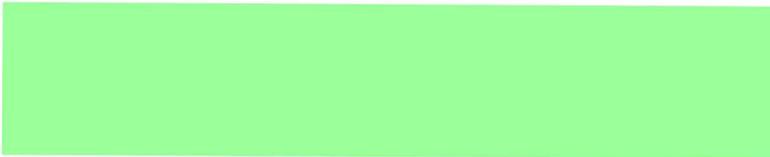
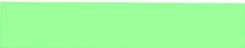


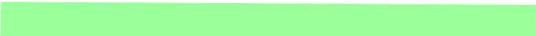


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 08 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

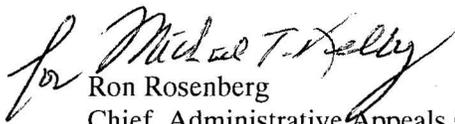


INSTRUCTIONS:

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

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

Thank you,


for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), describes itself as an "IT Development & Consulting Firm." The petitioner states that it was established in 1997, and employs 73 persons in the United States. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on each of two separate grounds, namely, that the evidence in the record of proceeding (1) failed to establish an employer-employee relationship with the beneficiary; and (2) failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion (Form I-290B), counsel's brief and additional documentation.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. FACTS AND PROCEDURAL HISTORY

In the March 25, 2013 letter in support of the petition, the petitioner stated that it "provides cost effective and quality software consultancy and out sourcing services worldwide" and that it has "experience in developing e-commerce, web-enabled applications, client server and legacy applications." The petitioner noted that it "has developed proven methodologies for downsizing and reengineering existing applications." The petitioner noted further that it is offering temporary employment to the beneficiary to perform duties as a programmer analyst for a period beginning October 1, 2013 and extending to September 12, 2016. The petitioner stated that in this role the beneficiary's job duties will be:

- 1) Allocating tasks to the team mates.
- 2) Monitoring the Team members on their work and also assessing their progress[.]
- 3) Generating the reports and sending the mails on daily basis.

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

- 4) Coordinating with Onsite Coordinators and Clients on daily basis through mails and phone (if required).
- 5) Responding to the Client mails and addressing their queries.
- 6) Analyzing the requirements and reporting any data issues or giving any suggestions for improvement.
- 7) Participating in weekly status meetings and providing the status updates to the Project Management.
- 8) Preparation of all relevant documents and creating the related Tasks in Prompt and tracking the progress daily.

The petitioner stated that beneficiary "will be an employee of [the petitioner]. [The petitioner's] end-client is [REDACTED] which has offices located in [REDACTED] MO. [REDACTED] has been retained by [REDACTED] to provide IT services in [REDACTED] MO." The petitioner included the phrase "only anticipated worksite at this time: [REDACTED] MO" and asserted that because it had no intention for additional work locations, no itinerary is required.

The petitioner referenced its contract with [REDACTED] and claimed that the agreement confirmed the petitioner as the beneficiary's employer. The petitioner also indicated that although it did not have an office at [REDACTED] locations, it would supervise the beneficiary through weekly teleconferences and status updates.

The petitioner also referenced the beneficiary's formal education and experience, noting the beneficiary had obtained a Bachelor of Technology Degree in Electrical and Electronics Engineering from [REDACTED] which had been evaluated as equivalent to a U.S. Bachelor of Science Degree in Electronics Engineering. The petitioner indicated that the beneficiary also had five years of experience in the information technology field.

As the requisite Labor Condition Application (LCA), the petitioner submitted an LCA that had been certified for a job opportunity within the occupational classification "Computer Programmers" SOC (ONET/OES) Code 15-1131, at a Level II (qualified) wage.

The initial record also included a copy of a letter on [REDACTED] letterhead, dated March 15, 2013, signed by [REDACTED], Partner, Delivery Executive. Mr. [REDACTED] indicated that [REDACTED] had contracted with the petitioner through a Web Order Invoice (WOI) and a standard Purchase Order (PO). Mr. [REDACTED] indicated further that "[i]n order to fulfill this Purchase Order [the petitioner] will select professionals" and that "[w]e expect at least thirty employees to be used in order to fulfill these WOIs and POs." Mr. [REDACTED] noted that the petitioner's employees will be working at [REDACTED], MO, the same employment location noted on the submitted LCA, and that the project is expected to last for three years.

