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



U.S. Citizenship
and Immigration
Services

DATE: **MAR 11 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

for *Michael T. Kelly*
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 a "Software Development" business. The petitioner states that it was established in 1996, and employs 162 personnel in the United States. Seeking to employ the beneficiary in a position to which it assigned the job title "Systems Analyst, the petitioner filed this petition 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 two separate and independent grounds, namely, that the petitioner (1) failed to establish an employer-employee relationship; 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), and the petitioner's brief.

Upon review of the entire record of proceeding, the AAO finds 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. Standard of Review

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

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

* * *

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. at 375-76.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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*, the AAO finds that the director's determinations in this matter were correct. Upon its 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, the AAO finds 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 the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. Facts and Procedural History

In the March 18, 2013 letter in support of the petition, the petitioner stated that it is "largely involved with product development and providing services by rendering analysis, development, and maintenance in software projects." The petitioner noted that it "focus[es] on providing project analysis and design, systems integration, custom application development, web application development, and e-commerce solutions to [its] clients." The petitioner noted further that it is offering temporary employment to the beneficiary to perform duties as a systems analyst in [REDACTED], Ohio and [REDACTED] North Carolina. The petitioner provided a list of the beneficiary's proposed duties as a systems analyst as follows:

- Analyze computer problems of existing and proposed systems and initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients.
- Gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems.
- Plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients' business processes.
- This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems.
- Employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems.
- Analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used, and format the output to meet user's needs.
- Develop complete specifications and structure charts that will enable computer users to prepare required programs.
- Once the systems have been instituted, coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

[Paraphrased and bullet points added for clarity.]

The petitioner stated that the "usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field." The petitioner also stated that the beneficiary "will be a direct employee of our company, and as such, our company retains supervisory control of the Beneficiary, including the right to hire and fire him and to receive periodic reports from him." The petitioner also stated that it pays any of the beneficiary's employment benefits; "retains the right to control the beneficiary's daily activities and the manner and means of his work, if required"; and evaluates its employees' work.

As the requisite Labor Condition Application (LCA) supporting the petition, the petitioner submitted an LCA that had been certified for use with a job opportunity that would be within the "Computer Systems Analysts" SOC occupational classification, (ONET/OES) Code 15-1121, at a Level I (entry level) wage.

The petitioner provided an itinerary of services for the beneficiary.² The itinerary noted that the beneficiary will perform services at [REDACTED] North Carolina and that the "[s]uccession of contracts: [is the petitioner] - [REDACTED]". The petitioner provided a revised version of the beneficiary's duties as follows:

- Develop RPD using OBIEE Admin Tolol, create reports using OBIEE Presentation services
- Design and Develop ETL Customization using Various tools of information Power center
- Manage, design and schedule ETL loads using scheduling tools
- Create SQL queries and design HTML webpages whenever necessary.

The petitioner indicated that the beneficiary shall perform the work during normal business hours (8:00 am to 5:00 pm) although the beneficiary may be expected to work some nights and weekends.

The initial record also included the petitioner's partially redacted Professional Services Agreement with [REDACTED] dated October 5, 2009, in which the petitioner is referred to as the subcontractor and [REDACTED] is referred to as the company. The October 5, 2009 agreement noted that the subcontractor "will provide the services of it's [sic] CONSULTANTs to undertake technical related services as applicable directly to COMPANY or indirectly to COMPANY's Client(s) (hereinafter referred to as 'CUSTOMER')." The agreement also provided that "CONSULTANT will provide Computer Programming Services to CUSTOMER" as designated on a statement of work (SOW).

The record further included a March 11, 2013 SOW signed by representatives of the petitioner and [REDACTED] dated June 12, 2012, which identified the beneficiary as the consultant. The SOW noted the start date of the work as March 13, 2013 and the estimated length of engagement as 12 months with possible extensions. The SOW stated (emphasis added):

The CONSULTANT will assist the CUSTOMER by providing Software Services to the CUSTOMER. Approximate working hours will be 8 am to 5 pm Monday through Friday *or as determined by the CUSTOMER from time to time.*

Any time over eight hours a day or forty hours a week *must be approved by the CUSTOMER* or the authorized party/parties prior to working the extra time.

