



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUL 03 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The director certified the decision to the Administrative Appeals Office (AAO) for review. Upon review, the AAO will affirm the decision of the director. The approval of the petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Texas Service Center on December 13, 2001. In the Form I-129 visa petition, the petitioner described itself as a textile import and export business established in 1983. In order to employ the beneficiary in what it designated as a director of textile technology engineering operations position, the petitioner sought 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 position was approved on December 19, 2001, for what was designated as a director of textile technology engineering operations position. Thereafter, it was discovered that the petitioner and the beneficiary, may have engaged in activities in violation of immigration laws of the United States. Upon subsequent review of the record of proceeding upon which approval of the petition was based, the director issued a NOIR, and ultimately did revoke the approval of the petition on October 24, 2011. Subsequently, an appeal was filed, but the AAO rejected the appeal on December 5, 2012, finding that it was not properly filed. Thereafter, counsel for the petitioner filed a motion to reconsider, and the AAO dismissed the motion on February 26, 2013. On May 30, 2013, the director certified the decision dated October 24, 2011 to the AAO for review. Thereafter, counsel for the petitioner submitted a brief, asserting that the director's basis for revocation of the petition's approval was erroneous and that the petitioner satisfied all evidentiary requirements.

Pertinent to the certified decision before the AAO, the record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR; (3) counsel's response to the NOIR with supporting documentation; (4) the director's decision dated October 24, 2011; (5) the Form I-290B and supporting materials filed on November 23, 2011; (6) the AAO's decision dated December 5, 2012; (7) the Form I-290B and supporting documentation filed on December 28, 2012; (8) the AAO's decision dated February 26, 2013; (9) the director's Notice of Certification; and (10) counsel's brief submitted in response to the director's certification of the decision. 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 that the petitioner has not overcome the revocation grounds identified by the director. Accordingly, the decision certified to the AAO will be affirmed, and the approval of the petition will remain revoked.

Later in the decision, the AAO will also address another ground, not identified by the director's decision, that the AAO finds would require the issuance of a new NOIR even if the stated grounds for revocation were overcome on certification. Specifically, beyond the decision of the director, the AAO finds that the approval of the petition violated 8 C.F.R. §214.2(h) or involved gross error as the petitioner failed to establish that the proffered position is a specialty occupation.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a director of textile technology engineering operations on a full-time basis at the rate of pay of \$250,000 or more per year. In its letter of support, dated December 4, 2001, the petitioner described the duties of the proffered position as follows:

This position of [d]irector of [t]extile [t]echnology [e]ngineering [o]perations for our corporation does in fact fulfill all of the criteria for a specialist classification. The position is very specialized and in this capacity [the beneficiary] will be responsible for approving new textile fabric engineering technology systems, textile products and textile quality engineering designs. He will also set up the quality control system of all import and export of raw textile material and finished textile products for our corporation.

This position requires that the individual have the responsibilities of analyzing the engineering specifications of production for physical characteristics of our textile goods. He will formulate and maintain the engineering m[e]thologies for our technology objectives for knit fabrics, yarn fabrics, woven fabrics, cotton fabrics, dyed fabrics, raw textile, and finished textile designs.

[The beneficiary] will utilize his detailed knowledge of specialized textile engineering procedures to design textile data analysis formulations for our corporation. He will identify and implement the cost benefit analysis of textile designs in conjunction with the quality of the standards required for each type of textile fabrics and materials.

This is a complex high-level specialized position within our field and industry. [The beneficiary] will be responsible for designing and implementing the textile engineering development programs that are used to maximize our productivity strategies targeted to our customers['] demands. He will study research results in order to identify and capitalize the most cost effective means of producing the best varied needs of our design coordination schedules, production needs, and standards for the textile designs.

Further, the petitioner stated that the position is "a complex position and one that involves a substantial amount of autonomy in the decisions of the company." The petitioner claimed that "it is critical that this individual have a minimum of a Bachelor of Science [d]egree in Textile Engineering so that they can adequately perform their specialized duties."

The AAO notes that on the Form I-129, the petitioner submitted its company address in care of its attorney's address, which is [REDACTED] Florida [REDACTED]. However, the petitioner indicated that the beneficiary will work at [REDACTED], Florida [REDACTED] which corresponds to the address provided for the petitioner in the Labor Condition Application (LCA) filed in support of the instant H-1B petition. The AAO notes that the

occupational code for the proffered position is designated as 012, which corresponds to "industrial engineering occupations."¹ The petitioner further indicated on the LCA that the beneficiary will be paid \$250,000 to \$600,000 per year.

The petition was approved on December 19, 2001. On December 3, 2010, the director of California Service Center issued an NOIR. The NOIR contained a detailed statement regarding the information that USCIS had obtained and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation.

In the NOIR, the director stated that the United States Citizenship and Immigration Services (USCIS) determined that the petitioner and the beneficiary engaged in activities in violation of immigration laws of the United States. In the preface to the discussion of the bases for the NOIR, the director provided background information regarding the petitioner and the beneficiary that led to the issuance of the NOIR. Regarding the beneficiary, the director noted a lawsuit pending against the beneficiary and his brother in the [REDACTED] Florida, filed by the government of Ecuador, the beneficiary's country of birth. The lawsuit alleged the beneficiary and his brother of embezzlement as former administrators of [REDACTED] which collapsed in July 2001. Subsequently, the government of Ecuador had requested that the United States extradite the beneficiary and his brother, [REDACTED]. On September 2, 2003, the Department of State revoked any and all visas issued to or held by the beneficiary. On February 18, 2008, the government of Ecuador issued a Presidential Degree (No. 914) to prohibit the issuance of Ecuadorian passports to fugitives of justice. USCIS was informed by the Ecuadorian consulate that the beneficiary has exhausted all legal procedures in Ecuador to obtain his passport.

Further, regarding the petitioner, the director noted that in the letter filed with the instant Form I-129, the petitioner "indicated that it was first established in 1983 to operate a Spanish language cable television station," and "over the last 18 years it has evolved into a multi-million dollar entity engaged in a vast array of new business ventures including a new technology and communications developments and services, a textile import and export operations, and real estate investments." However, the director found that the public records do not support the petitioner's claims regarding its business activities. For example, the director referenced the petitioner's 2003 U.S. Corporation Income Tax Return discovered as a result of an investigation and noted that most of the petitioner's 19 affiliates listed in Schedule K are no longer active or doing business.

The director also noted that the United States Customs and Border Protection (CBP) searched its databases and could not locate any import and export activities records for the petitioner and the affiliate companies during the H-1B validity period. The director stated that "the petitioner's statements about its textile operations are so ambiguous that it is difficult if not impossible to determine what it means by 'textile operations.'" The director also noted that the Florida Department of Revenue could not locate any wage records for the petitioner up until the fourth quarter of 2003. The director further found that the petitioner filed a second Form I-129 for the

¹ For more information about occupational codes see the Dictionary of Occupational Titles at http://www.occupationalinfo.org/defset1_2219.html (last visited June 11, 2014).

beneficiary on August 8, 2003, seeking a change in the beneficiary's approved employment as a director of textile technology engineering operations in the instant petition to Vice President of Engineering. In addition, the director noted that the beneficiary owns 33.33% of the petitioning company.