In addition to this letter, the petitioner submitted a copy of both (1) [REDACTED] standard WOI terms and conditions, in the form of an unsigned, undated printout from [REDACTED] procurement website, and (2) [REDACTED] standard purchase order terms and conditions, also in the form of an unsigned printout from [REDACTED] procurement website.

Upon review of the initial record, the director requested additional information from the petitioner to demonstrate that it had an employer-employee relationship with the beneficiary and had the right to control the beneficiary's work. The director requested, among other things, copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed, including a detailed description of the duties the beneficiary will perform and the qualifications that are required to perform the job duties. The director further requested a description of who would supervise the beneficiary.

In a September 20, 2013 letter in response, counsel for the petitioner asserted that the following documents established the beneficiary's eligibility for the requested H-1B classification:

1. Master Application Development and Maintenance Agreement (MAA) between [REDACTED] and the petitioner.
2. Employee Offer Letter.
3. The petitioner's Employee Handbook.
4. Dr. [REDACTED], Opinion letter.
5. List of current employees in similar position as the beneficiary.
6. Copies of current employees' degrees and/or transcripts.
7. Current employees' most recent earnings statement with petitioner.
8. ICETS Educational Evaluation.

Counsel summarized the relationship of the parties as between the petitioner and [REDACTED] and asserted that the [REDACTED] Petitioner MAA confirmed the parties' agreement that [REDACTED] does not control the terms and conditions of the employment, the performance of Beneficiary's work, or the manner in which the work is done."² The MAA submitted has an effective date of May 19, 2004 and states at section 2.1: "Vendor [the petitioner] will provide information technology services to [REDACTED] on a project-by-project basis pursuant to written Statements of Work upon written request by WellPoint for such services." The MAA at section 2.2 states:

The Services to be performed by the Vendor at [REDACTED] request will be described in a Statement of Work that must be signed by officers of both parties. . . . Each Statement of Work shall state the responsibilities of the Vendor regarding such project, and the hourly rates or fixed fee for the Services, including any payment schedule. Each Statement of [W]ork shall contain a description of the relevant software, technologies, response time parameters, performance goals and Incentives. Each Statement of Work will state the name of a project manager for [REDACTED] (the [REDACTED] Project Manager"), who will be authorized to act as [REDACTED] primary contact for Vendor with respect to the parties' obligations under the Statement of Work, and the names of Vendor's key

² In support of this assertion counsel references section 14.2 of the MAA which states: "Vendor shall be responsible for each subcontractor's compliance with the terms of the Agreement as well as for subcontractor's performance of any Services."

project personnel, including (1) the name of a project manager for Vendor (the "Vendor Project Manager"), who will be authorized to act as a Vendor's primary contact for [REDACTED] with respect to the parties' obligations under the Statement of Work, and (2) the names of any other key project personnel, if any (collectively, the "Key Employees") [and the percentage of each Key Employee's time that will be dedicated to the project covered by the Statement of Work]. Each Statement of Work shall be consecutively numbered.

The petitioner also submitted two amendments to the MAA, one with an effective date of December 1, 2005, and a second with an effective date of March 1, 2006. The December 1, 2005 amendment replaced section 2.8 with the following, in pertinent part:

- (a) Selection and Performance. [REDACTED] and Vendor shall cooperate in setting staffing requirements and obligations based on the requirements of particular projects, each party's needs to develop and maintain skills, and the availability of appropriate resources, and shall, subject to scheduling and staffing consideration, attempt to honor the other party's requests with respect to any specific individuals. [REDACTED] may interview the resource to be assigned to it, or any replacement thereof, prior to his/her appointment to the assignment. [REDACTED] may accept or reject the potential resource for any reason whatsoever, including but not limited to acceptance or rejections based upon skills required, background, experience and cultural fit.

The amendment continued in this section by indicating that [REDACTED] could reject a resource with any reason within five business days of the assignment and not be billed for up to five business days. The amendment emphasized that [REDACTED] is the sole judge of performance capability.

The December 1, 2005 amendment also addressed the removal of a resource by the Vendor, indicating the parties' agreement that Vendor would not arbitrarily remove any resource acceptable to [REDACTED] during the contractual time period. Further, if any resource was removed and a suitable replacement, as defined by [REDACTED] was not supplied within a reasonable timeframe, that [REDACTED] has the right to terminate the Statement of Work.

The March 1, 2006 amendment amended section 2.2 in regard to the time period [REDACTED] would not be required to pay for a replacement resource.

