

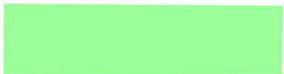
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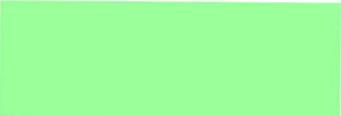
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **JAN 30 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "N. R." with a flourish.

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an IT consulting company established in 2011, with 32 employees. In order to employ the beneficiary in what it designates as a "Business Analyst" position, the petitioner seeks to classify her 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 the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a timely appeal of the decision. On appeal, the petitioner asserts that the director abused her discretion and erroneously denied the petition. In support of this assertion, the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO 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; (4) the director's notice of decision; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

As a preliminary matter, the AAO will also address an additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not establish (1) that the petitioner will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee, (2) the petitioner's eligibility at the time of filing for the benefit sought, and (3) that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested.

## I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a business analyst to work on a full-time basis at a salary of \$60,000 per year.<sup>1</sup> In addition, the petitioner indicated that the beneficiary

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<sup>1</sup> In the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner indicated that the beneficiary's rate of pay would be \$58,000 per year. No explanation was provided for the discrepancy.

would be employed at [REDACTED] and [REDACTED]

[REDACTED] The petitioner stated that the dates of intended employment are from October 1, 2013 to August 31, 2016.

In a letter of support, dated April 1, 2013, the petitioner stated that the beneficiary will be responsible for the following duties:

Gather and analyze business requirements; Conduct business process qualitative and quantitative analysis; be a part of Business team and give regular updates to QA team lead periodically; Analyze user requirements, conduct business/testing process analysis and gap analysis between systems and cover any deficiencies as per the functional changes desired; Prepare functional specifications documents mapping the business requirements to programs; Prepare charts and diagrams to assist in problem analysis; Study work procedures, information flows, production methods; Set operational specifications and formulate and analyze software requirements as assigned; Determine feasibility, cost and time required, compatibility with current system and computer capability; Process documentation of scripts developed and generated for testing applications. Collaborate with development team during all stages of project and provide in process testing results; Coordinate with the QA and other business personnel involved in the project that test, evaluate and validate new functions and applications, and identify issues in software or processes; Participate in conducting unit testing, system integration testing, user acceptance testing applying various business scenarios etc.

In the letter of support, the petitioner also stated that the “[b]eneficiary will be providing services at the end client, [REDACTED] through a contractual arrangement with [REDACTED]

In addition to the aforementioned letter, the documents filed with the Form I-129 included, *inter alia*, the following:

- A copy of a letter from the petitioner to the beneficiary, dated August 1, 2012, regarding an “[o]ffer of employment with [the petitioner].”<sup>2</sup> The letter states that the “employment start date will be August 3<sup>rd</sup>, 2012.”
- A copy of four pages of a five-page document entitled “Agreement for Information Systems Services,” made on August 21, 2012 between [REDACTED] and the petitioner (hereinafter, the [REDACTED] Agreement). The [REDACTED] Agreement states that [REDACTED] provides information systems services . . . to companies either directly or through other consulting firms” and that “[t]he [petitioner] shall provide [REDACTED] information systems services as specified in the Statement of Work [(SOW)].” The [REDACTED] Agreement states “the [REDACTED]

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<sup>2</sup> The offer of employment letter appears to relate to the beneficiary’s Optional Practical Training (OPT) in connection with her F-1 status.

Agreement shall continue in effect until either party terminates the [redacted] Agreement . . . [and] shall remain in effect regarding any [SOW] already in effect until such [SOW] is terminated or performance is completed.” The AAO notes that a copy of the SOW was not provided.

- A copy of the petitioner’s letter to the beneficiary, dated September 10, 2012, regarding the beneficiary’s “Project Assignment.” The letter states that the client’s name is [redacted] that the position is titled business analyst, that the location is [redacted], and that the start date is September 11, 2012.<sup>3</sup> The letter states that the job duties will include but may not be limited to the following:

Designing[,] developing[,] and implementing applications using current information [t]echnology; analyzing systems, [d]evelop [t]est [p]lans, [t]est cases, [t]est [s]cripts and [t]est procedures based on business requirement and documentation for testing; servicing accounting integration and data conversions; Creating requirement [t]raceability [m]atrix with link of [e]ach [t]est [c]ases [sic] with [b]usiness, [t]echnical, and [f]unctional [r]equirement. Developing re-usable manual test cases to adequately test applications; Estimating the testing impact of new requirements; Executing test activities; Preparation and proactive communication of status report to project teams and stake holders including system changes, issues and potential impact analysis. Automation test scripts for performing regression testing on the application; Creating and maintaining automated test cases; Administration of test automation, management and defect tackling tools; Perform extensive backend testing for data validation of applications; Test and debug the system to ensure that it performs as planned; Prepare end user documentation and conduct user training; Deploying the applications developed and provide required level of customer services needed.