Then the director identified the following bases for the issuance of the NOIR: that (1) the petitioner violated terms and conditions of the approved petition; and (2) the petitioner failed to establish an employer-employee relationship with the beneficiary. Specifically, the director found that the petitioner violated the terms and conditions of the approved petition by failing to pay the proffered wage of \$250,000. The director noted that according to the 2003 U.S. Corporation Income Tax Return, Schedule E, the beneficiary received \$169,870 for the period from September 1, 2003 to August 31, 2004. Further, the director found that the Florida Department of Revenue did not find any records of wage reports for the petitioner up until October 1, 2003. Instead, the Florida Department of Revenue found that the beneficiary was paid by the [REDACTED]

[REDACTED] Florida, a company with a different Federal Employer Identification Number (FEIN) than the petitioner, and for which the beneficiary was not authorized to work. The director also noted copies of the beneficiary's earnings statements from April 20, 2003 to April 26, 2003, May 25, 2003 to May 31, 2003, and June 29, 2003 to July 5, 2003, all of which were issued from [REDACTED]. Further, the director noted that a review of public records for each of the petitioner's affiliates did not indicate that any of them were involved in the import/export and/or production of textile products.

Therefore, the director requested evidence to substantiate the beneficiary's employment in the United States from December 10, 2001 to August 20, 2003, including but not limited to the following:

- An explanation of what duties the beneficiary performed while working for [REDACTED] including:
 - how the beneficiary was able to perform the duties of a textile engineer while working for a real estate management corporation; and
 - an itemized record from the Social Security Administration that shows the beneficiary's earnings and his employers since December 2001.
- Proof that the petitioner operated a textile import/export or production facility in the United States to include:
 - copies of U.S. Customs forms of textile products imported or exported by the petitioning entity;
 - copies of invoices and sales receipts showing textile products that were sold;

- photos of the petitioner's textile production facilities or import/export operations;
- lease agreements for the textile production or import/export facilities;
- catalogues of photos of textile products; and
- IRS certified corporate tax returns from 2001 to 2009.
- Copies of documents prepared by the beneficiary and used internally by the organization during the beneficiary's H-1B validity period which may include:
 - methods and procedures the beneficiary used to assess and approve new textile fabric engineering technology systems;
 - new textile fabric engineering technology systems that were purchased or leased upon recommendation by the beneficiary;
 - quality control system that was set up by the beneficiary; and
 - the beneficiary's cost benefit analysis of textile designs.

In addition, the director found that the petitioner failed to establish the requisite employer-employee relationship for the first 23 months of the H-1B validity period since the records indicated that the petitioner began filing quarterly wage reports with the State of Florida on November 1, 2003. The director provided a copy of the petitioner's 2003 corporation tax return and copies of pay stubs from [REDACTED] to support her bases for the NOIR.

The petitioner and counsel submitted a response providing a rebuttal for the director's conclusions. Further, counsel submitted the following documents:

- Copies of the petitioner's H-1B approval notices for the petitions filed on behalf of the beneficiary from December 19, 2001 to December 17, 2010.
- The receipt notice for the Form I-129 filed on December 17, 2010.
- A copy of the instant Form I-129 petition and supporting documents.
- A copy of the Form I-129 and supporting documents filed on August 8, 2003. In the letter dated July 25, 2003, the petitioner stated that "[t]oday, [the petitioner]'s primary business is real estate holdings and a real estate management." Further, the petitioner indicated that the beneficiary will be employed as a Vice President of Engineering, who "will formulate policies and direct the operations of the real

estate interests of the company." In the LCA certified on July 24, 2003, the occupational code is designated as 189, which corresponds to "Miscellaneous Managers and Officials."²

- An affidavit from Mr. [REDACTED] Mr. [REDACTED] claims that he has been working as manager at the petitioning entity since 2003.³ Mr. [REDACTED] states "[a]s a result of my daily activities and obligations at the company and my familiarity with the company's records, I have personal knowledge of the following facts." Mr. [REDACTED] discusses details about the beneficiary's employment history at the company, the beneficiary's family's textile business in Ecuador, and Form W-2s, Wage and Tax Statements, issued to the beneficiary from 2001 to 2009. The affidavit is accompanied by the following documents as exhibits: a document entitled "[REDACTED]" a copy of a letter dated May 8, 2007 from Mr. [REDACTED] describing the beneficiary's duties as Vice President of Engineering since August 2003, a copy of the letter dated July 26, 2003 filed along with the Form I-129 on August 8, 2003, and Form W-2s issued to the beneficiary from 2000 to 2009.
- A copy of a memorandum entitled "*Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*," from Donald Neufeld, Associate Director of Service Center Operations, to Service Center Directors (January 8, 2010).
- A copy of a two-page document entitled [REDACTED] On page one, it states that the petitioner has \$15 million to invest as a result of the sale of the convenience store investment. The document states that the "current plans are to invest these funds in the U.S." in communications and related new technology, textile industry import and export, and import and export and related financing. Page two is entitled "Budgeted Revenues-Future Plans" and forecasts revenue for the import and export of textiles and debt swaps for the next 4 years. This document is neither signed nor dated.
- A copy of the U.S. Corporation Income Tax Return for 2003 for the tax year beginning September 1, 2003 and ending August 31, 2004.
- A translated copy of document No. 914 of Executive Degree 2084-A, which states that "it is necessary for the Ministry of Foreign Affairs, Commerce and

² For more information about the Dictionary of Occupational Titles, see http://www.occupationalinfo.org/defset3_5324.html (last visited June 11, 2014).

³ The AAO notes that on appeal, counsel submitted another affidavit from Mr. [REDACTED] dated May 20, 2011. It is noted that the content of the first 23 paragraphs of the affidavits is identical, but the affidavit submitted with the appeal contains more discussion about employer-employee relationship. Further, the previously submitted appeal is undated.

Integration, its agencies and Consular Offices to abstain from issuing passports to Ecuadorians who are fugitives of the law."

- A copy of complaint filed against the beneficiary and his brother, by [REDACTED]⁴
- A copy of an AAO non-precedent decision dated August 3, 2005 on the appeal of an H-1B petition with receipt number [REDACTED]. The director revoked the approval of that petition based on the Department of State's revocation of visas previously issued to the beneficiary in that matter. The AAO withdrew the director's decision stating that the Department of State's invalidation of the visas offers no basis on which to revoke the extension of the H-1B petition under 8 C.F.R. § 214.2(h)(11)(iii)(A).

The director reviewed the evidence and determined that the documents submitted in response to the NOIR failed to rebut and overcome the grounds for revocation. The director determined that the petitioner failed to comply with the terms and conditions of employment. Specifically, the director found that the petitioner did not pay the proffered wage. The director further found that the beneficiary was not employed in the proffered position. In addition, the director determined that the petitioner failed to establish an employer-employee relationship with the beneficiary. Accordingly, on October 24, 2011, the director revoked the approval of the petition.

