than the petitioner, provides instruction to the beneficiary as to the order and sequence to follow in the performance of the work.

the position. In the instant case, the director specifically noted this factor in the RFE. The director provided examples of evidence in the RFE for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job.

In his brief, counsel claims that the beneficiary will be utilizing the petitioner's proprietary software. The petitioner did not provide any evidence to establish that [REDACTED] has an agreement or lease to use the petitioner's "proprietary software" on this project. Moreover, no documentation was submitted to demonstrate (1) that the petitioner has proprietary software, and (2) that the beneficiary would be utilizing the petitioner's proprietary software in the performance of his duties at [REDACTED] (or on any other projects). Counsel also states that "the petitioner provides all computer workstations and software when applicable" but did not further explain if it is "applicable" in the instant case. We note that the petitioner's business operations are located approximately 2,815 miles from the end-client; thus, without further clarification, it appears unlikely that the petitioner would be providing "all computer workstations and software" for this particular project.

Counsel also asserts that the beneficiary will not use proprietary information of the end-client to perform his duties. However, the March 27, 2013 letter from [REDACTED] indicates that the beneficiary will be employed in the "development of [its] [REDACTED]." As counsel's claims are not supported by the evidence in the record, his assertions do not satisfy the petitioner's burden of proof. Consequently, the petitioner has not established that it would provide or be the source of the instrumentalities and tools needed to perform the job, but rather [REDACTED] would likely be the primary source.

H. Letter from [REDACTED]

The record contains an October 20, 2013 letter from [REDACTED] CEO of [REDACTED] s. The letter is regarding [REDACTED], who is described as an employee of the petitioner. The beneficiary is not mentioned in the letter, and Mr. [REDACTED] did not explain the beneficiary's relationship to [REDACTED] (if any). Counsel claims that the letter was submitted because it "further clarifies and explains the Beneficiary and Petitioner's role on this assignment." However, as this individual is not the beneficiary, we must question the relevancy of the letter to the instant matter.

In the letter, Mr. [REDACTED] states: "As you are aware, we had a Purchase Order with [REDACTED] This project is completed, but we expect to work with them again in the near future and they have indicated the same." We note that contrary to Mr. [REDACTED] s statement, no information regarding [REDACTED] was provided to USCIS in this matter.

Mr. [REDACTED] also references a purchase order with [REDACTED] and a proposal that it is working on for a project with [REDACTED] Notably, the petitioner has not previously claimed that the beneficiary would be working on these projects. Rather, the petitioner asserted that it was contracted to design, develop, test, and maintain the [REDACTED] website.

In connection with Mr. [REDACTED] letter, the petitioner also submitted the following purchase orders for [REDACTED]

- A purchase order dated August 9, 2013, with a due date of September 4, 2013, issued by [REDACTED] to [REDACTED] for "Personal Services." The purchase order appears to be for \$0.
- A purchase order dated October 2, 2013 for [REDACTED] with a delivery date of October 14, 2013, for [REDACTED]." The total value is \$0.

Both documents were created after the H-1B petition was submitted. Regardless, the services have been completed, and there is no indication that there is any ongoing or future work pursuant to these purchase orders.

I. Floor Plan

The record also contains a document identified by counsel as [REDACTED] floor plan; however, the document does not contain any identifying information (e.g., the name of the company or the location or address of the property) or any indication of how the space is utilized. Moreover, it appears that the photocopy is incomplete and partially cut-off.

J. Requested Evidence

In the RFE, the director also asked the petitioner to provide information regarding the beneficiary's role in hiring and paying assistants. The petitioner and its counsel elected not to address this issue or provide any information in response to this material request for evidence. While the petitioner was given an opportunity to clarify the beneficiary's role in hiring and paying assistants, it chose not to submit any probative evidence on the issue. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

K. Dates of Employment

We note that there are inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 9, 2016. The petitioner also submitted a Purchase Order, which indicates that the project will begin approximately October 15, 2013 and end on approximately October 15, 2016. On the itinerary, the petitioner did not provide the dates of the assignments or projects, and the petitioner indicated that the end-date had not been determined. The petitioner's offer of employment states that the [REDACTED] project will be the beneficiary's "first assignment" and that he will then be assigned to work on another client project.

The petitioner also submitted a letter dated March 27, 2013 from [REDACTED] of [REDACTED]. The letter states that the project may last for the next three to five years, but it does not identify the beneficiary or his role, nor does the letter specify the duration of time that the beneficiary's services would be needed. Further, the letter does not indicate Mr. [REDACTED] role (if any) in determining the length of this or other [REDACTED] projects or his authority (if any) to make such a declaration about the duration of a project. It is not supported by independent,

objective evidence demonstrating the manner in which the conclusion was reached. For instance, the statement is not corroborated by documentation indicating that an ongoing project exists that will generate employment for the beneficiary's services (e.g., documentary evidence regarding the project scope, staging, or time and resource requirements; supporting contract negotiations; documentation regarding the business analysis and planning for specific work).