The letter also states, “[y]ou have been placed at this project through our contractual arrangement with [the petitioner], [redacted] and [redacted]

- A copy of a letter from [redacted] dated March 28, 2013, stating the following:

[The beneficiary], an employee of [the petitioner], is currently working as a Business Analyst. This is a contract with our client [redacted] an implementing partner at [redacted]. The job site is at [redacted]

[redacted] and [the petitioner], has the exclusive right to hire, fire, supervise and pay [the beneficiary] from its corporate office.

[The beneficiary] is responsible for the following[:]

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<sup>3</sup> This letter appears to relate to the beneficiary’s OPT in connection with her F-1 status.

- Performing comprehensive business analysis to ensure that all business units under [REDACTED] were compliant as per Federal and [REDACTED] Corporate standards.
- Documentation of existing business system standards in terms of Application Development and Maintenance (ADM) as well as IT Security and Risk Compliance (ITSRC) for [REDACTED] and [REDACTED]
- Analyzing and identifying areas of non-compliance.
- Formulating procedures and templates to ensure compliance as per Federal and [REDACTED] corporate standards.
- Facilitating regular touch point meetings with Business Unit owners of [REDACTED] Inc., and [REDACTED]
- Knowledge gathering and artifact collection through scheduled as well as informal meetings with several stake holders.
- Working in collaboration with the auditing team from [REDACTED] to understand and formulate remediation procedures for areas of non[-]compliance to standards.
- Performing extensive documentation including write ups, evidences [sic], and templates.
- Facilitating project kick off meetings with all stakeholders – defined the objective, reviewed roles and responsibilities, mapped timelines, milestones and communication processes.
- Working in perfect collaboration in a team of five and project due to complete ahead of schedule with desired standards of quality and perfection.

The above mentioned duties require at least a bachelor's degree in a directly or closely related field.

[The beneficiary's] work at [REDACTED] has been arranged through a series of contracts between [the petitioner], [REDACTED] and [REDACTED]. [REDACTED] does not have the ability to assign [the beneficiary] to a different employer or client.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 19, 2013. The director noted that the beneficiary's described duties do not appear to match those of a management analyst. The petitioner was asked to submit evidence to establish, among other things, (1) that the proffered position qualifies as a specialty occupation, (2)

that, for the duration of the requested H-1B validity period, a valid employer-employee relationship will exist between the petitioner and the beneficiary, and that the petitioner has the right to control the beneficiary's work, and (3) that there is sufficient specialty occupation work for the beneficiary to perform at the entity ultimately using the alien's services for the duration of the requested H-1B validity period.

In response to the director's RFE, the petitioner provided additional supporting evidence, including, among other things, the following:

- The petitioner's letter in response to the RFE, dated May 16, 2013, in which the petitioner stated that "[redacted] is the only party that can control his work." The petitioner also stated the following:

Please note that in an error, initially the project assignment letter identified wrong duties for the beneficiary, but was subsequently corrected, and a new letter was issued instead. Due to an administrative error, while filing for the H1b, the initial letter was attached. We now submit the correct letter, with the correct job duties that match the job duties in the support letter filed with the petition as well as with the duties in the end client's letter. We regret this error in filing.

The petitioner also stated the following:

[The beneficiary] is placed at the end client, [redacted] in [redacted] IL, through a series of contracts. The contractual chain is as follows:

[The petitioner] → [redacted] → [redacted]

In addition, the petitioner stated that its "minimum requirement for this position is a Baccalaureate Degree in Computer Science, Computer Applications, Information Systems, Business Administration, Engineering or a related quantitative technical or business discipline."

