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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: **JUL 01 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

Thank you,

*Michael T. Kelly*  
for Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 75+ employee information technology and software development firm<sup>1</sup> established in 2009. In order to employ the beneficiary in what it designates as a full-time "systems analyst" at a salary of \$72,000 per year<sup>2</sup> the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on each of three separate and independent grounds, namely: (1) that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation; (2) that the evidence of record failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (3) that the petitioner failed to submit a valid Labor Condition Application (LCA) that encompassed both of the locations where the petitioner stated that the beneficiary would work.

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

At the outset, based upon our comparison of the complete content of the LCA – which, in fact, was certified for both of the work locations specified in the petition – the evidence of record supports the conclusion that the director erred in dismissing the petition for not including an LCA certified for both of those locations. Accordingly, we hereby withdraw that ground for dismissal. However, for the reasons that will be discussed in this decision, we conclude that the director's decision to deny the petition (1) for its failure to establish the existence of an employer-employee relationship between the petitioner and the beneficiary; and, also, (2) for its failure to establish that the proffered position qualified for a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

We will first discuss the director's finding that the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." See

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 14, 2014).

<sup>2</sup> The LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analyst" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level II prevailing wage rate.

8 C.F.R. § 214.2(h)(4)(ii). We will then address the director's determination that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

## I. GENERAL OVERVIEW

According to the petition's information, if the petition were approved, the beneficiary would provide his services to [REDACTED] at a location in [REDACTED] Illinois. While the petitioner [REDACTED] [REDACTED] would provide the beneficiary, the record also reflects that two other business entities are each involved in procuring the beneficiary's services for [REDACTED]. Those two firms are (1) [REDACTED] [REDACTED] and (2) [REDACTED] (to which we will refer as

Neither the petitioner nor its counsel provides substantive information about the involvement of [REDACTED]. However, [REDACTED] is mentioned in the December 11, 2012 "Schedule 'A' – Work Order" executed by the petitioner and [REDACTED] which has been submitted on appeal. That document's "Project Details" section identifies the client as [REDACTED] at [REDACTED] Illinois. In addition, that contractual document's section "D. Additional Comments" section reads:

Disclosure: Global contract with our client [REDACTED] has "right to hire" clause.

We note that the record contains no evidence of any direct contractual relationship between [REDACTED] and the petitioner.

Also, the record of proceeding does not establish any contractual relationship between the petitioner and [REDACTED] - the one entity that appears to have contracted with [REDACTED].

## II. FACTUAL AND PROCEDURAL HISTORY

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Systems Analyst" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay him a salary of \$72,000 per year. The petitioner maintains that its gross annual income was \$16 million and its net annual income was \$4 million.

### **Documents filed with the Form I-129**

In its December 14, 2012 letter of support filed with the Form I-129, the petitioner's Human Resources (HR) Manager described the proffered position as follows:

Please note the above referenced beneficiary will work at our office and at a customer location that we assign the beneficiary to (depending upon project necessity), as indicated on the Labor Condition Application (LCA). The beneficiary will work under the supervision of our management team at all times. The beneficiary will work on projects that we assign, and will provide services to customers of our company or vendor pursuant to corporate contract agreements.

The beneficiary's work will be controlled and supervised by our management team with submission of regular progress reports and real-time communication follow-ups with project site managers. Through review of progress reports and timely communication with project site managers, our management personnel shall determine if the work performance is in accordance with contractual guidelines and requirements. Our management team shall provide all necessary technical support and available resources to the beneficiary, to ensure the successful completion of project deadlines and requirements stated in the contract agreements.

The petitioner's HR Manager continues his letter with the following assertion about the petitioner's "management control" over the beneficiary:

As the sole employer of the above referenced beneficiary, [REDACTED] will be responsible for maintain management control of all beneficiary's employment matters, including but not limit to wage assessment, benefits entitlement, approval of time sheets, training assistance, etc., in addition to any discretionary decision making, including hiring, firing, reprimand, and performance evaluation....

This support letter also described the duties of the proffered position as follows:

**PROFESSIONAL DUTIES OF SYSTEMS ANALYST**

The professional responsibilities of this full-time, permanent [(sic)] position as a Systems Analyst include:

- Develop, Maintain and support the GCI applications as per the [REDACTED] business requirements.
- Active involvement in solving the application defects and working on the project enhancements.
- Responsible for creating requirements document, design and test case documents
- Work with functional leads to gather new business requirement
- Performing design of new modules
- Development of new modules

The petitioner also stated that "[t]he position of Systems Analyst is a specialty occupation requiring the skills of an individual who has a minimum of a baccalaureate degree in Computer Science, Computer Applications, Managed Information Systems, Software Engineer, Systems Management,

Technology, Engineering, or related field."

