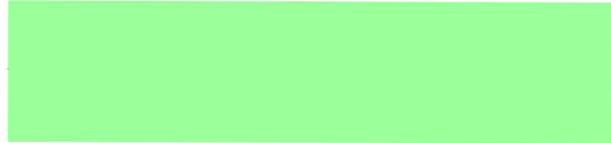
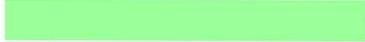


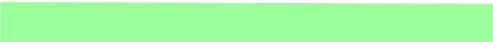


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 31 2014** OFFICE: CALIFORNIA SERVICE CENTER 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

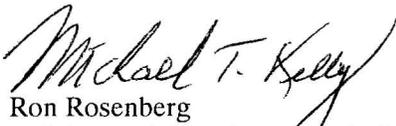
SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

  
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 "Information Technology Services" business. The petitioner states that it was established in 2006, and employs 38 personnel in the United States. It seeks to employ the beneficiary in a position to which it assigned the job title Computer Systems/Systems 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 determining that the petitioner failed to establish that the duties of the proposed position comprise a specialty occupation and that the petitioner has sufficient work for the requested period of intended employment.

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), the petitioner's statement and previously submitted documentation.

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.<sup>1</sup> Accordingly, the appeal will be dismissed and the petition will remain denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the petitioner's failure to demonstrate an employer-employee relationship between itself and the beneficiary.

## 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.

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

\* \* \*

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.* at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. 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 the petitioner'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 determination in this matter was 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 4, 2013 letter in support of the petition, the petitioner stated that it "offers experienced IT Consultants to assist clients with any IT and Software development services" and that its "consultants will work as a part of the client team to develop quality applications and are totally responsive to the needs of the team." The petitioner noted that it seeks "only the highest caliber professionals" and that it "require[s] the services of the beneficiary to meet the needs of

[its] clientele." The petitioner indicated that it intended to employ the beneficiary from October 1, 2013 to September 30, 2016.

The petitioner asserted:

The Computer Systems/Systems Analyst analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, he will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements. The actual computer programming may be performed with the assistance of the programmers.

Throughout this process, the Computer Systems/Systems Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised by the clients are adequately addressed. Consequently, the Computer Systems/System Analyst must constantly revise and revamp the system as it is being created to respond to unanticipated software anomalies him to fore [sic] undiscovered, to the extent that occasionally the system finally created bears seemingly little resemblance to that which was initially proposed.

The petitioner indicated that the beneficiary in this matter "will be involved in the designing and development of the application" which includes the following phases:

1. Analysis of the existing system and user needs
2. Communication and interaction with current system users
3. Design and development of a new computerized system
4. Writing and testing of newly designed programs
5. Implementation of the newly developed system
6. Provide technical support after system implementation

The petitioner also listed the beneficiary's day-to-day responsibilities as follows:

- Played onsite/offshore coordinator role, reviewed deliverables before transporting to Quality and production system. And organized status meetings with client and offshore leads to discuss project status and plan the upcoming activities. 20 percent of the time
- Prepared Business process for setting up of QM Master Data in Material MasterQuality [sic] view, Inspection Characteristics, Certification Profiles, Work Center requirements, Quality Plan, Catalogs for Usage Decisions, and Catalogs for Generic Characteristics. 20 percent of the time
- Configured the Action Box in the Notification screen, [s]o as to enable functions of return deliveries, Created repair order and return Delivery,

- Configuration set up in QM view, Goods Movement, UD for lots generated from Return Delivery. 15 percent of the time
- Designed and configured the Plant Parameter for Quality Management, Control Key-defining the payment control within Quality management and the Blocking reason-to restrict the vendor supply in case of quality deviation. 20 percent of the time
  - Developed custom QM workflow to handle the three types of quality notification processes namely internal notification, vendor return and customer complaint notification. 15 percent of the time
  - Worked with QM information System (QMIS) which is based on statistical Data for Data Analyst, Which gets updated from Inspection processing and Notification processing. 10 percent of the time

The petitioner stated that the usual minimum requirement to perform the duties for a computer systems/systems analyst "is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience."