Subsequently, an appeal was filed, but the AAO rejected the appeal on December 5, 2012, finding that it was not properly filed. Specifically, the AAO observed that the appeal was filed with a Notice of the Entry of Appearance as Attorney or Accredited Representative (Form G-28) filed for and signed by the beneficiary. The AAO noted that USCIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition and that the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). In the rejection, the AAO noted that, while the beneficiary was listed as one of the petitioner's corporate officers according to information provided on the website of the Florida Department of State Division of Corporations available at <http://ccfcorp.dos.state.fl.us/corinam.html> (last visited June 11, 2014), there was no evidence in the record that the beneficiary was legally authorized to sign as a representative on behalf of the petitioner with regard to the appeal before the AAO. The AAO specifically noted that the Form G-28 submitted by counsel clearly limits his representation/appearance to the beneficiary, and nowhere on the form is it indicated that the beneficiary is acting on behalf of the petitioner.

Thereafter, counsel for the petitioner filed a motion to reconsider stating that the AAO did not comply with the regulations at 8 C.F.R. § 103(a)(2)(v)(A)(2) by failing to give notice of the improper Form G-28. The AAO dismissed the motion on February 26, 2013 on several grounds. The AAO found that the motion was not properly filed by the affected party because the petitioner

⁴ The [REDACTED], an agency similar to the U.S. Federal Deposit Insurance Corporation, was the original plaintiff. After the [REDACTED]'s dissolution, Ecuador was substituted as the named plaintiff.

was not a party to the rejected appeal. The regulations at 8 C.F.R. §103.5(a)(1)(i) provides that "when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision." The AAO found that the petitioner did not have legal standing in the motion because the motion was based on a rejected appeal, which was improperly filed by the beneficiary and his counsel.

Further, the AAO found that it did not have jurisdiction, because the AAO was not the last official who made a decision in this proceeding. The regulations at 8 C.F.R. § 103.5(a)(1)(ii) states that the "official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The AAO found that "the latest decision in the proceeding" in this matter was the director's decision dated October 24, 2011, since the appeal was rejected without considering the merits of the appeal. Therefore, the AAO did not have jurisdiction since it was not "the official who made the latest decision in the proceeding." However, even assuming *arguendo* that the motion was filed by the affected party and that the AAO had the jurisdiction, the AAO found that it did not err in rejecting the appeal. Specifically, the AAO found that the regulations at 8 C.F.R § 103(a)(2)(v)(A)(2) applies to a situation where the appeal was filed without the Form G-28. In this case, the appeal was filed with the Form G-28, but by a party not entitled to file; therefore, the AAO was not required to request the Form G-28 pursuant to 8 C.F.R § 103(a)(2)(v)(A)(2). The AAO dismissed the motion on February 26, 2013. On May 30, 2013, the director certified the decision dated October 24, 2011 to the AAO for review.

The AAO reviewed the record of proceeding in its entirety, including the documentation submitted with the petition, in response to the NOIR and the certification, as well as the information obtained during the investigation. The AAO notes that the record of proceeding contains material discrepancies regarding the proffered position, and the petitioner has not sufficiently resolved the inconsistencies. 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). 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* As will be discussed, *infra*, the petitioner has not met its burden of proof in this regard.

The grounds for revocation certified to the AAO are (1) whether the petitioner violated the terms and conditions of the employment, and (2) whether the petitioner established that it had an employer-employee relationship with the beneficiary.

II. LAW AND ANALYSIS

A. Revocation

With regard to the revocation of the approval of a petition, the regulation at 8 C.F.R. § 214.2(h)(11) states the following:

Revocation of approval of petition--(i) General. (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. . . .

The regulations at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

As a preliminary matter, the AAO finds that the bases specified for the revocation action are proper grounds for such action. The director's statements in the NOIR were adequate to notify the petitioner of the intent to revoke approval of the petition in accordance with the statutory provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (2), (3), (4), and (5), and allotted the petitioner the required

time for the submission of evidence in rebuttal specified under 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, the AAO further finds that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions in response to the certification overcome the grounds for revocation indicated in the NOIR. The director determined that: (1) the petitioner failed to comply with the terms and conditions of employment and (2) the petitioner failed to establish that it had an employer-employee relationship with the beneficiary. In addition, the director discussed several issues related to the beneficiary under the heading "Remaining Issues," which include the validity of the beneficiary's passport, Ecuadorian government's lawsuit against the beneficiary in Florida circuit court, and the State Department's revocation of the beneficiary's visa. As stated by the director, such issues are not the bases for revoking the approval of the petition, but they are "derogatory information that led to the investigation" that revealed the above mentioned reasons for revocation. Since such issues are not the bases for revoking the approval of the instant petition, the AAO will not further discuss the merits of those issues.

B. No Employer-Employee Relationship

The AAO will now address the director's determination that the petitioner failed to establish that it had an employer-employee relationship with the beneficiary from December 19, 2001 to September 31, 2003.

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).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner had an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary was an "employee" of the petitioner.

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

Neither the former Immigration and Naturalization Service (INS) nor 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)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

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.⁵

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 318-319.⁶

⁵ 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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

⁶ 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

Therefore, 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).⁷

In the past, the former INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." *See id.*; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." *See Clackamas*, 538 U.S. at 440. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

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)).

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))).

⁷ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

The 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).

Moreover and as detailed above, in addition to the sixteen factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

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

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

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, 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, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director 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 was a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." As mentioned above, according to the petitioner's 2003 U.S. Corporation Income Tax Return, the beneficiary owns 33.3% of the petitioning entity. As also noted above, the beneficiary is listed as an officer of the petitioning entity. Therefore, the AAO will address the factors addressed in *Clackamas*, to determine whether the beneficiary, who is also a shareholder and officer of the petitioning entity, was an employee.

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

In the notice of revocation, the director found that "the evidence in the record is insufficient to establish that there is a separation between the beneficiary and the employing entity." The director found "it is not reasonable to believe that the petitioner could or would fire the beneficiary since to do so would result in the loss of the beneficiary's nonimmigrant status and his forced return to Ecuador to face criminal prosecution for embezzlement." In response to certification, counsel asserts that the director's statement that the petitioner "would never fire [the beneficiary] because doing so would cause [the beneficiary] to lose his immigration status in the United States, force him to leave the country and expose him to prosecution in Ecuador" is "demonstrably false." Counsel claims that "the company has twice placed [the beneficiary] on leave-both times in response to immigration developments. Specifically, counsel claims that the beneficiary was placed on leave when his H-1B visa petition was revoked in May 2005 until the AAO overturned the decision in August 2005, and that he is currently on administrative leave because his prior H-1B status has expired and he has not been issued his employment authorization document in connection with his status as the dependent of an E-2 treaty trader. In support of his assertion, counsel relies on Mr. [REDACTED] affidavit.

The AAO finds that Mr. [REDACTED] affidavit is not corroborated by documentary evidence in this regard. While the affidavit was substantiated by some independent documentary evidence such as Form W-2s, there is no evidence in the record to establish that the beneficiary was placed on leave during the period mentioned by counsel. 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)). In any event, placing a worker on administrative leave is not evidence that the claimed employee has been fired. Furthermore, as this evidence relates to the beneficiary's authorization to work in the United States, corroborating evidence of periods spent not working in the United States would only demonstrate compliance with the law and the decisions made by the U.S. government regarding the beneficiary's authorization to work in the United States.

It would not demonstrate that the beneficiary was fired or that the beneficiary could not override a decision to fire him, if made by someone else in the company. Therefore, the petitioner failed to demonstrate that it can fire the beneficiary.