Neither the MAA nor the amendments to the MAA identified the qualifications required to perform the duties of any requested work and further did not describe any proposed work. As the response to the director's RFE did not include a Statement of Work, the record before the director did not include evidence identifying [REDACTED] requirements regarding the specific work requested or qualifications to perform any requested work. Moreover, the record did not include evidence that the MAA was still in effect.

The petitioner did submit its March 25, 2013 letter confirming its offer of employment to the beneficiary. The letter repeated the description of duties as set out in the petitioner's initial support letter. The petitioner did not identify its requirements to perform the work specified in the employment offer.

The record also included a copy of the petitioner's On-Site Associates Policy Booklet dated February 1, 2013.

We have also fully considered the September 25, 2013 letter prepared by [REDACTED] Distinguished Professor in the Department of Electrical and Computer Engineering at the [REDACTED] - which we discuss in detail later in this decision. This two-page document concludes with the opinion that the proffered position's "job duties are so specialized and complex [as] to require a Bachelor's Degree in Engineering or Information Technology."

Lastly, the petitioner submitted a list of nine of its employees in the position of programmer analyst, a sampling of their payroll earnings statements, and copies of their transcripts and/or degrees. The employees' degrees included bachelor's degrees in engineering, technology (computer science/engineering), electronics and communication engineering, mechanical engineering, information technology, and a master of computer applications degree, two master's of science degrees, and a master's of science degree in mathematics. The record does not include evaluations of the foreign degrees.

Upon review of the record, the director denied the petition for the reasons stated above.

On appeal, counsel for the petitioner asserts that the director's determinations that the petitioner has not established an employer-employee relationship with the beneficiary and has not established the proffered position is a specialty occupation are based on the petitioner's failure to submit a statement of work (SOW) as it relates to the beneficiary's services to be performed at the end-client, [REDACTED]. Counsel now submits a 19-page SOW on appeal. The submitted SOW indicates that it "is effective as of the date last signed below or the date of the Purchase Order, whichever occurs first" and "shall continue in full force and effect until December 31, 2012 (the "Term")." The SOW indicates in pertinent part:

3.1. Overview – Provide support to generate various reports for the [REDACTED] [sic] Integrated Health Model team using multiple platforms including but not limited to [REDACTED] and utilizing toolsets such as Business Objects (BO) and SQL.

3.2. Objectives

* * *

(a) Vendor's services will continue from 04/01/2013 thru 12/31/2013 for the above project, unless terminated or extended earlier by agreement of the parties or in accordance with the Agreement.

(b) [The petitioner] will provide the following services:

- Work with [redacted] project team and associated stakeholders in project lifecycle activities including the planning, design, development, unit testing, system testing and user acceptance testing and production support for period identified above.

* * *

6. Program Management

[redacted] – [the petitioner's] project manager

The following are the Developers:

1 Offsite and 2 Offshore resources.

* * *

11.1 . . . This project will start on September 1, 2012 and complete by December 31, 2012, excluding planned post production support.

At section 11.2 the beneficiary is identified as resource 2 with a start date of April 1, 2013, and an end date of December 31, 2013. However, the beneficiary's location is listed "India."

Further, we note that section 6 above suggests that the referenced work would not be provided at [redacted] for it identifies "the Developers" as being "1 Offsite and 2 Offshore resources."

Moreover, the SOW is unsigned and thus does not present itself as a document that had any legal effect. As such, the document also has no significant evidentiary weight for the purposes of this appeal.

The petitioner also submitted three invoices billing [redacted] for the beneficiary's services in India in September, October, and November, 2013.

Counsel contends that the evidence established by a preponderance of the evidence that the instant petition should be approved.

II. STANDARD OF REVIEW

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

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

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

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads to the conclusion that the petitioner's claims are "more likely than not" or "probably" true.

III. LAW AND ANALYSIS

A. Employer-Employee Relationship

The first issue in this matter is whether the petitioner has established an employer-employee relationship with the beneficiary.

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)

[Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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

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

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

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

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

We reiterate that although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." *See* 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." See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

The United States Supreme Court, however, 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)).

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.³

³ 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

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." See 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 318-319.⁴

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

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly

"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).

There are also 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).