² The initial itinerary submitted is on the letterhead of "[REDACTED]". Subsequently, the petitioner submitted an itinerary on its own letterhead and noted the error.

The CONSULTANT will be responsible for all equipment (Laptop Computer and Software) *that the CUSTOMER may require the CONSULTANT to bring for his use at the CUSTOMER Site, if any.*

The petitioner also submitted a March 26, 2013 letter signed by the president of [REDACTED] which indicated that the beneficiary is currently assigned to a project at [REDACTED] through [REDACTED]'s contracts with [REDACTED] and the petitioner. The [REDACTED] representative reiterated the petitioner's claim that the petitioner "retains supervisory control of [the beneficiary] including the right to hire and fire him and to receive periodic reports from him."

The petitioner further provided a copy of its March 21, 2013 employment offer to the beneficiary, a copy of the employee handbook, its organizational chart, and a blank performance appraisal form, among other items. The petitioner's organizational chart showed its systems analysts reporting to the SDG Manager, who in turn reported to the SDG Applications & Technology Head, who reported to the president/CEO/CTO.

Upon review of the initial record, the director issued an RFE that 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 also 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 that the beneficiary would 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 its July 2, 2013 letter responding to the RFE, the petitioner emphasized that the beneficiary will work at [REDACTED] in North Carolina and will not work on in-house projects. The petitioner claimed that although the beneficiary will be located offsite, he will be supervised by the petitioner and will remain directly employed by the petitioner. The petitioner indicated that the beneficiary's assignment to [REDACTED] is expected to last for the entire requested validity period.

The petitioner submitted a May 16, 2013 letter signed by [REDACTED] Business Intelligence IT Manager for [REDACTED] Mr. [REDACTED] stated:

[The beneficiary's] Employer ([the petitioner]), is responsible for the supervision of its employees and/or contractors, paying its employees and contractors salaries and/or fees carrying out such personnel actions as hiring, firing, providing vacation, insurance, employee benefits, and compliance with workers compensation and all other applicable laws affecting his employer and its sponsored employees.

Mr. [REDACTED] also stated:

[The beneficiary] has been working at [REDACTED] as a consultant, under my direct supervision in the implementation of [REDACTED] **Implementation & Enhancements**. The current contract is ongoing Contract and long term and [the beneficiary], who is a key player required in the project to see the completion and, possibly, beyond to provide support.

His job title is Oracle Business Intelligence Technical Consultant (frequently referred to as a System Analyst and similar terms in industry shorthand) and will perform the following duties required to fulfill the terms of the contract at [REDACTED]

- ❖ Setting up the Physical Layer of the Oracle Business Intelligence Enterprise Edition.
- ❖ Setting up the Business Model and Presentation Layer of the Oracle Business Intelligence Enterprise Edition.
- ❖ Working on integration of ABS with BI using OBIA.
- ❖ Interact with End Users if needed.
- ❖ Build reports using Oracle Business Intelligence Enterprise Edition.
- ❖ Assist [REDACTED] wherever needed and suggest any improvements.
- ❖ Help with Unit and Integration Testing.

Mr. [REDACTED] also stated: "[a]s [the beneficiary's] manager, I have firsthand knowledge of the duties that he will be performing for this assignment. His services are valuable to our organization."

The petitioner also provided a copy of its employment agreement with the beneficiary dated March 22, 2013, and signed by both parties on March 28, 2013. The petitioner points out, in part, that the employment agreement states:

Duties rendered away from the Employer's premises will not alter the nature of the employment relationship and Employee will remain under the supervision of Employer and subject to the Employer's policies and procedures.

If Employee is directed to render services away from Employer's business premises, Employee shall report back to Employer 4 time(s) per month for an evaluation of progress, performance, and goals. Employee will also be required to maintain timesheets of worked [sic] performed at other premises and will provide the timesheets to Employer.³

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

³ Although the next sentence in this paragraph indicates "Employer contact for such reporting is;" the employment agreement does not provide a name or title identifying to whom the employee should report.