Further, the petitioner has not presented any claim to establish that the petitioner set the rules and regulations of the beneficiary's work. Instead, in the support letter dated December 4, 2001, the petitioner stated that the proffered position "is a complex position and one that involves a substantial amount of autonomy in the decisions of the company." Contrary to counsel's claim, it appears that the proffered position provided "a substantial amount of autonomy" for the beneficiary. Therefore, it is not apparent that the petitioner sets the rules and regulations of the beneficiary's work.

- Whether and, if so, to what extent the organization supervises the individual's work.

The AAO finds that the petitioner failed to establish that the petitioner supervised the beneficiary. As mentioned above, the record contains a copy of the two-page document entitled [REDACTED]. On page one, it stated that the petitioner has \$15 million in funds to invest as a result of the sale of the convenience store investment. The document stated that the "current plans are to invest these funds in the U.S." It further states that the petitioner "wishes to be able to closely monitor its investments." And "expects those to be in the following industries," which include "communications and related new technology, textile industry import and export, and import and export and related financing." Under the subtitle "Textile Industry Import & Export," the petitioner stated that "[a]s a result of the particular expertise of [the beneficiary] in the Textile Industry, and specifically his knowledge of the needs of this industry in Ecuador, we expect to generate \$225,000 to \$310,000 annual net commission income from this function as detailed in the attached." Page two is entitled "Budgeted Revenues –Future Plans," and forecasts revenue for the import and export of textiles and debt swaps for the next 4 years. The AAO finds that the document is not reliable as it only discusses projected and future plans and revenues, it is neither signed nor dated, and the AAO is unable to determine if the document was generated by an authorized official for the petitioner. Further, even if the document was reliable, it does not offer sufficient information to establish that the petitioner supervised the beneficiary. While the document stated that the petitioner "wishes to be able to closely monitor its investment," the document did not indicate the extent or means of supervision. Further, as mentioned above, the petitioner indicated in its support letter that the beneficiary's position "involves a substantial amount of autonomy." Therefore, it does not support a finding that the organization supervised the beneficiary's work.

- Whether the individual reports to someone higher in the organization.

The AAO finds that the petitioner failed to provide any corroborating evidence that the beneficiary reported to someone higher in the organization. In the Form I-129, the petitioner stated that it has 11 employees. In the letter dated December 4, 2001, the petitioner claimed that it is "a full service business conglomerate, which handles a variety of entities and employs a complete staff of

professional[s] who oversee the operations." However, the AAO finds that the record is devoid of sufficient information about employees at the petitioning entity, their positions within the company, and their relation to the beneficiary's position. Therefore, the petitioner failed to establish that the beneficiary reported to someone higher in the organization.

- Whether and, if so, to what extent the individual is able to influence the organization.

The AAO finds that the beneficiary had substantial influence over the organization. In the support letter dated December 4, 2001, the description of the duties for the beneficiary included "approving new textile fabric engineering technology systems," "set[ting] up the quality control system," "formulat[ing] and maintain[ing] the engineering m[e]thodologies for our technology objectives," "design[ing] textile data analysis formulations," and "designing and implementing the textile engineering development programs." Based on the job description, it appears that the beneficiary's position involved "a substantial amount of autonomy in the decisions of the company."

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

The petitioner did not submit employment agreements or contracts or any other documents describing the beneficiary's employment relationship with the petitioner.

- Whether the individual shares in the profits, losses, and liabilities of the organization.

The Schedule E of the 2003 Corporation Income Tax Return indicates that the beneficiary received \$169,870 as compensation as an officer. Therefore, it appears that the beneficiary shared in the profits of the organization.

In view of the above and the lack of sufficient, corroborating evidence to the contrary, it appears that the beneficiary was a proprietor of this business and was not an "employee" having an "employer-employee relationship" with a "United States employer." Specifically, the AAO finds that it has not been established that the beneficiary was "controlled" by the petitioner or that the beneficiary's employment could be terminated. The AAO notes that the record is also devoid of information regarding to what extent, if any, the petitioner supervised the beneficiary's work or if the beneficiary reported to someone higher in the organization. It appears that the beneficiary was not supervised, did not report to anyone in the organization, and was given "substantial amount of autonomy in the decision of the company." Finally, the AAO also notes that there is no record of employment actions or any employment history for this corporation that establishes that it ultimately controlled the work of the beneficiary. Therefore, based on the tests outlined above, the petitioner has not established that it was 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).

In response to the certification, counsel referred to the USCIS memorandum issued by Donald Neufeld, associate director for service center operations, to assert that the employer is the entity that had control over the beneficiary. Counsel emphasized "the Neufeld memorandum directs that a petitioner must be able to demonstrate that it has 'right to control' an employee to establish the relationship" and listed some of the factors discussed in the memorandum. However, the AAO notes that while counsel repeatedly stated that the petitioner had control over the beneficiary, counsel fails to support these assertions with probative documentary evidence. For example, counsel described the beneficiary's duties as the Vice President of Engineering as described in the H-1B petition filed in September 2009, to claim that the beneficiary had "access to and regularly worked with the company's most sensitive financial and technological data and information." However, this is outside the scope of the instant H-1B's validity period and is not relevant to establish the petitioner's control of the beneficiary from December 19, 2001 to December 15, 2004. Further, counsel relies on Mr. [REDACTED] affidavit, which, as previously mentioned, is uncorroborated and therefore not probative evidence. Counsel also referred to the petitioner's 2003 tax return to state that "the tax return is fully consistent with these facts;" that it identifies [REDACTED] as a subsidiary which is under the control of the parent, the petitioner" and that [REDACTED] reported the beneficiary and his brother's salary.⁸ However, as noted, the 2003 tax return covers the tax year starting September 1, 2003 to August 30, 2004, and reporting of the beneficiary's compensation outside of the instant H-1B validity period and by a separate legal entity is irrelevant to establishing the petitioner's employer-employee relationship with the beneficiary for the instant petition.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). That is, based on the tests outlined above, the petitioner has failed to provide sufficient evidence to establish 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 AAO affirms the director's decision to revoke the approval of the petition.

C. Violation of Terms and Conditions of Employment

Next, the AAO will discuss whether the petitioner violated the terms and conditions of the approved employment. Specifically, the director found that the petitioner did not pay the proffered wage, and that the beneficiary was not employed in the proffered position.

⁸ A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980).

1. Not Employed in the Proffered Position

The AAO will first discuss whether the petitioner has established that the beneficiary was employed in the proffered position.

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary performed, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. 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. 591-92.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate that a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition. See §§ 101(a)(15)(H)(i)(b) and 214(i)(1).

In this case, the AAO finds that the petitioner has provided insufficient probative documentation to substantiate its claims regarding its operational activities and the actual work that the beneficiary performed during the instant H-1B validity period from December 19, 2001 until August 20, 2003. That is, there is a lack of substantive, documentary evidence that the petitioner was a viable entity (e.g., an enterprise engaged in regular, systematic and continuous operations which produces services or goods) such that it is able to substantiate its claim that it had H-1B caliber work for the beneficiary during this H-1B validity period.