⁴ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

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

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

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

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

Applying the *Darden* and *Clackamas* tests to this matter, we find that the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." The petitioner indicated that the beneficiary will work offsite in [REDACTED] Missouri and that his work will be for the end-client, [REDACTED]. The petitioner repeatedly claims that the beneficiary will be in its direct

⁵ It is unclear why the petitioner initially indicated that its relationship with [REDACTED] was through [REDACTED] if the petitioner in fact already had a direct relationship with [REDACTED] as the evidence submitted in response to the director's purportedly shows. It is incumbent upon the petitioner to resolve any

employ and that it will maintain supervisory control over the beneficiary, even though the beneficiary will be working at [REDACTED] offices. As noted above, counsel asserts that section 14.2 of the MAA between the petitioner and [REDACTED] establishes that [REDACTED] does not control the terms and conditions of the beneficiary employment, work, or the manner in which the work is done. However, while section 14.2 indicates generally that the petitioner will maintain responsibility "for subcontractor's performance of any services," section 2.8 of the amended MAA reveals that [REDACTED] is actively involved in the interviewing and ultimate assignment of any resource the petitioner supplies. In addition, [REDACTED] may reject any resource in its sole discretion and it appears that [REDACTED] is the sole judge of a resource's performance capability for assignment to its work. These sections place significant restrictions on the petitioner's exercise of control over the beneficiary's work and the manner in which it is accomplished, while, at the same time, indicating that [REDACTED] maintains substantial control in these specific areas.

Moreover, the MAA at section 2.2 specifies that the services to be performed by the petitioner will be described in a SOW signed by officers of both parties and that it is the SOW that states the responsibilities of the petitioner. It is the SOW that contains the description of the software, technologies, and performance goals and it is the SOW that names the petitioner's primary contact and the key personnel for the project. As the petitioner did not provide a SOW for the director's review, it is not possible to identify the project to which the beneficiary would be assigned, the beneficiary's duties thereon, and the beneficiary's direct supervisor, if any.⁶

Furthermore, the latest amendment to the MAA is in 2006, thus it is not possible to conclude that the MAA is still current and active. The petitioner's submission of documentation from [REDACTED] dated in 2013, casts further doubt on whether the petitioner's MAA with [REDACTED] still exists. In this matter, the record does not include any signed documentation between the petitioner and [REDACTED] which details the agreement between the two entities and the ultimate end-client. Thus, the record in this matter does not include a current comprehensive agreement between the petitioner and [REDACTED] or a current comprehensive agreement between the petitioner and [REDACTED]

inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁶ The 19-page SOW submitted on appeal is unsigned and thus carries no probative weight as the MAA specifically required that the SOW pursuant to the MAA must be signed by both parties to the agreement. In addition, the SOW submitted on appeal includes contradictory terms, indicating that the SOW "shall continue in full force and effect until December 31, 2012" while also stating that the "Vendor's services will continue from 04/01/2013 thru 12/31/2013." Even if the SOW was signed, the inconsistent information regarding the term of the SOW casts doubt on whether the SOW was in effect when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In this matter the beneficiary will work at the end-client facility. The record does not include probative evidence of who will provide the instrumentalities and tools for the beneficiary's work – but we do also note, one, that there is no evidence that the petitioner will be providing its own proprietary applications, and, two, that it is likely that [REDACTED] will provide necessary means and instrumentalities at least by way of access to its systems. In addition, as discussed above, the one MAA submitted, even if still in effect, casts doubt on the petitioner's actual management of the beneficiary's daily work.

We recognize that it may be possible for a petitioner to establish its claimed employer-employee relationship with the beneficiary without submitting copies of all of the contractual documents that are involved in the contractual interplay among the petitioner and other business entities that culminate in the beneficiary's assignment to the particular end-client. However, to meet its burden of proof in this area the petitioner will have to at least submit credible and persuasive evidence that is sufficiently comprehensive to accurately relate the contractual terms and conditions, generated in that interplay, whose application would figure as relevant factors for weighing and balancing under the common-law employer-employee analysis discussed above. This, however, the record of proceeding has failed to do.

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

In the above regard, it is worth noting that, without credible corroborative documentation to support them, assertions about how control over the beneficiary and his or her work would be exercised will carry no weight. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner simply has not submitted sufficient documentation establishing the full operative scheme here of the types and degrees of control to be exercised by IBM, WellPoint, and IBM with regard to the day-by-day work of the beneficiary.