L. Conclusion

Upon review, there is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

Notwithstanding the lack of non-speculative work for the beneficiary for the requested employment period, we assessed and weighed the available relevant factors as they exist or will exist, and the evidence does not support the petitioner's assertion that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). The petitioner claims that the beneficiary will be employed at the [REDACTED] office, and the evidence indicates that [REDACTED] or possibly some other future client will have discretion over when and how long the beneficiary will work, as well as assigning projects to the beneficiary. It appears that he will use the tools and instrumentalities of the client. There is a lack of evidence establishing the petitioner's right to control or actual control in the instant case, as well as the beneficiary's role (if any) in hiring and paying assistants. Furthermore, as discussed, a substantive determination cannot be made or inferred with regard to the provision of benefits. The petitioner failed to establish such aspects of the employment, such as who will oversee the day-to-day work of the beneficiary and who will be responsible for his performance evaluations. In the instant case, it appears that the petitioner's role is likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client. *See Defensor v. Meissner*, 201 F.3d at 388.

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

V. SPECIALTY OCCUPATION

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

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

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

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

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

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

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

As the director set out, 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 at 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS therefore 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.

Moreover, we reiterate that to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position, 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. It must be emphasized that determining whether a proffered position qualifies as a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.

A. Material Findings Regarding the Proffered Position

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position

offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

A critical aspect of this matter is whether the record adequately demonstrates the requirements for the proffered position. We find that, as currently constituted, it does not do so. Specifically, the petitioner has not stated any minimum requirements for the proffered position. Thus, based on the petitioner's own standards or lack thereof, it cannot be found that the position requires both (1) the theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) in accordance with section 214(i)(1) of the Act.

We observe that the petitioner provided a Purchase order from [REDACTED] which describes the requirements for the proffered position as a "Bachelor's in IT related field plus 2 years of programming exp."; however, we first note that the offer letter indicates that the project with [REDACTED] would be the beneficiary's "first assignment." The itinerary for this assignment states that the project end date is "TBD." The petitioner did not provide any details for the beneficiary's subsequent assignments.

Second, while the job duties provided by [REDACTED] for the programmer analyst position overlap with the petitioner's narrative, [REDACTED]' description consists of three job duties that are described as relatively abstract tasks.¹⁴ Based on the record before us, it is unclear how the company arrived at the conclusion that the stated requirements are necessary for the performance of these duties. The petitioner has not provided an objective and reliable standard by which we can determine that the performance of the duties as described requires at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, none of the job descriptions in the record provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Consequently, the record does not establish which tasks are major functions of the proffered position and the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). Moreover, the duties of the proffered position have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a

¹⁴ According to [REDACTED], the programmer analyst will perform the following duties:

- Monitor information management processes for completeness, consistency and accuracy; identify problems[.]
- Maintains and modifies programs; make approved coding changes per direction of technical architect.
- Codes software applications to adhere to designs supporting internal and external customer needs.

day-to-day basis. As a result, we cannot discern the primary and essential functions of the proffered position.

Upon review, the job descriptions submitted in this matter do not adequately convey the specific tasks the beneficiary is expected to perform to establish eligibility for H-1B classification. For example, the abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary "troubleshoots, resolves or escalates project issues in a timely manner" and "[w]orks with testers and architects to resolve issues." We note that the task of working to resolve issues could involve a range of duties, and the petitioner did not provide any further specification as to what these tasks would entail. Further, the petitioner did not provide an explanation of the beneficiary's specific role in "work[ing] with" testers and architects. There is no description of the measures that the beneficiary is expected to take to resolve issues. The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

According to the petitioner, the beneficiary "[m]aintains standards compliance." However, the petitioner did not identify what type of standards the beneficiary will attempt to comply with, or how compliance with these standards will be achieved. The petitioner also claims that the beneficiary "[m]onitor[s] information management processes for completeness, consistency and accuracy; identif[ies] problems." The statements fail to provide any particular details regarding the demands, level of responsibilities, and requirements necessary for the performance of monitoring processes and identifying problems.

Additionally, the petitioner claims that the beneficiary "[m]aintains and modifies programs; make[s] approved coding changes per direction of technical architect." The petitioner does not provide further clarification as to the beneficiary's specific role in the maintenance and modification of programs, nor did it explain how the beneficiary is expected to "make" approved coding changes.