On the Form I-129 petition, the petitioner stated that it is a textile import and export business established in 1983, with 11 employees and a gross annual income of \$1.7 million. Further, the petitioner designated its operations under the North American Industry Classification System (NAICS) code 8742; however, the AAO finds that this is an invalid code and does not provide information about the nature of the petitioner's business.⁹

In the support letter dated December 4, 2001, filed with the Form I-129, the petitioner described its business as follows:

This corporation was founded in October 1983 and was first established to operate a Spanish [l]anguage cable [t]elevision [s]tation. However, during the last 18 years, our corporation has evolved into a multi[-]million dollar entity that has spread its profits into a vast array of new [business] ventures, new technology and communications developments, and services, a textile import and export operations, and real estate investments. In the last 18 years, [the petitioner] has become a full service business conglomerate, which handles a variety of entities and employs a complete staff of professionals who oversee the operations.

The petitioner further indicated that it is "becoming a leader in textile operations," "[w]ith a strong economic revival in the United States and expanding international markets, the billion-dollar industry provides a world of opportunity." The petitioner stated that it is "currently expanding our textile division into one of our premium divisions, investing millions of dollars into this division to make it one of the premier textile operations in the United States."

Further, the petitioner indicated that the beneficiary is being offered the position of a director of textile technology engineering operations. As mentioned above, the description of the duties for the beneficiary included "approving new textile fabric engineering technology systems," "set[ting] up the quality control system," "analyzing the engineering specifications of production" for textile goods, "formulat[ing] and maintain[ing] the engineering m[e]thodologies for our technology objectives," "design[ing] textile data analysis formulations," "identify[ing] and implement[ing] the cost benefit analysis of textile designs," "designing and implementing the textile engineering development programs," and "studying research results in order to identify and capitalize the most cost effective means."

However, as the director noted in the NOIR, the AAO finds the description of the beneficiary's duties inconsistent with the description of the petitioner's business. In the NOIR, the director stated that "the petitioner's statements about its textile operations are so ambiguous that it is difficult if not impossible to determine what it means by 'textile operations.'" The director further stated that "[f]rom the description of the beneficiary's duties, to the petitioner's statements, the impression is

⁹ For more information about North American Industry Classification System, see U.S. Dep't of Commerce, U.S. Census Bureau, NAICS Concordances at <http://www.census.gov/eos/www/naics/concordances/concordances.html> (last viewed June 11, 2014).

given that it is investing in an actual textile manufacturing plant." But the director further noted that "the petitioner then also indicates that it is engaged in textile import and export activities."

The AAO agrees. In the Form I-129, the petitioner described its type of business as "textile import and export." In the support letter, the petitioner claimed that "during the last 18 years, our corporation has evolved into a multi[-]million dollar entity that has spread its profits into a vast array of new business ventures, new technology and communications developments and services, a **textile import and export operations**, and real estate investments" (emphasis added). The petitioner further stated that it is "becoming a leader in textile operations" and that it is "currently expanding our textile division into one of our premium divisions" to make it into one of the premier textile operations in the United States." Based on these statements, it appeared that the petitioner had an existing textile import and export operations in the United States. Further, based on the description of the beneficiary's duties, it appeared that the petitioner planned to invest in textile production in the United States.

In response to the NOIR, the petitioner offered contradicting statements regarding its operations and the beneficiary's duties. In Mr. [REDACTED] affidavit, he provided the following information regarding the petitioner's involvement in the textile business:

The [REDACTED] family has been in the textile industry for many years in Ecuador. In 1948, [the beneficiary]'s grandfather started [REDACTED] a company which originally produced synthetic fibers. By 1955, the company began producing cotton fabrics and the family created a cotton yarn plant called [REDACTED] and a cotton fabric plant in Ecuador.

* * *

After receiving his degree, [the beneficiary] returned to Ecuador and started [REDACTED] [The beneficiary] identified and purchased the land for the factory, he supervised the construction of the factory, he outfitted the factory, and he began production. By 1966, Indulana was producing goods, and 80 people were working in the factory.

Initially, [REDACTED] only sold products in Ecuador. By 1994, the company began to expand into Colombia. At the time, the company was producing 100,000 meters of fabric per year, it had 12 product lines, and it had approximately \$2 million in sales. To produce this material, the company hired 200 workers who worked in 3 shifts-24 hours a day. The company also employed 10 professional staff people.

By 2000, with the family's agreement, [the beneficiary] decided to expand [REDACTED] reach further.

After consultations with the family, it was determined that [the petitioner] would develop a textile business in the United States. [The petitioner] applied for [the beneficiary] to come to the U.S. to run this project.

After receiving a visa, [the beneficiary] began working to develop [the petitioner's] textile business. At first, [the beneficiary] investigated the potential U.S. markets to determine what products the company could produce. Next, [the beneficiary] investigated whether the company should build factories for production, or lease space. Next, [the beneficiary] worked on the systems that would be necessary to produce materials including quality control, design standards, production schedules, and specifications. Finally, [the beneficiary] considered whether the planned business made economic sense.

* * *

Ultimately, economic conditions did not warrant initiating full scale textile production in the United States. In fact, at the time, the competitors were largely leaving the United States to produce abroad. At the same time, the company's real estate business was growing and becoming more complex.

As a result, [the beneficiary] and the company determined that it would be more appropriate to have [the beneficiary] concentrate his efforts on the company's real estate holdings.

Based on the statements above, it appears that prior to filing the instant petition, the beneficiary and his family were involved in textile operations outside of the United States; in Ecuador and Colombia. However, in the support letter and on the Form I-129, the petitioner made ambiguous representations about being engaged in textile import and export business without specifying the location of the business, and did not provide any documentary evidence to substantiate its claimed import and export business activities in the United States.

The AAO finds that Mr. [REDACTED] affidavit makes further contradicting statements about the nature of its business and proffered position. In the affidavit, Mr. [REDACTED] reiterated the beneficiary's duties in the proffered position as follows:

From December 2001 to August 2003, [the beneficiary] was the company's full[-] time [d]irector of [t]extile [t]echnology [e]ngineering [o]perations. In this capacity, he established the quality control system of all import and export of raw textile material and finished textile products, designed and implemented the engineering development programs to maximize productivity strategies; formulated and maintained the engineering operational procedures and goals and designed coordination schedules, production needs, and product assurance for engineering specifications.

Based on this statement, it appears that the petitioner had an on-going operation since the beneficiary "established the quality control system." "designed and implemented the engineering development programs," "formulated and maintained the engineering operational procedures and

goals and designed coordination schedules, production needs, and product assurance for engineering specifications." As stated above, however, Mr. [REDACTED] also stated earlier in the affidavit that the beneficiary "investigated the potential U.S. markets to determine what products the company could produce," "investigated whether the company should build factories for production or lease space," and "worked on the systems that would be necessary to produce materials." Moreover, "ultimately, economic conditions did not warrant initiating full scale textile production in the United States"; consequently, "[the beneficiary] and the company determined that it would be more appropriate to have [the beneficiary] concentrate his efforts on the company's real estate holding" and applied to "change [the beneficiary's] focus from textiles to real estate."