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Systems Analysts" SOC (ONET/OES) Code 15-1121, at a Level I (entry level) wage. The LCA identified the beneficiary's place of employment as [REDACTED] as well as also listing two locations in [REDACTED] as locations for the beneficiary's employment. The LCA was certified for a validity period beginning September 1, 2013 to August 31, 2016.

The petitioner also submitted a number of documents to demonstrate a "contractual path" for the beneficiary's employment. The first document is a March 25, 2013 letter prepared by [REDACTED] which was sent to the petitioner's president to verify that [REDACTED] had contracted the beneficiary to [REDACTED]. This letter indicated that [REDACTED] policy is not to give any kind of letter to any firm related to [the beneficiary's] assigned [sic]." The [REDACTED] representative claimed that the beneficiary's primary responsibilities as a "SAP Systems Analyst" include but are not limited to the following:

- Full customizing of SAP QM Module and its integration with other SAP Modules in global template.
- Created and designed the notifications and executed the order with material and Manpower Planning associated with cost.
- Worked with conversion team for migrating data from legacy system to SAP thru [sic] LSMW.
- Worked in MM areas of inventory management, things like Purchasing, procurement, Subcontracting, third-party, consignment, stock transports, requisitions, vendor evaluation, info records, release strategies and master records.

- Responsible for conducting workshops for Business process design integration with other SAP modules.

The [REDACTED] representative also claimed that the project is ongoing and long term and that [REDACTED] is not responsible for controlling and supervising the beneficiary's work at [REDACTED].

The second document submitted is a March 21, 2013 letter signed by [REDACTED] [REDACTED] stated that the beneficiary is working as a subcontractor and "has been deputed to our direct client [REDACTED] [REDACTED] for an ongoing engagement as a SAP QM Analyst." [REDACTED] claimed that the beneficiary reported directly to the petitioner's president and that "[a]s part of assignment, [the beneficiary] is performing following duties:"

- Preparing Business process for setting up of QM Master Data in Material Master Quality View, Inspection Characteristics, Certification Profiles, Work Center requirements, Quality Plan, Catalogs for Usage Decisions, and Catalogs for Generic Characteristics[.]
- Core QM functions were implemented like triggering Incoming Inspection for GR's, Inspections for Process Orders for Bulk and Finished Goods, triggered Inspections for Delivery, Inspections for Customer Returns and Recurring Inspections.
- Configured the Action Box in the Notification screen, so as to enable functions of return deliveries, Created repair order and return Delivery, Configuration set up in QM view, Goods Movement, UD for lots generated from Return Delivery.
- Develop custom reports required for the business using SAP forms, SMART forms.
- Worked on PM Master Data such as Functional locations, Equipment, Notifications, Work orders, Maintenance Plans and task lists.
- Categorized Equipment Master data and configured them with separate user status profiles based on Business users need[.]

[REDACTED] continued by indicating that "this statement is merely an expression of intent and is not contractually or equitably binding commitment."

The petitioner also submitted two affidavits signed by individuals who claimed to be the beneficiary's co-workers and who asserted that the beneficiary is working with [REDACTED] Technologies providing consultancy services to [REDACTED] from April 2012 to March 2013. These individuals do not identify their employer.

The petitioner further submitted a copy of a March 14, 2012 Master Service Agreement (MSA) between [REDACTED] and itself which called for the petitioner to provide personnel to [REDACTED] clients and those clients' subsidiaries, affiliates, successors, or assigns. The MSA indicated that Connexions and its client has the right to inspect and reject the consultant's work and terminate the assignment if the consultant did not comply with any mandatory testing

requests or if the testing results were unsatisfactory. The Task Order appended to the MSA is dated March 14, 2012, with a start date of March 26, 2012 for a twelve-month duration with possible extension. The Task Order identifies the beneficiary as the consultant but does not identify his specific duties. The initial record also included a number of electronic mail transmissions between the beneficiary and the end-client regarding the day-to-day duties of the beneficiary's assignment and copies of weekly status reports and time sheets signed by the petitioner's president and the beneficiary.