The evidence is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The petitioner's claim that it exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this

matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." See 8 C.F.R. § 214.2(h)(4)(ii).

B. Specialty Occupation

The next issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

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

As recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

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

We have reviewed the record in its entirety and we concur with the director's determination that the record is insufficient to establish the proffered position as a specialty occupation. To ascertain the intent of a petitioner, USCIS must look 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, location of employment, proffered wage, et cetera. The petitioner initially provided an overly broad description of the proposed duties of the proffered position while also attesting that the beneficiary would work for the end-client, [REDACTED]. On the certified LCA, the petitioner attested that the proffered position is a Level II computer programmer. The petitioner did not specify its usual minimum requirement to perform the job duties, instead the petitioner referenced the beneficiary's degree and experience.⁷ 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.

The record of proceeding in this case is devoid of information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. Even if the content of the unsigned SOW submitted on appeal merited consideration, even that document does not detail the beneficiary's specific duties to be performed and does not include information regarding the qualifications necessary to perform any of the abstract objectives listed. Thus, the record does not include a definitive description of the duties to be performed.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at

⁷ Counsel, in response to the director's RFE, asserts that in order to perform the duties of the position the candidate needs a bachelor's of science degree in engineering, information technology or a related discipline. The only support for this assertion is the opinion letter prepared by Dr. [REDACTED].

8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Upon our review of the totality of the record, we find that the petitioner has not provided substantive information and supportive documentation sufficient to establish even that, in fact, the beneficiary would be performing services primarily as a computer programmer. The petitioner has also failed to establish that, at the time the petition was filed, it had secured non-speculative work for the beneficiary that corresponds with its claims regarding the nature of the work it described in its submitted position description. As the petitioner in this matter has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that the position proffered here is a specialty occupation.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. We affirm the director's determination that the petitioner has not provided a description of the actual work the beneficiary will perform for the end-client. For this reason, the appeal will be dismissed and the petition denied.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of the appeal on the issue of specialty occupation.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

To make its determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

We recognize the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸

⁸ Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

In this matter, the petitioner identifies the proffered position as a programmer analyst on the Form I-129 and attests on the LCA that the position falls within the parameters of the Computer Programmers occupational classification identified by SOC (ONET/OES code) as 15-1131. In the chapter on computer programmers, the *Handbook* provides the following overview of the occupation:

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

The *Handbook* lists the typical duties of a computer programmer as:

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

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited June 30, 2014).

Regarding the education and training of a computer programmer, the *Handbook* reports:

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited June 30, 2014).

If, in fact, the proffered position is that of a computer programmer, as the petitioner attested on the submitted LCA, the *Handbook* does not support the petitioner's claim that the proffered position is a specialty occupation. That is, the *Handbook's* pertinent information indicates that a position's inclusion within the Computer Programmers occupational group is not sufficient in itself to establish the position as one for which at least a bachelor's degree or the equivalent in a specific specialty is normally a minimum requirement for entry.

Although the *Handbook* indicates that most computer programmers have a bachelor's degree it also indicates that some employers hire workers who have an associate's degree. Accordingly, a bachelor's degree is not the minimum requirement necessary to enter into the occupation. In addition, although most programmers get a degree in computer science or a related subject "most" is not indicative that a computer programmer position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)). The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmer positions require at least a bachelor's degree in computer science or a closely related field, it could be said that "most" computer programmer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the generally described position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Although the position is generally described and it is not apparent that the proffered position could be classified as a computer systems analyst, we have reviewed the *Handbook's* report on the education and training for such a position.⁹ In the chapter on computer systems analysts, the *Handbook* indicates at most that a bachelor's degree in computer or information science may be a common preference, but not a standard occupational, entry requirement. In fact, this chapter notes that many systems analysts only have business or liberal arts degrees and skills in information technology or computer programming.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited June 30, 2014).

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must demonstrate that a baccalaureate or higher degree in a specific discipline is normally the minimum requirement for entry into the particular position. Thus, the proffered position must require a precise and specific course of study that relates directly and closely to the position in question. Although a general-purpose bachelor's degree, or a degree in a variety of fields, may be acceptable for a particular occupation, such general requirements do not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position. Accordingly, the *Handbook* does not identify a degree in a specific discipline as required to perform the duties of either a computer programmer or a computer systems analyst as here described.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, in order to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) it is incumbent upon the petitioner to provide other persuasive evidence that the proffered position would satisfy this criterion. However, as will be discussed, the petitioner has not submitted such evidence.