On appeal, the petitioner asserts that the Service erred in finding that the totality of evidence provided does not demonstrate that it will maintain control over the beneficiary's work. The petitioner repeats its previous claims and references to previously submitted documents. The petitioner notes that the updated itinerary of service shows the succession of contracts between the petitioner and the end client and that the documents "demonstrate that the Petitioner will have and maintain the right to control when, where, and how the Beneficiary performs the work at [redacted] end-client site." The petitioner also provides two SOWs prepared by [redacted] and submitted to [redacted]. The first SOW - dated December 12, 2012, with a start date of January 1, 2013, extended for a twelve-month period - noted that [redacted] has been invited to assist in developing manufacturing Business Intelligence frame work leveraging the already implemented Business Intelligence architecture in an enhancement phase. The SOW indicated that that it targets phase three called the BI enhancement phase, where the enhancement requests will be sent in the form of new "CEMLIs". [redacted] proposed project resources for phase three included a project manager, an onsite lead consultant, an Oracle EBS Consultant, a BI Consultant, and an ETL Consultant. The SOW noted that the location for the onsite work is the [redacted] location in [redacted] North Carolina and that [redacted] would ensure the timely availability of required software and hardware and various environments, test data, access to the OBIEE/Source system, and DBA support.

A second SOW dated June 4, 2013, indicated that the work would be extended for a six-month period and included essentially the same information as the first SOW.

To support its claim that the proffered position is a specialty occupation the petitioner also repeats the descriptions of the beneficiary's proposed duties as set out in the initial letter from [redacted] and the May 16, 2013, [redacted] letter submitted in response to the RFE.

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)

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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.

The AAO reiterates 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.⁴

⁴ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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).

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 318-319.⁵

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 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,

⁵ 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))).

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 conclude 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] North Carolina and that his work will be for the ultimate end-client, [REDACTED]. The petitioner repeatedly claims that the beneficiary will be in its direct employ and that it will maintain supervisory control over the beneficiary, including retaining "the right to control the beneficiary's daily activities and the manner and means of his work, if required." The petitioner's March 11, 2013 SOW with [REDACTED] which identifies the beneficiary as the consultant who will provide computer programming services to its customer/client, indicates however that the beneficiary's approximate working hours could be determined by [REDACTED]'s customer from time to time and that any hours additional to the forty-hour work week must be approved by the customer. Moreover, in response to the director's RFE, the representative of the end-client indicates he is the individual who directly supervises the beneficiary in the implementation of his work and that "[a]s [the beneficiary's] manager, I have firsthand knowledge of the duties that he will be performing for this assignment." Thus, the record identifies the end client as the entity ultimately responsible for supervising and managing the beneficiary's work. It is the end client, not the petitioner, who controls the type and timing of work that is performed.

The petitioner's agreement with [REDACTED] which allows [REDACTED] clients to dictate the amount of work and the end client's statement that it supervises and manages the beneficiary's work undermines the petitioner's claim that it is the entity that supervises and controls the beneficiary's actual day-to-day work. We observe that the petitioner's employment agreement, for example, requires only that the beneficiary (1) report to the petitioner four times per month and (2) also maintain timesheets of the work performed. In conjunction with the lack of any evidence of a the petitioner maintaining a supervisory or management presence at the beneficiary's work location, this fact further confirms that the beneficiary's daily tasks are directed, reviewed, and assessed by the end-client. The petitioner has not established that it controls the beneficiary's work for the end client. As the evidence of record does not establish how the petitioner supervises the beneficiary or how it controls his daily work at the [REDACTED] North Carolina worksite, the petitioner has not established the necessary elements to establish the employer-employee relationship.