The petitioner also included the following revised description of duties and the percentage of time allocated to each duty:

- **Consult with clients, gather and analyze their business requirements** to be implemented to their programs/systems[;] Conduct business process qualitative and quantitative analysis; Prepare functional specifications documents mapping the business requirements to programs; Prepare charts and diagrams to assist in problem analysis; (15%)
- **Translate business needs into operational technical requirement.** Assist cross-functional team in drafting and designing the work flow and business operation procedures customized to client's needs. Set operational specifications and formulate and analyze software requirements as assigned; As a team member work

in the various aspects of commercial software analysis and design. Develop end user applications and reports; Study work procedures, information flows, production methods; Document findings and recommend new business and financial systems; (40%)

- **Determine feasibility, cost and time required, compatibility with current system;** Process documentation of scripts developed and generated for testing applications; Conduct gap analysis between the current MIS system and the new system and cover any deficiencies as per the functional changes desired in the systems; Study business process workflow in existing systems and suggest alternatives applying various business scenarios, test cases, business principles and concepts to improve them and match new requirements; (25%)
- **Assist in Conducting UAT's [(User Acceptance Testing)] etc.** Collaborate with development team during all stages of project and provide help in process testing results; be a part of the Business team and give regular updates to QA team lead periodically; testing and mapping documents; ensure timely submission of proposals and be responsible for quantitative and qualitative goals of the project/client. Assist in conducting UATs etc. (20%)

**The expanded job duties are as follows:**

- **Gather and analyze business requirements;** Prepare business requirements documents for the functional changes desired in the systems; Conduct gap analysis between the current MIS system and the new system and cover any deficiencies as per the functional changes desired in the systems;
  - *These duties will also involve the following: Investigate, evaluate, and make purchase recommendations for business development systems, both hardware and software, for cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed system will be financially feasible. He will also review current system/program codes, applying clients' business scenarios and test cases, and redesign the system/program to meet business needs.*
- **Translate business needs into operational technical requirement.** Study business process workflow in existing systems and suggest alternatives applying various business scenarios, test cases, business principles and concepts to improve them and match new requirements; Document findings and recommend new business and financial systems; Do Business Process Re-engineering and map client specific business transactions and processes; Propose changes in equipment, processes and procedures that would result in overall system enhancement; Give inputs for functionality testing from business perspective and determine technical needs for design and development of the MIS;
  - *These duties will involve gathering and understanding business*

*requirements, preparing business requirements documentation and systems requirements study for the functional changes desired in IT system; Conducting detailed structured planning and development of error free procedures. Assist in data migration and performing periodic functional testing to ensure data is properly migrated in compliance with business requirements;*

- **Assist in conducting User Acceptance [T]esting (UAT) etc.**
  - *These duties will include: Giving inputs for functionality testing from business perspective, preparing business test cases and scenarios and perform user acceptance testing and based on findings, tweak the system operation procedures to increase its operating efficiency to meet business needs etc.*
- A copy of a letter, dated March 27, 2013, from the Senior Vice President, Chief Information Officer at [REDACTED] stating that the beneficiary is responsible for the following duties:
  - Performing comprehensive business analysis to ensure that all business units under [REDACTED] were compliant as per Federal and [REDACTED] Corporate standards.
  - Documentation of existing business system standards in terms of Application Development and Maintenance (ADM) as well as IT Security and Risk Compliance (ITSRC) for [REDACTED] and [REDACTED]
  - Analyzing and identifying areas of non-compliance.
  - Formulating procedures and templates to ensure compliance as per Federal and [REDACTED] corporate standards.
  - Facilitating regular touch point meetings with Business Unit owners of [REDACTED], and [REDACTED]
  - Knowledge gathering and artifact collection through scheduled as well as informal meetings with several stake holders.
  - Working in collaboration with the auditing team from [REDACTED] to understand and formulate remediation procedures for areas of non[-]compliance to standards.
  - Performing extensive documentation including write ups, evidences [sic], and templates.
  - Facilitating project kick off meetings with all stakeholders – defined the

objective, reviewed roles and responsibilities, mapped timelines, milestones and communication processes.

- Working in perfect collaboration in a team of five and project due to complete ahead of schedule with desired standards of quality and perfection.
- A copy of the revised letter from the petitioner to the beneficiary, dated September 11, 2012, regarding the beneficiary's "Project Assignment."<sup>4</sup> The letter states that the client's name is [REDACTED] that the position is titled business analyst, that the location is [REDACTED] and that the start date is September 11, 2012.<sup>5</sup> The letter states that the job duties will include but may not be limited to the following:

Gather and analyze business requirements; Conduct business process qualitative and quantitative analysis; be a part of Business team and give regular updates to QA team lead periodically; Analyze user requirements, conduct business/testing process analysis and gap analysis between systems and cover any deficiencies as per the functional changes desired; Prepare functional specifications documents mapping the business requirements to programs; Prepare charts and diagrams to assist in problem analysis; Study work procedures, information flows, production methods; Set operational specifications and formulate and analyze software requirements as assigned; Determine feasibility, cost and time required, compatibility with current system and computer capability; Process documentation of scripts developed and generated for testing applications. Collaborate with development team during all stages of project and provide in process testing results; Coordinate with the QA and other business personnel involved in the project that test, evaluate and validate new functions and applications, and identify issues in software or processes; Participate in conducting unit testing, system integration testing, user acceptance testing applying various business scenarios[,] etc.