The AAO finds Mr. [REDACTED] statements regarding the beneficiary's duties inconsistent. On one hand, Mr. [REDACTED] appears to state that the beneficiary investigated the U.S. markets for potential production in the United States, but ultimately decided that the U.S. market was not suitable for production. On the other, Mr. [REDACTED] also stated that the beneficiary established a "quality control system of all import and export of raw textile material and finished textile products" and "designed and implemented the engineering development programs to maximize productivity strategies."

In response to the certification, counsel analyzes the description of duties provided and states that the description clearly reveals the petitioner "was in the process of setting up a textile business and intended to have [the beneficiary] help the company establish and grow it." However, counsel does not explain the discrepancies in Mr. [REDACTED] affidavit. More importantly, the AAO finds that the petitioner failed to provide probative evidence to support its statements with regard to its business operations. While Mr. [REDACTED] claimed that the beneficiary established a "quality control system" and "designed and implemented the engineering development programs," the petitioner did not provide independent documentary evidence to corroborate his claims.

As mentioned above, it is noted that in the NOIR, the director raised questions about inconsistencies and requested specific documents regarding the petitioner and the beneficiary such as:

- An explanation of what duties the beneficiary performed while working for [REDACTED] including:
 - how the beneficiary was able to perform his duties as a textile engineer while working for a real estate management corporation; and
 - an itemized record from the Social Security Administration that shows the beneficiary's employers and his earnings since December 2001.
- Proof that the petitioner operated a textile import/export or production facility in the United States to include:
 - copies of U.S. Customs forms of textile products imported or exported by the petitioning entity;

- copies of invoices and sales receipts showing textile products that were sold;
 - photos of the petitioner's textile production facilities or import/export operations;
 - lease agreements for the textile production or import/export facilities;
 - catalogues of photos of textile products; and
 - IRS certified corporate tax returns from 2001 to 2009.
- Copies of documents prepared by the beneficiary and used internally by the organization during the beneficiary's H-1B validity period which may include:
 - methods and procedures the beneficiary used to assess and approve new textile fabric engineering technology systems;
 - new textile fabric engineering technology systems that were purchased or leased upon recommendation by the beneficiary;
 - the quality control system that was set up by the beneficiary; and
 - the beneficiary's cost benefit analysis of textile designs.

The AAO notes that while counsel submitted some documents in response to the NOIR, counsel did not submit any of the documents mentioned above to resolve the identified inconsistencies. The AAO notes that 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). Further, the AAO also notes that 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).

Further, and as previously discussed, the AAO finds insufficient evidence in the record that the beneficiary was employed in the proffered position in part because of contrary evidence showing the beneficiary was paid by [REDACTED] instead of the petitioner. In the NOIR, the director noted that "the records indicate that the beneficiary did not work for the petitioner for all of 2001, 2002, and until the fourth quarter of 2003, since no record of wages paid to the beneficiary by the petitioner could be found with the Florida Department of Revenue." Instead, the search by the Florida Department of Revenue found that the beneficiary was paid by [REDACTED] a company for which the beneficiary was not authorized to work.¹⁰

¹⁰ The AAO notes that the beneficiary's admission and continued stay in the United States is conditioned on the maintenance of the H-1B "nonimmigrant status in which the alien was admitted or to which it was changed

In response to the NOIR, counsel claims that [REDACTED] "merely cut [the beneficiary]'s check" but it is the petitioner that had control over the beneficiary. Counsel claimed that the petitioner "used the profits from [REDACTED] (its wholly owned subsidiary) to pay all of its employee wages and their benefits, including [the beneficiary]" and that [REDACTED] was "an excellent candidate for this role because it had reliable cash earnings." Counsel further stated that "to this day, [REDACTED] administers the company's health insurance program, including [the beneficiary]'s plan." Again, counsel based his statements entirely on Mr. [REDACTED] affidavit, which is not corroborated by documentary evidence, and is not considered probative evidence. 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).

The AAO finds that the petitioner did not submit any documents related to [REDACTED] other than that it is listed as a claimed subsidiary with an address at [REDACTED] which matches the address that the petitioner claimed that the beneficiary would work, and the address for the petitioner provided in the LCA.¹¹

The AAO notes that the record contains a site visit report that the former Immigration and Naturalization Service, conducted in July 2003. The report states that the investigator visited the site at [REDACTED] Florida. The investigator observed that the petitioner's name did not appear in the business directory or the shingle outside of the building or the suite, but all reflected that [REDACTED] was at the location. The investigator further found that business cards displayed at the reception desk were for a real estate business, and there were no apparent signs that the petitioner was doing business at this address.

under section 248" and compliance "with the conditions" of that status. § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i). The fact that the beneficiary was paid by PREMC suggests that the beneficiary engaged in unauthorized employment, which constitutes a failure to maintain and comply with the conditions of his H-1B nonimmigrant status under section 237(a)(1)(C)(i) of the Act.

¹¹ The AAO further notes that other than being listed as a claimed subsidiary, the record does not contain evidence of corporate ownership for [REDACTED]. The AAO notes that to determine ownership and control of a corporate entity, documentary evidence such as the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362, 364-365 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In addition, and as previously mentioned, the petitioner filed a new Form I-129 on August 8, 2003 to request changes in the proffered position from the director of textile technology engineering operations to vice president of engineering. In the letter dated July 25, 2003, the petitioner stated that "[t]oday, [the petitioner]'s primary business is real estate holdings and a real estate management." Further, the petitioner indicated that the beneficiary "will formulate policies and direct the operations of the real estate interests of the company." While a business may certainly change the focus of its business if it is within its corporate charter and/or bylaws to do so, the AAO finds based on the evidence presented in the record that the petitioner failed to establish either (1) that it engaged in the textile import and export business, or (2) that the beneficiary was employed in the proffered position as described in the approved and authorized in the approved petition. The AAO notes that in the event of a material change to the terms and conditions of employment specified in the original petition, the petitioner must file an amended or new petition with USCIS with a corresponding LCA. Specifically, the pertinent regulation requires:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

8 C.F.R. § 214.2(h)(2)(i)(E); *see also id.* § 214.2(h)(11)(i)(A) (requiring petitioners to "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and file an amended petition). Based on the records, it is not apparent when the changes in business focus occurred from textile to real estate management, but it is noted that an amended petition was not filed until August 2003, following the site visit in July 2003. Further, as mentioned, the beneficiary was paid by [REDACTED] a real estate management company for most of this H-1B validity period, instead of the petitioner; specifically from December 2001 to August 2003. Therefore, it appears that the petitioner failed to comply with the regulatory requirements to immediately notify the service under § 214.2(h)(11)(i)(A).

2. Did Not Pay the Proffered Wage

Next, the AAO will discuss whether the petitioner paid the proffered wage. Specifically, in the notice of revocation, the director found that the petitioner failed to pay the proffered wage of \$250,000. The director noted that the petitioner's 2003 U.S. Corporation Income Tax Return indicates that the beneficiary was paid \$169,870 or only 67% of the attested wage. The director also stated that the Florida Department of Revenue could not locate records of any quarterly wage reports filed by the petitioner until the 4th quarter of 2003. Instead, it was noted that [REDACTED] paid the salary for the beneficiary for the years 2001, 2002, and 2003.

In response, counsel claimed that "[i]ndisputable evidence reveals that [the beneficiary] received wages that were consistent with [the petitioner]'s Form I-129 and Labor Condition Application."