In addition, the record does not demonstrate that the beneficiary will use the tools and instrumentalities of the petitioner. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are 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 the work will 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. In this matter the beneficiary will work at the end-client facility. The record shows at most that the beneficiary may be required to provide his own laptop and software, but that it is the end client that will ensure the timely availability of required software and hardware and various environments, test data, access to the OBIEE/Source system, and DBA support. In addition, as discussed above, the record shows that it is the end-client that will supervise and manage the beneficiary's actual daily work. Again, the record does not establish that it is the petitioner that exercises day-to-day control over the beneficiary and the content and quality of his work. Accordingly, the petitioner has not substantiated the employer-employee relationship.

In sum, we find that there is not sufficient relevant, probative, and credible evidence to lead us to conclude that it is more likely than not that the petitioner and the beneficiary would have that employer-employee relationship that this segment of the decision has discussed as essential for finding that the petitioner qualifies as a United States employer as defined in the H-1B regulations.

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. 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)). 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.

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

The AAO reviewed the record in its entirety and concurs with the director's determination that the record is insufficient to establish the proffered position as a specialty occupation. 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.*

To determine the sufficiency of the evidence with regard to the specialty occupation issue, USCIS must, of course, review and evaluate the weight of the Form I-129 and the allied documents filed in support of the petition. Here we find that the petitioner provided an overly broad description of the proposed duties of the proffered position. On the certified LCA, the petitioner attested that the proffered position is a Level I computer systems analyst. The petitioner also asserted that the "usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field." While we find that the relatively abstract descriptions of the proposed duties generally comport with generalized duties that can be ascribed to the Systems Analyst occupational group, we also find that the duties as so described do not detail the proposed duties with sufficient specificity to determine either the substantive work that their actual performance would entail or any specific educational level of highly specialized knowledge in any specific specialty that would be required to perform that work.

The end-client, in a May 16, 2013 submission, identified the beneficiary as an Oracle Business Intelligence Technical Consultant and indicated that the beneficiary would set up the physical layer and the business model and presentation layer of the Oracle Business Intelligence Enterprise Edition (OBIEE) as well as work on integration of ABS with BI using OBIA, build reports using OBIEE, and help with unit and integration testing. The end-client added that the beneficiary will interact with end users if needed and assist wherever needed and suggest any improvements. The entity that contracted with [REDACTED] notes, in the SOW provided on appeal, that its understanding of the proposed work encompassed phase three - the BI enhancement phase - as phase one (the study phase) and phase two (the execution phase) had been completed. Although this information provides more detail regarding the actual duties the beneficiary will perform, it is not possible to ascertain if the beneficiary's duties encompass the duties of a specialty occupation. It is not possible to conclude from the information provided that these duties require the theoretical and practical application of a body of highly specialized knowledge and the 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.

Assuming *arguendo* that the proffered duties as described above would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

As a preliminary matter which materially impacts upon the AAO's analyses and ultimate conclusion on the specialty occupation issue, we note that to the extent that they are described in the record of proceeding, the proposed duties and by extension, the position which they are said to comprise, are not presented with substantive details and explanation sufficient to establish that they exceed the range of duties and associated positions that fall within the Systems Analysts occupational category but do not require the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in any specific specialty.

As a corollary, we also find that the record of proceeding lacks persuasive explanation and supportive documentation showing any objective measures or standard by which the particular position and its duties here proffered should be regarded as more complex, unique, and/or specialized than Systems Analysts positions and their constituent duties that do not require at least a bachelor's degree in a specific specialty or the equivalent.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns 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.

The AAO recognizes 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.⁶

In this matter, the petitioner identifies the proffered position as a computer systems analyst. In the chapter on Computer Systems Analysts occupational category, the *Handbook* provides the following overview of the occupation:

Computer systems analysts study an organization's current computer systems and procedures and design information systems solutions to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

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

- Consult with managers to determine the role of the IT system in an organization

⁶ The AAO 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/>.

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

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

Systems designers or *systems architects* specialize in helping organizations choose a specific type of hardware and software system. They translate the long-term business goals of an organization into technical solutions. Analysts develop a plan for the computer systems that will be able to reach those goals. They work with management to ensure that systems and the IT infrastructure are set up to best serve the organization's mission.

Software quality assurance (QA) analysts do in-depth testing of the systems they design. They run tests and diagnose problems in order to make sure that critical requirements are met. QA analysts write reports to management recommending ways to improve the system.