The letter also states, "[y]ou have been placed at this project through our contractual arrangement with [the petitioner], [REDACTED]"

- A copy of an affidavit by the beneficiary, dated April 26, 2013, stating, among other things, that she is an employee of the petitioner working as a business analyst at [REDACTED] and that her job duties are as follows:

Gather and analyze business requirements; Conduct business process qualitative and quantitative analysis; formulate procedures and templates to ensure compliance per

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<sup>4</sup> The "Project Assignment" letter that was previously submitted is dated September 10, 2012.

<sup>5</sup> The AAO notes that this letter relates to the beneficiary's Optional Practical Training (OPT) in connection with her F-1 status and not to the H-1B petition.

federal and [REDACTED] standards; Analyze user requirements, conduct business/testing process analysis and gap analysis between systems and cover any deficiencies as per the functional changes desired; Prepare functional specifications documents mapping the business requirements to programs; Prepare charts and diagrams to assist in problem analysis; Study work procedures, information flows, production methods; Set operational specifications and formulate and analyze software requirements as assigned; Process documentation of scripts developed and generated for testing applications. Collaborate with development team during all stages of project and provide in process testing results; facilitating project kick off meetings with all stakeholders and working in collaboration with the team members, and other duties as assigned by my managers.

- Copies of the petitioner's "Weekly Review Reports" of the beneficiary from March 4, 2013 to April 26, 2013.
- Copies of various job vacancy postings.
- A copy of the petitioner's organizational chart.

On appeal, the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and that the petitioner clearly established that the proffered position is a specialty occupation. 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. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* 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.

## II. LAW AND ANALYSIS

### A. Inconsistencies in the Petition

Applying the preponderance of the evidence standard, upon review of the entire record of proceeding and the totality of the evidence presented, the AAO notes, as a preliminary matter, that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Accordingly, the AAO will discuss some of these issues first before addressing the grounds of ineligibility.

Specifically, in this matter, the petitioner provides conflicting information as to the job duties. As previously noted, the petitioner's letter to the beneficiary, dated September 10, 2012, regarding the beneficiary's "Project Assignment, lists job duties that differ from those specified in the support letter. In response to the RFE, the petitioner provided a letter dated September 11, 2012, with revised job duties and claims that the September 10, 2012 was submitted in error. The AAO notes that while the letter may have been submitted in error, it referred to the beneficiary, position title, and end-client. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the submission of the letter with incorrect duties was an "administrative error" does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Also, in its letter in response to the RFE, dated May 16, 2013 the petitioner stated that [REDACTED] is the only party that can control [the beneficiary's] work," incorrectly referred to the female beneficiary using a masculine pronoun, and stated that "[the beneficiary] is placed at the end client, [REDACTED] in [REDACTED] IL, through a series of contracts." The record contains no evidence explaining who "[REDACTED]" is or any agreement between the petitioner and [REDACTED]. No credible explanation for the inconsistencies was provided. Thus, the AAO must question the credibility and the accuracy of the assertions made by the petitioner in support of the petition.

Furthermore, the AAO finds that there are various inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. For instance, in the LCA, the petitioner indicates that the dates of intended employment for the proffered position are September 1, 2013 to August 31, 2016. The Form I-129 indicates that the dates of intended employment are October 1, 2013 to August 31, 2016. As previously noted, however, the August 1, 2012 letter from the petitioner to the beneficiary, regarding an "[o]ffer of employment" states that the "employment start date will be August 3<sup>rd</sup>, 2012." While this letter may relate to the beneficiary's Optional Practical Training (OPT), no explanation to that effect was provided. Also, the "project assignment" letters, dated September 10, 2012 and September 11, 2012, indicate that the "project start date" is September 11, 2012 and do not list an end date. Thus, the record contains no explanation with respect to these inconsistencies.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in

support of the visa petition. *Id.* In this case, the discrepancies and errors catalogued above undermine the credibility of the petition.