The documents filed with the initial petition, also included, among others:

- The required Labor Condition Application (LCA). It was certified for work at two locations: (1) [REDACTED] and (2) at [REDACTED] the petitioner's corporate address. The LCA also specified Computer Systems Analysts as the related occupational group for the position for which the LCA would be used.
- A copy of the petitioner's offer letter, dated May 1, 2011, extending employment to the beneficiary. The letter was signed by the beneficiary only.
- Business documents pertaining to the Petitioner.
- Information regarding the petitioner's employee benefits.
- An unsigned December 6, 2012 draft letter, to which we accord no weight: not only is it unsigned, but the letter does not even contain a signature line that would identify the person for whose signature the document was drafted.<sup>3</sup> We note that this unsigned draft includes assertions that:
  - [REDACTED] "has contracted with [REDACTED] to provide programming and consulting services to end-client [REDACTED] "client."
  - The beneficiary "would continue to work on a project at client's location at [REDACTED]"
  - [REDACTED] is the preferred vendor and [REDACTED] is the primary vendor for this project".
  - The beneficiary "continues to work on a client project involving GCI processes."
  - The project is "ongoing" and "we" – unidentified – "would require the beneficiary's services through 2015, and anticipate further extensions."<sup>4</sup>
- A December 12, 2012 document, on the petitioner's letterhead, and signed by [REDACTED] as Account Manager for the petitioner. We take the following

<sup>3</sup> We note the letter is on plain paper (no letterhead), is unsigned, and does not even identify the name, title, and organization of the person for whom the draft was prepared.

<sup>4</sup> Because the letter is unsigned we will not note any of its other details.

paragraph - verbatim - from the document's comments about the much mentioned Project:

**BRIEF PROJECT DESCRIPTION:** The purpose of the GCI process is to take billable charges data from iMedica, Legacy OHM, and PrimeSuite, and translate for Group Management. GCI does this by taking in charge data from a source (IMedica, OHM, or Prime Suite), applies the translations and finally creating an A04, A08, A28 and P03 files to be processed by ConnectR. The ConnectR internally verify these incoming messages and post it to the Centricity Group Management which eventually billed to the insurance company's.

- This document from the petitioner also provides a table. It states the following as "areas in which [the] beneficiary will be engaged in delivering services":
  - Develop, maintain, and support the GCI applications as per the business requirements.
  - Active involvement in solving the application defects and working on the project enhancements.
  - Responsible for creating requirements document, design and test case documents[.]
  - Work with functional leads to gather new business requirement[.]
  - Performing design of new modules[.]

- The table also states:

Throughout the course of service the beneficiary will work with the following tools and technologies:

- .Net
- Visual Studio
- .Net Console Application
- SSIS Packages
- SQL Server
- ConnectR
- Centricity Group Management
- Citrix
- Windows
- VB

- C#

Also filed with the Form I-129 was a copy of the Professional Services Agreement (PSA) between [REDACTED] and the petitioner.

### **Documents submitted in response to the RFE**

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 6, 2013. The petitioner was asked to submit probative evidence to establish, in part, that a valid employer-employee relationship will exist between the petitioner and the beneficiary. Additionally, the petitioner was asked to document that a valid employer-employee relationship was maintained with the beneficiary through the previous H-1B approval period. The director outlined some of the types of specific evidence that could be submitted.

Counsel's April 15, 2013 letter replying to the RFE stated that the beneficiary would work at the [REDACTED] facility as indicated in the LCA; that he would "work under the supervision of petitioner's management team at all times"; that he would "work on tasks assign[ed] by supervising management personnel"; and that he would "provide services to [REDACTED] pursuant to corporate contract agreements." Counsel also asserted that "the beneficiary's work will be controlled and supervised by petitioner's management team with submission of regular progress reports and real-time communication follow-ups with project site managers." Counsel also stated that "as the sole employer" of beneficiary, the petitioner would be "responsible to maintain management control of all beneficiary's employment matters."

Among other documents submitted in response to the RFE are (1) an organization chart for the petitioner; (2) tax documentation pertaining to the petitioner; (3) evidence of the petitioner's insurance coverage and enrollment; and (4) evidence in support of the beneficiary's maintenance of H-1B status with the petitioner throughout the previous H-1B approval period.