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.

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 Feb. 25, 2014).

The duties described by the end-client in this matter depict a limited set of duties focused on a small segment of the Oracle Business Intelligence Enterprise Edition. The information provided by [REDACTED] further limits the duties to phase three, enhancing an already studied and executed system. Moreover, it is not clear what role the beneficiary will fill within the contract specifications as outlined by [REDACTED]. The position, as described by [REDACTED] and

corresponds to no more than a generally routine or generic systems analyst position with no dimensions of complexity, uniqueness, and/or specialization that would elevate it above the range of systems analyst positions not requiring at least a bachelor's degree in a specific specialty or the equivalent. There is simply not enough information regarding the actual duties of the proffered position to conclude otherwise.

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

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

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

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

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

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 Feb. 25, 2014).

Here, although the *Handbook* indicates that most systems analysts have a bachelor's degree in a computer or information science field it also indicates that some employers hire workers with business or liberal arts degrees. In addition, although the *Handbook* reports that most systems analysts hold a degree in a computer or information science subject, "most" is not indicative that a computer systems analysts 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)(I)). 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 systems analysts positions require at least a bachelor's degree in computer or information science, it could be said that "most" computer systems analysts 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 and limited 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.

Accordingly, the *Handbook* does not provide a basis for us to conclude that the proffered position's inclusion within the Systems Analysts occupational classification is sufficient to establish the position as for which a bachelor's degree or higher or its equivalent in a specific specialty is normally the minimum requirement for entry – as would be required to satisfy this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 a computer systems analyst as here described.

We observe as well that the petitioner asserted that the usual minimum requirement for performance of the job duties of a computer systems analyst is a bachelor's degree, or equivalent, in computers, engineering, or a related field. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (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).

In any event, as the *Handbook* indicates that the Systems Analysts occupational group includes positions held by persons without at least a bachelor's degree or the equivalent in a specific specialty, the proffered position's inclusion within the Systems Analysts occupational group is not in itself sufficient to establish it as a particular position for which at least a bachelor's degree in a specific specialty or the equivalent is a normal requirement for entry.

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, 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 persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The petitioner has not provided such additional probative evidence establishing that a degree in a specific discipline is required.

Moreover, the AAO observes that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. 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, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a 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.

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

As 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. Although the petitioner claimed that the "minimum prerequisites for the offered position clearly mark it as a specialty occupation," the petitioner has not submitted documentary evidence in support of the claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*. Accordingly, based upon a complete review of the record, we find that 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 the information provided by the end-client is limited and insufficient to analyze. That is, it is not

clear from the record's descriptions whether the beneficiary will primarily be writing code or performing other low-level technical duties. 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, id.* Thus, the petitioner fails to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

Further, the AAO again observes that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. Paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is meant for positions in which the beneficiary would perform routine tasks requiring limited, if any, exercise of independent judgment; the beneficiary's work would be closely supervised and monitored; and he or she would receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. 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.

Additionally, given the *Handbook's* indication that computer systems analysts positions do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into those occupations, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.⁷

Thus, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other computer systems analysts positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, 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). Moreover, we here incorporate into this analysis this decision's earlier comments and findings about the fact that the evidence of record does not elevate the position or

⁷ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Computer Systems Analysts," <http://flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=16740&year=13&source=1> (last accessed Feb. 25, 2014).

its constituent duties above a Computer Systems Analysts position not requiring at least a bachelor's degree or the equivalent in a specific specialty.

Turning to the third criterion, we next find that the petitioner has not provided evidence that it previously employed anyone to perform the duties of the proffered position. Accordingly, the petitioner's recruiting and hiring history cannot be examined. 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 generated and necessitated by the performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described and explained with sufficient specificity to show that they are more specialized and complex than a computer systems analysts position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. We here also incorporate this decisions earlier comments and findings with regard to the deficiencies of the descriptions of duties.

In addition to the lack of sufficient specificity to distinguish the proffered position from other computer systems analysts positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.⁸ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁸ 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.

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.

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

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

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

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