In that regard, the petitioner submitted that previously mentioned opinion letter prepared by Dr. [REDACTED]. Here we will discuss why we accord no probative value to that document towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁹ Although the petitioner did not attest that the proffered position falls within the occupational classification of "Computer Systems Analyst" on the submitted LCA, the *Handbook's* chapter on computer systems analysts, includes a brief description of a programmer analysts position. In this chapter, the *Handbook* states that programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited June 30, 2014).

In the letter dated September 26, 2013, Dr. [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position, (2) states that he has been supplied with "company information" and then references the petitioner's website, (3) lists six of the duties the petitioner described as proposed for the beneficiary, (4) lists the duties of a computer programmer as set out in the O*NET's description of the occupation, and (5) inexplicably asserts that the six responsibilities listed by the petitioner correspond to some of the duties listed in the O*NET's description of duties. Dr. [REDACTED] then states his belief that a programmer analyst position encompassed skills learned in an IT or closely related bachelor's degree program and that "in the US these kinds of skills require a minimum of a Bachelor's Degree in Engineering or Information Technology." Dr. [REDACTED] concluded that, in his opinion, the petitioner's position required "a minimum of a Bachelor's Degree in Engineering, Information Technology, or closely related field."

First, Dr. [REDACTED] submission does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed six of the responsibilities and without explanation or analysis claimed that the generally described duties corresponded to some of the duties described in the O*NET's report on computer programmers. As a result, the extent to which Dr. [REDACTED] analyzed the petitioner's list of responsibilities for the proffered position prior to formulating his letter is not evident.

Next, Dr. [REDACTED] notes that his analysis is limited to the information provided by the petitioner's website and the percentage breakdown of the programmer analyst position at the petitioner. Accordingly, Dr. [REDACTED] opinion is not accompanied by, and does not expressly indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties supplied by the petitioner would actually require. Nor does Dr. [REDACTED] letter articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. Nor does Dr. [REDACTED] note that the beneficiary's actual work will be performed for a third party. Dr. [REDACTED] also fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Dr. [REDACTED] has done here.

It is important to note that Dr. [REDACTED] states that his opinion is "limited to the information provided, and my educational experience and judgment."

With regard to the "information provided" about the proffered position, we see that the letter states that "the attorneys representing this case have provided [him] with":

- 1) [Petitioner's] company information, <http://www.tetrasoft.us/contactus.html>.

2) Percentage breakdown of the Programmer Analyst position at [the Petitioner].

* * *

Because Dr. [REDACTED] does not provide a copy of the "percentage breakdown" which apparently was a material consideration in the formation of his opinion, we find that his submission is deficient on its face, as materially incomplete. It does not provide us with the opportunity to independently review and fairly evaluate the basis of one of the grounds of Dr. [REDACTED] opinion. Also, as a body charged with the responsibility to determine issues based upon the content of the record of proceeding before us, we should not speculate as to the content of the "percentage breakdown" or assume that it is either consistent or inconsistent with information that the petitioner provided within this record. This aspect alone is sufficient reason for us to accord no probative value to the opinion that Dr. [REDACTED] pronounced in his letter, for it leaves in doubt a material part of the factual foundation upon which he apparently relied as a basis for his opinion.

We also note that the only "company information" that Dr. [REDACTED] seems to credit to the referenced Internet site is the following promotion-like statement:

[The petitioner] has been providing high quality and cost effective software consultancy and outsourcing services to their clients in the USA, Europe, and India. They harness the power of Information Technology and use a low risk global delivery model to help their customer's secure a competitive edge in their respective businesses.

However, in the absence of any countervailing explanation from Dr. [REDACTED], that statement holds no substantive value towards establishing the proffered position as a specialty occupation.

We next note that Dr. [REDACTED] letter stated that "[i]n a broad sense, a person holding the position of Programmer Analyst (from the O*NET under Computer Programmer description) should be able to "perform the duties listed in the O*NET's description." Dr. [REDACTED] then listed six of the duties which the petitioner had described for the position proffered here, specifically, the petitioner's list of responsibilities of: allocating tasks to team members, assessing team members' progress, generating progress reports, responding to clients' queries, requirements analysis, and participating in weekly status meetings. Dr. [REDACTED] opined that the six responsibilities listed by the petitioner corresponded with the following list of duties as outlined by O*NET:

Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment[;] Perform systems analysis programming tasks to maintain and control the use of computer systems software as a systems programmer.