The RFE response also included an April 1, 2013 letter from [REDACTED] signing as Director-IT Accounting and Finance Systems, [REDACTED] Ms. [REDACTED] wrote to "confirm that [the beneficiary] provides contract services to [REDACTED]. In this regard, she states:

We have contracted with [REDACTED] to have [the beneficiary] provide consulting services until December 2015. [REDACTED] would like to continue [his] contractual services pending an approved.

The letter also confirms that the beneficiary would perform his services at the [REDACTED] location in [REDACTED] Illinois.

With regard to the relationship between the petitioner and the beneficiary, Ms. [REDACTED] states:

[The beneficiary] will report directly to his employer, [the petitioner], and it is his employer, [the petitioner], that will issue performance reviews and take any disciplinary action regarding his work, if necessary.

\* \* \*

While [the beneficiary] will be performing his job duties at our location, he is not an employee of [REDACTED] [The petitioner] is solely responsible for ensuring that his duties are performed in a satisfactory manner. [REDACTED] is not responsible for his wages, nor do we have authority to assign him to another location. These rights are retained by his employer[,] [the petitioner].

The letter's description of the services that the beneficiary would provide is virtually the same as the description in the December 12, 2012 submission from the petitioner's Account Manager, which we have discussed above. That is, [REDACTED] states:

While performing services to our company, he will perform the following duties assigned by his employer [the petitioner]:

- Develop, Maintain and support the Group Cast Interface (GCI) applications as per the [REDACTED] business requirements.
- Active involvement in solving the application defects and working on the project enhancements.
- Responsible for creating requirements document, design and test case documents
- Work with functional leads to gather new business requirement
- Performing design and development of new modules

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 1, 2013.

We will now address some of the documents submitted on appeal with the Form I-290B.

### **Documents submitted on appeal**

According to the petitioner's August 19, 2013 letter submitted on appeal, all of its "onsite engagements are supervised by [its] Manager [REDACTED] The record's copy of the petitioner's organizational chart identifies Mr. [REDACTED] as the petitioner's "AVP, Account Manager." That petitioner's letter also states that this AVP, Account Manager "interacts with the client and vendor management on day to day activities related to corporate account management."

However, there is no evidence that Mr. [REDACTED] or any management-level member of the petitioner's staff is located at the beneficiary's worksite or maintains any office space at the beneficiary's [REDACTED] worksite. Further, we note that, while the letter indicates that the petitioner

is, naturally, involved in overseeing its accounts and in maintaining communication with clients and vendors, neither this letter nor any other evidence of record demonstrates to us that the petitioner has any substantive involvement in (1) determining the beneficiary's daily work schedule; (2) assigning particular tasks to the beneficiary during the course of the project work to which he is assigned; or (3) directing and evaluating the content, pace, and quality of the beneficiary's day-to-day project-work.

While we note the sample of the periodic performance reviews that the petitioner exercises with the beneficiary, there is no indication anywhere in the record that [REDACTED] is either a party to those reviews or is in any way bound by them.

Next we see a "Dear sir/Madam" document produced on plain paper – with no letterhead – signed by Ms. [REDACTED] as "Director-IT." Of chief interest to us is the fact that we here again have a document that asserts that the petitioner is the beneficiary's employer, pronounces some aspects of the petitioner's interaction with the beneficiary (such as form of payments to the beneficiary, control over his hours, and "wage assessment") but fails to even identify, much less describe, the specific ways in which [REDACTED] would be involved, by operation of their contractual rights, in controlling the beneficiary and his work in the very practical context of the [REDACTED] project.

(It should be noted that we accord no weight to the letter's pronouncement that the proffered position qualifies as a specialty occupation, for the author provides no documentary support for the claim. Here is a good time to also note that the various pronouncements that the petitioner is the beneficiary's employer or sole employer are neither conclusive nor decisive, for they are not based upon the common-law analysis required in the employer-employee determination.)

Next, there is a nine-page document entitled "Project Information & Itinerary of Services," which counsel's comments on the Form I-290B describes as:

A complete itinerary of services with all specific details requested, including but not limited to: the name of the project, the address where the beneficiary performs the work, the title and duties of the beneficiary's position; the duration of contracted employment dates; contract information of the end-client organization, and beneficiary's supervisory information for the project assignment.