The petitioner states that the beneficiary will be assigned to the end-client [REDACTED] to "work on design, develop, test, and maintain [REDACTED] web interface." However, the record does not contain a more specific description of the project, or describe the duties of the proffered position within the context of this project such that we can ascertain the scope and complexity of the offered employment. Moreover, the petitioner fails to sufficiently define how these tasks entail the need for a particular level of education, or educational equivalency, along with work experience.

According to the petitioner, the beneficiary will "code software applications to adhere to designs." The evidence contains neither a substantive explanation nor documentation showing the range and volume of software applications that the beneficiary would code. Likewise, the record does not clarify the substantive work and associated application of specialized knowledge that would be involved in performing this duty.

B. Review and Analysis of the Supplemental Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

For the reasons discussed above, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the

proffered position for the entire period requested. Accordingly, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will be employed.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position 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.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary for the entire employment period requested, we will next discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts." 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 that it addresses.¹⁵ We reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.¹⁶ However, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

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

Education

¹⁵ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed on the Internet at <http://www.bls.gov/OCO/>.

¹⁶ For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited November 26, 2014).

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

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

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

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited November 26, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions.¹⁷ This section of the

¹⁷ When reviewing the *Handbook*, we note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

narrative begins by stating that a bachelor's degree in a related field is not a requirement. The *Handbook* continues by stating that there are a wide-range of degrees that are acceptable for positions in this occupation, including general purpose degrees such as business and liberal arts. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, it does not report that such a degree is normally a minimum requirement for entry.

According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. It further reports that many analysts have technical degrees. We observe that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, it specifically states that such a degree is not always a requirement. Thus, the *Handbook* does not support the claim that the occupational category of computer systems analyst is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level computer systems analyst position, would normally have such a minimum, specialty degree requirement or its equivalent.

In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record regarding 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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

USCIS must ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. 20 C.F.R. § 655.705(b). In the letter of support, the petitioner did not indicate that there are any particular requirements for the programmer analyst position. Accordingly, the designation of the proffered position as a Level I (entry-level) position on the LCA would be appropriate.

On the other hand, the Purchase Order describes the end-client's requirements for the proffered position as a bachelor's degree in an information technology related field, plus two years of programming experience. Provided the proffered position was found to be a higher-level position requiring a such academic credentials and experience, it appears that the LCA would not correspond to the proffered position; that is, specifically, the LCA submitted in support of the petition would then fail to correspond (1) to the level of requirements ascribed to the proffered position, and (2) to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations. Accordingly, for these reasons also, the petition could not be approved.

and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard, industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the relevant industry attesting that such firms "routinely employ and recruit only degreed individuals." The petitioner did not provide any documentation to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including information regarding the proffered position and evidence regarding its business operations. We reviewed the record of proceeding in its entirety. However, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

More specifically, the petitioner has not credibly demonstrated that the duties the beneficiary will be responsible for or 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. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may assert are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has not shown how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The petitioner indicated that the beneficiary's educational background and prior work experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it (or in this case, the end-client) normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's (or end-client's) past

recruiting and hiring practices, as well as information regarding employees who previously held the position, as well as any other documentation submitted by the petitioner in support of this criterion.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's (or end-client'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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation 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").

To satisfy this criterion, the evidence of record must therefore show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner (or end-client) has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In the instant matter, the petitioner did not submit any documentation in support of this criterion of the regulations. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific 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 a specific specialty, or its equivalent.

We reviewed the petitioner's statements and the documentation provided regarding its business operations and the proffered position. However, the petitioner has not established that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we again note that the petitioner designated the proffered position on the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (qualified) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has not submitted any evidence to satisfy this criterion of the regulations. We therefore conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, we cannot conclude that the proffered position qualifies as a specialty occupation.

VI. DATE OF ACTUAL NEED FOR SERVICES

The petitioner filed the Form I-129 petition on April 5, 2013. When adjudicating the petition, the director determined that the petitioner had not established that the actual need for the beneficiary's services was within six months of the filing of the H-1B petition in accordance with 8 C.F.R. § 214.2(h)(9)(i)(B).

Upon review of the record of proceeding, we note that there are inconsistencies in the evidence with regard to the beneficiary's dates of employment. For instance:

- On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 9, 2016. The petitioner's director signed the form on March 24, 2013.
- With the petition, the petitioner submitted a Purchase Order signed by the

petitioner and [REDACTED] on March 29, 2013 (just a few days prior to the submission of the H-1B petition). It indicates the project to which the beneficiary will be assigned will commence on approximately October 15, 2013.

- On the itinerary, the petitioner did not provide the dates of the assignments or projects, and the petitioner indicated that an end-date was to be determined.
- The petitioner's offer of employment does not provide the dates of intended employment.