B. Lack of Standing to File the Petition as a United States Employer

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

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

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

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

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

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

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

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 with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>6</sup>

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

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

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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>7</sup>

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

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445;

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<sup>7</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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

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

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

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

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

Specifically, while the petitioner claimed that the beneficiary will work for [REDACTED], and provided a copy of a letter from [REDACTED] stating that the beneficiary is currently working as a business analyst and has been contracted to [REDACTED] through [REDACTED] the record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client. Moreover, the March 28, 2013 letter from [REDACTED] stated that "[the beneficiary], an employee of [the petitioner], is currently working as a Business Analyst. This is a contract with our client [REDACTED] an implementing partner at [REDACTED]. The job site is at [REDACTED] . . ."

While the record contains a copy of the agreement between the petitioner and [REDACTED] (the Agreement), the petitioner did not provide a copy of the statement of work referred to in the Agreement. The petitioner also did not provide a copy of the applicable contract, work order,

and/or statement of work between [REDACTED] and [REDACTED] and/or [REDACTED]. As a result, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, three-year validity period at [REDACTED] or the petitioner's location. Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors relating to the end-client, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that she performs. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

### C. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to August 31, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather, the "project assignment" letters from the petitioner to the beneficiary, dated September 10, 2012 and September 11, 2012, indicate that the "project start date" is September 11, 2012 and do not list an end date. Also, the letter from [REDACTED] dated March 28, 2013 and the letter from [REDACTED] dated March 27, 2013, do not list a start or an end date for the contracted work.

The AAO finds that the petitioner has not provided documentary evidence to establish the existence of work available to the beneficiary as a business analyst, for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. 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). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.<sup>9</sup>

Based on the above, the petitioner has not established, by a preponderance of the evidence, that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the appeal will be dismissed and the petition will be denied.

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<sup>9</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

#### D. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

The AAO will now address the basis of the director's decision, namely whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

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

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

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

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former INS had

reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Business Analyst," to work on a full-time basis at a salary of \$60,000 per year.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Management Analysts" – SOC (ONET/OES) Code 13-1111, at a Level I (entry level) wage.

Again, the issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence of record fails to establish, by a preponderance of the evidence, that the position as described constitutes a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding 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 that is the subject of the petition.

The AAO recognizes 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.<sup>10</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the occupational category "Management Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Management Analysts" including the sections regarding the typical duties and requirements for this occupational category.<sup>11</sup> However,

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<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.

<sup>11</sup> For additional information regarding the occupational category "Management Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-1>

the *Handbook* does not indicate that normally the minimum requirement for entry into management analyst positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "What Management Analysts Do" describes the duties of such positions as follows:

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

### **Duties**

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports
- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-2> (last visited Jan. 29, 2014).

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

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

### **Education**

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

### **Licenses, Certifications, and Registrations**

The Institute of Management Consultants USA (IMC USA) offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA's Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

### **Work Experience in a Related Occupation**

Many analysts enter the occupation with several years of work experience. Organizations that specialize in certain fields typically try to hire candidates who have experience in those areas. Typical work backgrounds include management, human resources, and information technology.

### **Advancement**

As consultants gain experience, they often take on more responsibility. At the senior level, consultants may supervise teams working on more complex projects and become more involved in seeking out new business. Those with exceptional skills may eventually become partners in their consulting organization and focus on attracting new clients and bringing in revenue. Senior consultants who leave their consulting company often move to senior management positions at nonconsulting organizations.

### **Important Qualities**

**Analytical skills.** Management analysts must be able to interpret a wide range of information and use their findings to make proposals.

**Communication skills.** Management analysts must be able to communicate clearly and precisely in both writing and speaking. Successful analysts also need good listening skills to understand the organization's problems and propose appropriate solutions.

**Interpersonal skills.** Management analysts must work with managers and other employees of the organizations where they provide consulting services. They should work as a team toward achieving the organization's goals.

**Problem-solving skills.** Management analysts must be able to think creatively to solve clients' problems. Although some aspects of different clients' problems may be similar, each situation is likely to present unique challenges for the analyst to solve.

**Time-management skills.** Management analysts often work under tight deadlines and must use their time efficiently to complete projects on time.

*Id.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited Jan. 29, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry into this occupation. While the *Handbook* indicates that a bachelor's degree is the typical entry-level requirement, the *Handbook* does not indicate that a degree in a *specific specialty* is normally the minimum requirement for entry into these positions.