We have considered the content of this document, but we do not see it as meriting any probative weight with regard to the issues before us. There is no evidence that this document has been produced by, or that its content has been adopted or endorsed by, [REDACTED]. Further, as extensive and broad-in-scope as the document may be, it does not detail the beneficiary's role in the project. Further still, the document lacks any of the substantive information that is so lacking in this record of proceeding, that is, concrete and comprehensive details of the contractual framework of terms, conditions, and specifications ultimately governing the aspects of control over the beneficiary and his work that would reveal how the common-law employer-employee factors would fall among the three business entities that have a hand in this employment scenario – that is, the petitioner, [REDACTED].

The appeal submissions also include another copy of the [REDACTED] Petitioner PSA.

We will now note aspects of this document, and the attached "Schedule 'A' Work Order," that we find especially relevant. (Hereafter, we will refer to that Schedule A as simply the [REDACTED] Petitioner work order.")

The PSA indicates that the beneficiary's selection to perform the [REDACTED] work order depended upon his acceptance by the "client" – which the work order identifies as [REDACTED]. We also again note that the client is identified as [REDACTED] – thereby suggesting that [REDACTED] has a material role in the management of the [REDACTED] project work. The same is suggested by the fact that the [REDACTED] work order's disclosure section identifies [REDACTED] client.

The [REDACTED] Petitioner work order references the beneficiary, the client [as [REDACTED], the position [as System Analyst], the skill set [as Java and .Net Development] and the location [as [REDACTED] IL]. The duration of the project is listed as "eighteen (18) months, with possible extensions." The document does not provide such details as the duties of the proffered position, requirements for the position (if any), or the nature and scope of the project.

It did not escape our attention that the [REDACTED] Petitioner work order refers to the beneficiary's position as "Java Developer" – a designation that does not correspond with the Systems Analyst job-title and SOC/O\*NET occupational-group designation that the Form I-129 and the LCA assigned to the proffered position.

Next, there is an August 19, 2013 letter from [REDACTED] signing as the petitioner's Director-HR. We find that the statements in this letter basically repeat or otherwise assert basically the same claims about the petitioner's business relationship with the beneficiary.

The documents submitted on appeal also include additional information about [REDACTED] timesheets and monthly status reports referencing the beneficiary; an undated Initial Performance; and document copies that were previously submitted.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address the director's determination that the petitioner failed to establish that it will have an employer-employee relationship with the beneficiary. The record supports the conclusion that the evidence fails to establish that the petitioner 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).

As a preliminary matter, we find that proper resolution of this issue is to be determined by the evidentiary record that the petitioner has developed with regard to the beneficiary's [REDACTED] project work. We say this because we find that the record of proceeding contains insufficient evidence to support a reasonable finding that the petitioner had secured any specific work for the beneficiary at its

own location. Absent showing at the time of petition filing that the petitioner had definite, non-speculative work for the beneficiary at its own location, there is no basis for a determination that the petitioner and the beneficiary would have an employer-employee relationship. After all, the existence of work for the beneficiary is a basic element of a petitioner's claim that it would be employing the beneficiary if the petition were approved. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner maintains that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work at the end-client, [REDACTED]. The petitioner submitted documentation indicating that there is a professional services agreement between the petitioner and [REDACTED] (the purported preferred vendor for [REDACTED]). As outlined in the Professional Services Agreement, the petitioner is the subcontractor for [REDACTED]. However, the petitioner did not submit sufficient documentation which outlined in detail the nature and scope of [REDACTED] relationship with [REDACTED] the purported end-client.

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

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

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

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

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

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

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

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

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase

that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>5</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.<sup>6</sup>

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<sup>5</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

<sup>6</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)).

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>7</sup>

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Additionally, 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

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(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

<sup>7</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).

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."

The record provides incomplete and imprecise information regarding who will be supervising and controlling the beneficiary on a day-to-day basis. A letter provided by [REDACTED] Director-IT states that the beneficiary "will work under the supervision of [REDACTED] Mr. [REDACTED] at all times." However, Ms. [REDACTED] goes on to state that both Mr. [REDACTED] "and our on-site project manager shall jointly determine if the work performance is in accordance with contractual guidelines and requirements." The letter does not explain the mechanics of such "joint determinations" as may be specified in the governing contractual agreement(s), but, more importantly, it leaves unanswered such relevant employer-employee questions as which entity sets the standards by which the determinations will be made and, more fundamentally, how the pertinent contracts specifically describe and distribute among the contracting parties latitude and discretion to remove the beneficiary from the project work.