Counsel noted that in the Form I-129 and the LCA, the petitioner indicated that the petitioner would pay the beneficiary \$250,000 per year and indicated that the prevailing wage for his position was \$63,170.00. Counsel refers to Mr. [REDACTED] affidavit and the Form W-2s in the record to assert that the petitioner "performed its promise."

Upon review of the record, the AAO finds that the petitioner failed to establish that it paid the proffered wage of \$250,000. First, as mentioned, the AAO finds that the petitioner's reliance on its 2003 corporate tax return is misplaced since it covers the tax year beginning September 1, 2003 and ending August 31, 2004. As noted, the petitioner filed another H-1B petition [REDACTED] for the beneficiary to change his position which was approved on August 20, 2003. The 2003 corporate tax return does not cover the instant H-1B validity period, which is from December 19, 2001 to August 19, 2003, and is therefore irrelevant to the determination of whether the petitioner paid the proffered wage for the instant H-1B validity period. Accordingly, the AAO withdraws the part of the director's conclusion that relies on the petitioner's 2003 corporate tax return; however, the AAO still finds that the petitioner failed to establish that it paid the attested wage of \$250,000 in accordance with the terms and conditions of the approved petition.

The AAO notes that counsel relies largely on Mr. [REDACTED] affidavit and the Form W-2s in the record to assert that the beneficiary received the proffered wages. As mentioned, Mr. [REDACTED] affidavit is largely uncorroborated and is not probative evidence with regard to the wages paid to the beneficiary by the petitioner.

Further, the AAO finds that the Form W-2s, in the record indicate the following:

Year	Employer	Amount
2000	[REDACTED]	\$600,000
2001	[REDACTED]	\$600,000
2002	[REDACTED]	\$350,000
2003	[REDACTED]	\$138,443
	[REDACTED]	\$ 45,000
	[REDACTED]	\$183,443
2004	[REDACTED]	\$180,000

Counsel claims that the beneficiary's "Form W-2s indicate [that] [the petitioner] performed on its promise." Counsel notes that "the petitioner paid [the beneficiary] \$600,000.00 in 2001, \$350,000.00 in 2002; \$183,433.02 in 2003; and \$180,000.00 in 2004."

The AAO notes that while the Form W-2s indicate that the beneficiary was paid the above mentioned amount, the Form W-2s were not issued by the petitioner, but by [REDACTED] during the

instant petition's validity period from 2001 to 2003. In addition, the record also contains earnings statements for the beneficiary from April, May, and June 2003, which were also issued by [REDACTED]. As discussed above, counsel claims that the petitioner "used the profits from [REDACTED] (its wholly owned subsidiary) to pay all of its employee wages and their benefits, including [the beneficiary]" and that "to this day, [REDACTED] administers the company's health insurance program, including [the beneficiary]'s plan." Counsel based his statements entirely on Mr. [REDACTED] affidavit, which is not corroborated by documentary evidence, and is not considered probative evidence. Instead, counsel claims that the director asks for more evidence—all of which is superfluous" such as the petitioner's corporate tax returns for the years 2000 to 2002, the beneficiary's personal tax returns, and the petitioner's quarterly wage reports for 2000 through 2003. Counsel claims "none of these records are more reliable for determining [the beneficiary]'s pay than the W-2s, affidavits, and [the] tax return that [the petitioner] produced."

The AAO finds that the evidence counsel claims is "more reliable" provides inconsistent information regarding the beneficiary's employment. Specifically, the Form W-2s were issued by [REDACTED] not the petitioner. As the petitioner failed to submit any documents related to its own tax returns or quarterly wage reports for the relevant time period, however, there is no evidence that [REDACTED] as a claimed subsidiary of the petitioner, paid the salary for the services that the beneficiary allegedly performed on behalf of the petitioner in the proffered position, despite the director's specific request for such material evidence. The AAO notes that 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). The petition must be and will therefore be denied on this additional basis.

In response to the certification, counsel states "given the fact that the U.S. Department of Labor certified the prevailing wage for the beneficiary at \$63,170, even if the director's assertion that [the beneficiary] earned less than the reported wage was correct, the beneficiary received far more than the certified prevailing wage for his position." However, as noted in the director's decision, by signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. In the totality of circumstances, including the lack of evidence regarding the petitioner's business operations combined with the fact that the beneficiary's wage statements were issued by [REDACTED] the petitioner's failure to pay the proffered wage raises unrefuted eligibility issues regarding the validity of the beneficiary's employment with the petitioner in accordance with the approved terms and conditions attested on the Form I-129. Therefore, absent sufficient, corroborating evidence to the contrary, the AAO finds that the petitioner did not pay the proffered wage and that the petitioner violated terms and conditions of employment.¹²

¹² It is noted that the director shall also send to the petitioner a notice of intent to revoke the approval of petition if the director finds that the petitioner violated the terms and conditions of the approved petition, e.g., by failing to pay the beneficiary the wage attested on the approved petition. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

D. Specialty Occupation

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the proffered position is a specialty occupation. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the 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 at 387. 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.

The petitioner stated that the beneficiary would be employed in a director of textile technology engineering operations position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "industrial engineering occupations."

The AAO reviewed the chapter of the *Handbook* entitled "Industrial Engineers," including the sections regarding the typical duties and requirements for this occupational category.¹⁴ However, the AAO finds that there is insufficient evidence that the proffered position is an industrial engineer position.

The subsection entitled "What Industrial Engineers Do" states the following about the duties of this occupation:

Industrial engineers find ways to eliminate wastefulness in production processes. They devise efficient ways to use workers, machines, materials, information, and energy to make a product or provide a service.

Duties

Industrial engineers typically do the following:

- Review production schedules, engineering specifications, process flows, and other information to understand methods and activities in manufacturing and services
- Figure out how to manufacture parts or products, or deliver services, with maximum efficiency
- Develop management control systems to make financial planning and cost analysis more efficient
- Enact quality control procedures to resolve production problems or minimize costs
- Work with customers and management to develop standards for design and production
- Design control systems to coordinate activities and production planning to ensure that products meet quality standards

¹³ All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates into the record of proceeding the chapters of the *Handbook* regarding "Industrial Engineers," "Market Research Analysts" and "Management Analysts."

¹⁴ For additional information on the occupational category "Industrial Engineers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-4> (last visited June 11, 2014).

- Confer with clients about product specifications, vendors about purchases, management personnel about manufacturing capabilities, and staff about the status of projects

Industrial engineers apply their skills to many different situations from manufacturing to business administration. For example, they design systems for

- moving heavy parts within manufacturing plants
- getting goods from a company to customers, including finding the most profitable places to locate manufacturing or processing plants
- evaluating how well people do their jobs
- paying workers

Industrial engineers focus on how to get the work done most efficiently, balancing many factors—such as time, number of workers needed, available technology, actions workers need to take, achieving the end product with no errors, workers' safety, environmental concerns, and cost.

To find ways to reduce waste and improve performance, industrial engineers first study product requirements carefully. Then they use mathematical methods and models to design manufacturing and information systems to meet those requirements most efficiently.