The *Handbook* reports that many fields of study provide a suitable educational path for these positions. The *Handbook* identifies common areas of study to include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. However, neither the petitioner nor counsel has submitted any evidence to establish that the fields of business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English encompass a specific specialty. Without documentary evidence to support the claim, the assertions of the petitioner and counsel will not satisfy the petitioner's burden of proof. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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).

Furthermore, the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a management analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

On appeal, the petitioner cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) and states the following:

In that case, the court reversed the denial on the ground that such a narrow agency interpretation would preclude any position from satisfying the "specialty occupation" requirements where a specific degree is not available in that field..

Specifically, the AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the former INS was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

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

In any event, the petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

On appeal, the petitioner also cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry

and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>12</sup> As noted above, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a requirement of a bachelor's or higher degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in

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<sup>12</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 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 authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. Also, the record of proceeding does not contain any submissions from professional associations, individuals or similar firms in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

The petitioner submitted copies of ten job vacancy announcements to support its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner failed to submit sufficient evidence demonstrating that any of the advertising companies are similar in size and scope to that of the petitioner, an IT consulting business with 32 employees. Thus, the record is devoid of sufficient information regarding the ten advertising companies to conduct a legitimate comparison of each of these firms to the petitioner. Without such evidence, job advertisements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and another organization share the same general characteristics, information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Specifically, the advertisements provided do not establish that a bachelor's degree in a *specific specialty* or its equivalent is required by the advertising employers. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant as the record does not indicate that the posted job announcements are for parallel positions in similar organizations in the same industry.

(b)(6)

In addition, two of the advertised positions are for senior-level business systems analysts, therefore they are not parallel to the entry-level position that the petitioner is seeking to classify as a specialty occupation. Also, the record fails to demonstrate that the advertisement for an "application security analyst" by [REDACTED] is a parallel position to the proffered position.

Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>13</sup>

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO 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 the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business analyst. Specifically, the petitioner failed to demonstrate how the business analyst duties as described in this record of proceeding comprise a position that requires the theoretical and practical application of such an educational level of a body

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<sup>13</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just ten job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of business analyst at an IT consulting company required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

of highly specialized knowledge in a specific specialty that only a person with a bachelor's or higher degree in a specific specialty or its equivalent can perform it.

While some of the courses listed on the copy of the beneficiary's transcript for the Bachelor of Arts in Economics degree from the [REDACTED] may be beneficial in performing certain duties of a business analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate (or higher) degree in a specific specialty, or its equivalent, are required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level based upon the occupational classification "Management Analyst" at a Level I (entry level) wage.<sup>14</sup> This designation is appropriate for positions for which the petitioner expects the beneficiary to only have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish that this position is significantly different from other

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<sup>14</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

business analyst positions such that it refutes the *Handbook's* information that there are various acceptable degrees for these positions, including a general-purpose degree such as business administration, for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of business analyst is more complex or unique than other business analyst positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

While a petitioner may believe or otherwise 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 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 artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 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* § 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 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 a specific specialty 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 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.

On appeal, the petitioner states that it "is currently employing over 24 business analysts and has employed several others of [sic] business analysts in the past." The petitioner submits a document entitled, "Employee List as of June 27, 2013," listing the names, titles, and qualifications of 36 individuals, 26 of whom are identified as either business analyst or business systems analyst.<sup>15</sup> The petitioner also submits copies of the degrees for 11 individuals.<sup>16</sup> We note that evidence of the petitioner's past employment practices was requested by the director in the RFE dated April 19, 2013. However, the petitioner did not submit the requested evidence until appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. at 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of

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<sup>15</sup> The other individuals are identified by the following titles: QA tester, technical analyst, system analyst, data analyst, quality analyst, functional tester, test engineer, or testing specialist.

<sup>16</sup> The degree copies that were submitted are degrees in the following majors: Master of Business Administration, Bachelor of Arts in Economics and Political Science, Master of International Business, and Master of Science in Computer Engineering. The AAO notes that these degrees reflect the qualifications for 11 individuals, but without further evidence do not establish that the petitioner has a past practice of hiring individuals with a bachelor's degree, or higher, in a specific specialty, to perform the duties of the proffered position or that these individuals actually work or have worked for the petitioner. Moreover, the petitioner did not submit "copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study," as requested in the RFE.

the evidence submitted for the first time on appeal.

Upon review of the record, the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, 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 the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence to establish that the duties of the business analyst position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Management Analysts" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes 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) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the

petition denied for this reason.

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

As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

### III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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