Additionally, the petitioner has provided inconsistent information with respect to the duration of the relationship between the parties and the location(s) where the beneficiary will work for the duration of the requested H-1B employment period. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from January 1, 2013 to December 31, 2014. [REDACTED] states that the period of service is from January 1, 2013 until December 31, 2015. The "Project Information & Itinerary of Services" references December 31, 2015 on page 1 and September 30, 2016 on page 7. The Schedule "A"-Work Order between the petitioner and [REDACTED] references a start date of December 17, 2012 and a duration of eighteen (18) months with possible extensions. The letter from [REDACTED] Director-IT Accounting & Finance Systems, [REDACTED] maintains that "[w]e have contracted with [REDACTED] to have [REDACTED] provide consulting services until December 2015." When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Additionally, as noted above, the record of evidence fails to establish who will be supervising and controlling the beneficiary on a day-to-day basis when the beneficiary is working with the end-

client. The petitioner contends on appeal that "All onsite engagements are supervised by our Manager . On behalf of Mr. may hire fire, and relocate employees' at the locations, and interacts with the client and vendor management on day to day activities related to complete account management." Such statements beg specific information – not provided – as to what the practical realities are, in the project context, of the claimed "interact[ing]," to include how, how often, and by whom it is conducted. Also, the frequency and depth of the claimed interaction by the petitioner is made more uncertain by the geographical distance between the parties.

The "Duty & Reporting," section of that undated "Offer Letter" that was signed only by the beneficiary has this pertinent term, which is not indicative of the petitioner exercising any real degree of actual day-to-day oversight, supervision, or control over the beneficiary's work assignments and specific tasks as the project progresses:

You shall provide reports concerning work activities monthly, and discuss work goals/progress with your reporting manager.

We see this direction to have contact with the petitioner every month as indicative of the petitioner not having a direct influence on how the beneficiary's role in the project would unfold in terms of his actual work and task assignments and their associated performance guidelines on timelines and means and manner of performance.

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 – and these seem to within the petitioner's realm - 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 project work 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. As reflected in our comments on the documentary record, there is a significant weight of evidence in these other areas that would align as factors not favoring an employer-employee determination for the petitioner. However, as should also be clear in this decision so far, the record of proceeding is simply not sufficiently comprehensive to provide a conclusive determination on the employer-employee issue. An evidentiary record that fails to fully disclose all of the relevant factors will not establish that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary.

Additionally, the petitioner's December 14, 2012 letter states that the "beneficiary will work at our office and at a customer location that we assign the beneficiary to." As noted in the LCA, the beneficiary may work at the end-client's location or at the petitioner's location. However, the petitioner did not provide any evidence of the project and job duties the beneficiary would perform if he returned to work onsite with the petitioner. Therefore, it is not clear what the substantive nature of the work would be for the entire period of employment requested on the Form I-129.

The petitioner has thus 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 the petitioner established that it would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>8</sup>

The evidence of record 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 he performs. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (*citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary

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<sup>8</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).

"employee." 8 C.F.R. § 214.2(h)(4)(ii). Moreover, 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. Accordingly, the appeal must be dismissed and the petition must be denied on this basis.

### III. SPECIALTY OCCUPATION

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record, the evidence fails to establish that the position as described constitutes a specialty occupation. For this additional reason, the appeal will be dismissed and the petition will be denied.

The petitioner should note that, because the evidence of record does not establish any work for the beneficiary at the petitioner's own location, we accord no weight to the assertions that the beneficiary would perform specialty occupation work at that location if the [REDACTED] project were completed earlier than anticipated. The itinerary submitted on appeal makes no reference to when and for how long the beneficiary would be at the petitioner's corporate address and what specific duties would be performed there on an in-house project. Again, 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). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof, as unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a

specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which

petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, Cisco) may require as the ultimate employment of the beneficiary. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

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 company's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* 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. In other words, as the nurses in *Defensor v. Meissner* would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id* at 387-388.