Dr. [REDACTED] claimed that a programmer analyst position encompassed skills learned in an IT or closely related bachelor's degree program and "[i]n the US these kinds of skills require a minimum of a Bachelor's Degree in Engineering or Information Technology." Dr. [REDACTED] asserted that the degree requirement is common to the industry in parallel positions among similar

organizations and that the nature of the position is specialized and complex. Dr. [REDACTED] concluded that in his opinion, the petitioner's programmer analyst position required "a minimum of a Bachelor's Degree in Engineering, Information Technology, or closely related field."

Aside from the substantial deficiencies that we have already found in Dr. [REDACTED] submission, we now add the following aspects, which also devalue the submission below any probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The letter provides little substantive analysis as to how Dr. [REDACTED] arrived at his opinion as to the educational requirements for the proffered position. Each of the six job-responsibilities that Dr. [REDACTED] ascribes to the proffered position is a generalized statement of a generalized and rather vague function which, we find, does not in itself convey the need for any particular level of educational attainment of knowledge of any body of highly specialized knowledge. The same holds even for all of those duties considered in the aggregate, for they are listed as no more than:

- Allocating tasks to team members.
- Assessing team members' progress.
- Generating progress reports.
- Responding to clients' inquiries.
- Requirements analysis.
- Participate in weekly status meetings.

Without persuasive explanation or justification the opinion letter simply identifies those vague and abstract duties with more specific duties that the O*NET attributes to computer programmer positions and then pronounces that "the "job duties are so specialized and complex [as] to require a Bachelor's Degree in Engineering or Information Technology."

In light of all of its aspects discussed above, we find that the Dr. [REDACTED] submission is a conclusory and perfunctory document that lacks a sufficient factual and analytical foundation to merit any probative value. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Finally, there is an aspect of Dr. [REDACTED] document that affirmatively weighs against the petitioner's specialty occupation claim. That aspect is Dr. [REDACTED] conclusion that the proffered position requires "a minimum of a Bachelor's Degree in Engineering, Information Technology, or closely related field." (It is this conclusion that counsel apparently relies upon when asserting that the petitioner requires a bachelor's degree in engineering, information technology, or a closely related field in order to perform the duties of the proffered position.)

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

The issue here is that the fields of study specified include engineering, a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering, computer science or information systems or any related analytic or scientific discipline. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the generally described position proffered in this matter.

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

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Again, USCIS has consistently stated that, 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 139, 147 (1st Cir. 2007). As such, even if the substantive nature of the work had been established, which it has not, the instant petition could not be approved for this additional reason.

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

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

As stated earlier, 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).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. There are no submissions in the record from professional associations, individuals, 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. Although Dr. [REDACTED] asserted that the degree requirement is common to the industry in parallel positions among similar organizations, Dr. [REDACTED] failed to articulate a foundation for this assertion. As noted above, he failed to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information to support his opinion, an opinion even more broadly-based than that of the *Handbook*.

Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations 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 petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The petitioner in this matter provided an overview of the duties of the proffered position and submitted limited evidence from the end-client. That is, it is not clear from the record whether the beneficiary will write code, perform other low-level technical duties, monitor systems, supervise team members, or provide client support. Thus, it is not possible to ascertain what the beneficiary will actually do on a routine basis. Again, absent supporting documentary evidence

the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Thus, the petitioner fails to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that any particular level of relative complexity or uniqueness can even be determined that would require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

Consequently, as the evidence of record does not demonstrate that the proffered position is more complex or unique than positions within its Computer Programmers occupational classification that can be performed by persons who do not have at least a baccalaureate degree in a specific specialty or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the petitioner has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, by showing that for the particular position that is the subject of the petition it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner submitted a list of nine of its employees purportedly in the position of programmer analyst, a sampling of their payroll earnings statements, and copies of their transcripts and/or degrees.