Their versatility allows industrial engineers to engage in activities that are useful to a variety of businesses, governments, and nonprofits. For example, industrial engineers engage in supply chain management to help businesses minimize inventory costs, conduct quality assurance activities to help businesses keep their customer bases satisfied, and work in the growing field of project management as industries across the economy seek to control costs and maximize efficiencies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-2> (last visited June 11, 2014).

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that its proffered position of "director of textile technology engineering operations" falls under the occupational category for "Industrial Engineers." In other words, the AAO finds that the petitioner has not provided sufficient information to establish that the proffered position is an industrial engineering position. For example, while counsel claims that the beneficiary "established the quality control system of all import and export of raw textile material and finished textile products, designed and implemented the engineering development programs to maximize productivity strategies; formulated and maintained the engineering operational procedures and goals and designed coordination schedules, production needs, and product assurance for engineering specifications," counsel did not substantiate his claims with substantive and corroborating

documentary evidence. Further, given the inconsistencies present in the petition, including but not limited to the lack of evidence that the petitioner ever engaged in textile import and export activities in the United States as claimed, the AAO finds that the petitioner's claim that the proffered position is an industrial engineer is not credible.

The *Handbook* provides the following information in the subsection entitled "How to Become an Industrial Engineer" for this occupational category:

Industrial engineers must have a bachelor's degree. Employers also value experience, so cooperative education engineering programs at universities are also valuable.

Education

Industrial engineers need a bachelor's degree, typically in industrial engineering. However, many industrial engineers have degrees in mechanical engineering, manufacturing engineering, industrial engineering technology, or general engineering. Students interested in studying industrial engineering should take high school courses in mathematics, such as algebra, trigonometry, and calculus; computer science; and sciences such as chemistry and physics.

Bachelor's degree programs include lectures in classrooms and practice in laboratories. Courses include statistics, production systems planning, and manufacturing systems design, among others. Many colleges and universities offer cooperative education programs in which students gain practical experience while completing their education.

A few colleges and universities offer 5-year degree programs in industrial engineering that lead to a bachelor's and master's degree upon completion, and several more offer similar programs in mechanical engineering. A graduate degree allows an engineer to work as a professor at a college or university or to engage in research and development. Some 5-year or even 6-year cooperative education plans combine classroom study with practical work, permitting students to gain experience and to finance part of their education.

Programs in industrial engineering are accredited by ABET.

Handbook, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-4> (last visited June 11, 2014).

According to the *Handbook*, industrial engineers typically need a bachelor's degree in industrial engineering. In this case, the beneficiary received a Bachelor of Science in Textile Engineering from [REDACTED] on June 7, 1964.

In the notice of revocation, the director notes that in the affidavit submitted by Mr. [REDACTED] in response to the NOIR, Mr. [REDACTED] stated that the beneficiary "investigated the potential U.S. markets to determine what products the company could produce" or "investigated whether the company should build factories for production or lease space." The director found that the duties submitted by the petitioner appear to be a blend of duties that more closely resemble those performed by a market research analyst or management analyst.

The AAO reviewed the chapter of the *Handbook* entitled "Market Research Analysts" and "Management Analysts" including the sections regarding the typical duties and requirements for these occupational categories. However, the *Handbook* does not indicate that "Market Research Analysts" or "Management Analysts" comprise occupational groups for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

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

Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, and computer science. Others have backgrounds in business administration, the social sciences, or communications.

Courses in statistics, research methods, and marketing are essential for these workers. Courses in communications and social sciences, such as economics, psychology, and sociology, are also important.

Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4> (last visited June 11, 2014).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the

Handbook, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences such as economics, psychology, and sociology are also 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" 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," 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.¹⁵ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background 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. As discussed *supra*, 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. 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 normally the minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research 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.

¹⁵ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does 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. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Similarly, the subchapter of the *Handbook* entitled "How to Become a Management Analyst" states the following about this occupation:

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Management Analysts, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-4> (last visited June 11, 2014).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the 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. Similar to market research analysts, the *Handbook* reports that many fields of study provide a suitable education 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. The petitioner has not submitted any evidence to establish that the fields business, management, economics, political science and government, accounting, finance, marketing psychology, computer and information science, and English encompass a specific specialty.

As previously discussed, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as marketing and computer information science, 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.¹⁶ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's degree is the typical entry-level requirement for management analysts, it also indicates that many fields of study provide a suitable education for management analyst positions. Thus, according to the *Handbook*, it appears that management analysts possess academic backgrounds in disparate fields of study (i.e., business, management, accounting, marketing, economics, statistics, computer and information science, and engineering).

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. Obviously, a *preference* for a candidate with a master's degree in business administration is not an indication of a *requirement* for the occupation. Even if such a degree were required and not simply preferred, as noted above, while a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, the acceptance of 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 degree in business/business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normally the 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.

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that the normal, minimum entry requirement is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (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.

¹⁶ As noted above, whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does 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. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

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

As previously discussed, the AAO finds that the petitioner has submitted insufficient documentary evidence to establish that the proffered position is an industrial engineer position. Further, the petitioner has not established that its proffered position, whether classified as a market research analyst or a management analyst, 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, there are no submissions from professional associations or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Thus, based upon a complete review of the record, the petitioner has not established 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. 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 the proffered 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.

It is further noted that, although the petitioner asserts that a bachelor's degree in textile engineering is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the claimed duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's "thirty-eight (38) years of professional accomplishments coupled with his academic background definitely make him an excellent candidate for this very specialized engineering position." However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, 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 performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may 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").

The petitioner stated in the Form I-129 petition that it has 11 employees and that it was established in 1983 (approximately 18 years prior to the H-1B submission). However, the petitioner did not submit any information regarding its employees.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

In its support letter dated December 4, 2001, the petitioner claimed that "the position is very specialized," and that "[the proffered position] is a complex high-level specialized position within our field and industry." The petitioner further claimed that the position is "a complex position and one that involves a substantial amount of autonomy in the decisions of the company." However, as discussed above, the petitioner provided insufficient probative documentation to substantiate its claims regarding its operational activities and the actual work that the beneficiary performed during the instant H-1B validity period. While the petitioner claimed that it is a textile import and export business, the record did not contain documentary evidence to establish existence of its operational activities in the United States. Further, as discussed, the beneficiary was paid by [REDACTED] instead of the petitioner. Since there the record does not contain sufficient establish that the beneficiary was employed in the proffered position and performed the duties that the petitioner claims are specialized and complex, the petitioner failed to establish that the knowledge required to perform such duties is usually associated with a bachelor's degree.

Upon review of the record of proceeding, the AAO finds that the petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are 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).

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.

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. 591-92. Moreover, as previously discussed, a simple assertion by counsel does not qualify as independent and objective evidence. 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. 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506.

When a petitioner fails to resolve discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. The record of proceeding lacks sufficient documentary evidence that establishes or corroborates the substantive nature of the beneficiary's duties. As previously noted, 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). Again, 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. 591-92.

III. CONCLUSION

Based upon a complete review of the record of proceeding, the petitioner has failed to overcome the revocation grounds specified in the NOIR and the subsequent revocation decision.¹⁷ Accordingly, the director's decision to revoke the approval of the petition is affirmed. The approval of the petition remains revoked.

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 director's decision to revoke the approval of the petition is affirmed. The petition remains revoked.

¹⁷ The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the director's decision is affirmed and the petition remains revoked for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.