We will enter this additional finding before analyzing the evidence of record under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A): the range of acceptable degree majors or academic concentrations specified by the petitioner weighs against its argument that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

The petitioner stated that "[t]he position of Systems Analyst is a specialty occupation requiring the skills of an individual who has a minimum of a baccalaureate degree in Computer Science, Computer Applications, Managed Information Systems, Software Engineer, Systems Management, Technology, Engineering, or related field." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" 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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Again, in the letter of support, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree in Computer Science, Computer Applications, Managed Information Systems, Software Engineering, Systems Management, Technology, Engineering, or a related field. However, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of the disciplines (including any and all engineering fields) are closely related fields, or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree (such as a degree in business) 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 *id.*

Having made that preliminary finding, we turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding. In doing so, we recall the position's duties as stated in the December 12, 2012 letter from Ms. [REDACTED] writing as Director – IT Accounting and Finance Systems at [REDACTED]

While performing services to our company, he will perform the following duties assigned by his employer [the petitioner]:

- Develop, Maintain and support the Group Cast Interface (GCI) applications as per the [REDACTED] business requirements.
- Active involvement in solving the application defects and working on the project enhancements.
- Responsible for creating requirements document, design and test case documents[.]
- Work with functional leads to gather new business requirement[.]
- Performing design and development of new modules[.]

As we already noted, this description is virtually the same as what the petitioner provided in its letter of support filed with the Form I-129. We focus on what [REDACTED] provided, however, in line with the principle reflected earlier in this decision that where, as here, the work that is asserted as the basis for the H-1B specialty occupation petition is to be performed as part of another entity's project, that entity's requirements for the project work to be performed by the beneficiary must be a primary consideration in determining whether, in fact, the proffered position qualifies as a specialty occupation.

We find that, as evident in the bullet-phrase descriptions quoted above, the record of proceeding presents the proffered position and its constituent duties in relatively abstract terms of generalized functions. While the petitioner and [REDACTED] also assert IT applications and programs that would be applied to the general project work, neither entity describes in specific, substantive terms what the beneficiary would actually do on a day-to-day basis in the actual performance of those generally stated duties. Consequently, we find that the evidence of record does not develop the proffered position and the proposed duties with sufficient specificity and substantive detail to establish the position or its duties as more specialized, complex, and/or unique than positions in the Computer Systems Analysts occupational group that do not require the services of a person with at least a bachelor's degree or the equivalent in a specific specialty.

As the above discussion and findings are an intrinsic part of our analysis of each of the criteria at 8C.F.R. § 214.2(h)(4)(iii)(A), we hereby incorporate them into the analysis of each criterion that follows below.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>9</sup> As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Computer Systems Analysts" occupational category.

The *Handbook's* discussion of the duties and educational requirements of the Computer Systems Analysts occupational group states, in pertinent part, the following:

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals

Computer systems analysts use a variety of techniques to design computer systems such as data-modeling, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions.

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<sup>9</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

Analysts conduct in-depth tests and analyze information and trends in the data to increase a system's performance and efficiency.

Analysts calculate requirements for how much memory and speed the computer system needs. They prepare flowcharts or other kinds of diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up. Most analysts do some programming in the course of their work.

Most computer systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

Because systems analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (accessed May 20, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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

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

\* \* \*

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

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (accessed May 13, 2014).

The statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook's* statement that "most" computer systems analysts possess a bachelor's degree in a computer-related field, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of systems analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Additionally, with regard to positions that do require attainment of a bachelor's degree or equivalent, the *Handbook* indicates that a bachelor's degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer systems analysts have liberal arts degrees and gained their programming or technical expertise "elsewhere."

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

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

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

Next, 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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor has the petitioner submitted any letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

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

Next, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's in a specific specialty or its equivalent is required to perform that position. Rather, the petitioner and the end-client have not distinguished either the proposed duties, or the position that they comprise, from generic computer systems analyst work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

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

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

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

As the record of proceeding contains no evidence regarding the petitioner's recruiting and hiring of any other computer systems analysts, there is no evidence for consideration under this criterion. As

the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Computer Systems Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite); and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's and end-client's letters of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's or end-client's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent. We incorporate into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty.<sup>10</sup> For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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<sup>10</sup> It must be noted that the petitioner has submitted an LCA that had been certified for a Level II wage-level, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. 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). Therefore, it is not credible that the position is one with specialized and complex duties.

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Consequently, the appeal will be dismissed and the petition will be denied on this basis also.

#### IV. BENEFICIARY'S QUALIFICATIONS

The petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of his foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

#### V. PRIOR H-1B APPROVALS

Finally, it is noted that the beneficiary currently holds H-1B status. However, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

#### VI. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record (1) does not establish that the proffered position qualifies for classification as a specialty occupation; and (2) does not

demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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.