We note first that the array of degree majors or academic concentrations reflected in the submitted documentation does not appear to be consistent with a requirement for a degree in a specific specialty or within a range of specialties with core bodies of knowledge that are closely related to the requirements of the proffered position. The referenced employees' degrees were in a variety of fields, including bachelor's degrees in engineering, technology (computer science/engineering), electronics and communication engineering, mechanical engineering, information technology, and a master of computer applications degree, two master's of science degrees, and a master's of science degree in mathematics.¹⁰

The petitioner does not explain how these degrees specifically relate to the overview of the duties described. As the petitioner accepts a number of different degrees to perform the duties of the position proffered here, and has failed to describe how the different degrees relate specifically to the duties described, the petitioner has not satisfied this particular criterion. Acceptance of such a broad range of degrees to purportedly perform the duties of the position is tantamount to an admission that the position proffered here is, in fact, not a specialty occupation.

In addition, there are even more fundamental issues with the employees' degree information submitted by the petitioner.

¹⁰ In addition, the majority of these degrees/transcripts have been obtained from foreign educational institutions. As the petitioner has not submitted comprehensive evaluations of these degrees, it is not possible to conclude that any of the foreign degrees are equivalent to a bachelor's degree issued by an accredited U.S. university.

First, as noted earlier in this decision, it is the substantive duties and their requirements as performed in the position's day-to-day operations - and not a position's job title - that are most pertinent to the determination of the specialty occupation issue. Here, however, the petitioner merely identifies the positions of the sampled employees as "Programmer Analyst," without providing any information as to how the duties assigned to each of those positions compare with the duties that the petitioner has ascribed to the proffered position. Thus, the petitioner has not established that the proffered position and the others to which the petitioner assigned "Programmer Analyst" titles are substantially the same and thus are proper subjects for comparison. In this regard, we note in particular our earlier comments and findings with regard to the generalized and vague descriptions of the duties that the petitioner has promoted as constituting the proffered position as a computer programmer position. If such broad duty descriptions are the petitioner's basis for ascribing the "Programmer Analysts" title to the nine position that it now references, then we would likely find that the petitioner has not even established that those positions were computer programmer positions and as such related to the issues before us.

The next fundamental issue that undermines the weight of the educational information provided about the nine positions is that they are not presented as representing even the full range of such positions that were held at the time of that the information was submitted. This is obvious upon close reading of the following language of introduction by counsel:

[T]he petitioner attests that it has hired multiple workers for this position who hold at least a Bachelor's degree. Enclosed please find a list of current employees who presently hold the position of Programmer Analyst with [the Petitioner] . . . and each employee's credentials. . . .

The fact that "multiple workers" have been hired with degrees begs the question of how many may have been hired without them.

Further still, as a company for whom the petitioner's Form I-129 specifies 1997 as the founding date, we would expect that the petitioner provide a more expansive list than just current employees.

Also, the petitioner's submissions miss a critical element for satisfying this criterion, namely, the requirement to not just show some pertinent hiring-actions, but rather providing a sufficient documentary history *of exclusively recruiting and hiring* only persons with at least a bachelor's degree or the equivalent in a specific specialty.

We also observe that while a petitioner may believe and assert that a proffered position requires a degree in a specific specialty, 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See*

Defensor v. Meissner, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is not necessitated by the actual performance requirements of the proffered position, it would not satisfy this criterion.

In the above regard, we specifically find that as reflected in all of the comments and findings that we have made about its deficiencies, the evidence of record does not provide a credible basis for the petitioner's assertions about the proffered position's degree requirements.

For all of the reasons discussed above, we conclude that the petitioner has failed to satisfy the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal recruiting and hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Given the broad and generalized functional descriptions of the position's duties, which we have discussed, relative specialization and complexity have not been developed by the petitioner as a distinguishing aspect of the nature of the proffered position's duties. Thus, the evidence of record does not establish the nature of those duties as more specialized and complex than the nature of the duties of positions with the pertinent occupational classification (Computer Programmers) whose duties are not so specialized and complex as to require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

In addition to the lack of evidence of sufficient specificity and complexity to elevate the duties of the proffered position above the duties of other positions in the pertinent occupational classification whose performance does not require knowledge usually associated with at least a bachelor's or higher degree in a specific specialty, we also note that petitioner has submitted an LCA that was certified for only a Level II prevailing-wage, which is appropriate for a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment.¹¹ We find this aspect of the record somewhat inconsistent with the level of specialization and complexity required to satisfy this particular criterion.

Accordingly, the petitioner has also failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the record, 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.

¹¹ See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

As the petitioner has not established the position proffered here is a specialty occupation, the beneficiary's qualifications will not be addressed. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

IV. CONCLUSION

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

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

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

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