The petitioner must demonstrate eligibility in accordance with 8 C.F.R. § 103.2(b)(1), which states the following:

Demonstrating Eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

Therefore, a petitioner must establish eligibility at the time of filing the benefit request. *Id.* Any evidence submitted in connection with an H-1B petition is incorporated into and considered part of the petitioner's request. *Id.*

Throughout the record, the petitioner claims that the beneficiary will be employed off-site on the end-client's project in [REDACTED] California. No other work sites were provided. The Purchase Order is the only document in the record of proceeding endorsed by [REDACTED]; that provides a start date. Importantly, the Purchase Order was (1) signed by the petitioner *five days after* the Form I-129 was signed; and (2) signed by both the petitioner and [REDACTED]

Within the record, the petitioner does not dispute the start date provided on the Purchase Order. Furthermore, counsel provided a response to the director's RFE, in which he recounts this section of the Purchase Order. Thus, he represents that the start date of approximately October 15, 2013 accurately reflects the end-client's actual need for the beneficiary's services.

Title 8 C.F.R. § 214.2(h)(9)(i)(B) states in pertinent part that a "petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services" Here, the evidence indicates that the petitioner filed the petition more than six months prior to the October 15, 2013 start date provided in the Purchase Order. Consequently, the director did not err in the decision to deny the petition on the basis that the visa petition was impermissibly filed more than six months before the date of actual need for the beneficiary's services. *See id.* Accordingly, we hereby affirm this additional basis for denying the petition.

VII. BENEFICIARY'S QUALIFICATIONS

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent.¹⁸

VIII. AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) was enacted to, among other things, provide protections in the H-1B process against the displacement of United States workers. *See generally* Pub. L. No. 105-277, div. C, tit. IV, § 416(c), 112 Stat. 2681. ACWIA requires that every petitioner pay a "training" fee for each H-1B petition that it files. *See id.* The collected fees are used to provide education, training and job placement assistance to United States workers in job areas that petitioners traditionally use H-1B workers. *See id.* The programs that are funded by ACWIA are part of the government's efforts to help ensure that United States workers are trained in new and emerging fields by raising the technical skill levels of these workers, and that growing businesses have access to the skilled American workforce they need in order to reduce the need to use the H-1B program. *See id.* The fee is currently \$750 for petitioners who employ a total of 25 or fewer full-time equivalent employees in the United States, and \$1,500 for petitioners who employ 26 or more full-time equivalent employees in the United States. *See* Pub. L. No. 108-447, div. J, tit. IV, 118 Stat. 2809 (permanently reinstating the ACWIA fee which had sunset on October 1, 2003, and raising it from \$1,000 to \$1,500 per qualifying petition).

In the instant case, the petitioner reported on the Form I-129 petition that it employed 22 workers and that it was permitted to pay the lower ACWIA fee of \$750. We note, however, that USCIS records indicate that the petitioner has filed approximately 170 employment-based petitions on behalf of foreign workers since 2012, and that the vast majority of these petitions were approved.¹⁹

¹⁸ Nevertheless, we note that the petitioner claimed in its March 30, 2013 letter that the beneficiary possesses "education equivalent to a Master Degree in Business with a major in Information Systems." However, the petitioner did not submit the beneficiary's academic credentials in support of its statement. Subsequently, the director issued an RFE.

The petitioner responded and provided a copy of the beneficiary's foreign diploma indicating that he possesses a three-year degree in statistics. In addition, the petitioner submitted an evaluation of the beneficiary's education, training and experience with a finding that the beneficiary possesses the equivalent of a Bachelor of Science degree with a dual major in computer information systems and statistics. No explanation for the prior inconsistent representations regarding the beneficiary's master's degree level education was provided.

¹⁹ The petitioner shall immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. 8 C.F.R. § 214.2(h)(11)(i)(A). If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. *Id.* When an approved petition is not used because the beneficiary does not apply for admission to the United States, the petitioner shall notify USCIS. 8 C.F.R. § 214.2(h)(8)(ii)(C).

Thus, we must question whether the information provided on the H-1B petition accurately reflects the petitioner's workforce and whether it has met its full obligation with regard to the ACWIA fee. Nevertheless, as the multiple grounds for denying the petition identified above are dispositive of a finding of eligibility in this matter, we do not need to further discuss this additional issue. We note, however, that if the petitioner had overcome these grounds for denying the petition (which it has not), the petitioner would be required to address this issue and provide probative evidence in support of its statements regarding its eligibility to pay the lower ACWIA fee before the petition could be approved. Full compliance with the H-1B petition process is critical to the U.S. worker protection system established in the Act and necessary for H-1B visa petition approval.

XI. CONCLUSION

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. 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. 128. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.