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 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 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 July 16, 2013 letter in response, counsel for the petitioner submitted an April 2, 2012 offer letter issued by the petitioner to the beneficiary offering him the position of systems analyst at a \$60,000 annual wage. The offer letter is signed by both parties. The offer letter indicated generally that the beneficiary "shall use [his] best energies and abilities on a full time basis to perform, at location designated by the Company and including customer offices, the employment duties assigned to [him] from time to time." The petitioner also included a copy of an "Addendum to Employment Contract Dated April 9, 2012" between the petitioner and the beneficiary.<sup>2</sup> The addendum identified the beneficiary's responsibilities as:

Supporting the project which includes key functional areas in SAP QM and PM (Marketing, Sales, Management etc.), Management Accounting, Treasury, Fixed Assets, Project Systems, Consolidation, Procurement, and Inventory Management.

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He will be required to provide her [*sic*] weekly update to our Tech Lead and attend weekly calls (twice in a week) with our Tech Lead as well. He is also required to alter/modify or take corrective actions as advised by our Practice Lead for successful execution of the project on time and on budget.

The addendum provided a breakdown of the different phases of the project and set out the percentage of time the beneficiary will devote to general activities as follows:

- Requirement gathering and leading workshops – 10 percent

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<sup>2</sup> It is unclear if the reference to an employment contract dated April 9, 2012 is a reference to the employment offer dated April 2, 2012, which is in the record or is a reference to a different agreement.

- System Configuration – 10 percent
- Documentation – 10 percent
- Source code writing – 30 percent
- Development – 20 percent
- End User Support, Knowledge transfer – 15 percent

Although the petitioner also provided its organizational chart, the chart does not identify the positions of tech or practice lead.

In addition to the addendum and organizational chart, the petitioner submitted a May 22, 2013 letter stating that the beneficiary "is [its] full time employee" and that the beneficiary had been assigned to assist [REDACTED] through contracts between the petitioner, [REDACTED]

[REDACTED] In the following sentence the petitioner stated: "[a]ccording to the service requirements of the above-mentioned contract, [the beneficiary] will be responsible for the following duties, from approximately April 2012 to Dec 2014." The petitioner listed the following duties:

- Core QM functions were implemented like triggering Incoming Inspection for GR's, Inspections for Process Orders for Bulk and Finished Goods, triggered Inspections for Delivery, Inspections
- Worked on PM Master Data such as Functional locations, Equipment, Notifications, Work orders, Maintenance Plans and task lists
- Gather business requirements and scenarios and confirm standardization vs. custom modifications
- Categorized Equipment Master data and configured them with separate user status profiles based on Business users need
- Unit Testing, Integration Testing for QM module, User authorizations, Roles & Profiles

The petitioner reiterated that it will control and supervise the beneficiary's work.

The petitioner also included a second task order dated May 9, 2013, which identified the client as [REDACTED] identified the beneficiary as the consultant, indicated that the extension date was retroactive to May 6, 2013 and that the duration of the task order as through December 31, 2014. The petitioner also resubmitted many of the documents it submitted when it filed the petition.

Upon review of the record, the director denied the petition, determining that the lack of contracts, statements of work, work orders, service agreements, and letters between the petitioner and the actual end-client precluded a determination regarding the work to be completed and that the proffered position is a specialty occupation. The director also observed that the first task order submitted had expired prior to the filing of the petition and that the second task order submitted was not in effect until May 9, 2013, after the petition was filed on April 15, 2013. The director concluded that the petitioner had not established that specialty occupation work was available

when the petition was filed and the petitioner had not provided evidence of the actual work to be performed by the beneficiary.

On appeal, the petitioner provides the same description of duties for the proffered position as initially provided. The petitioner claims that the beneficiary is working at [REDACTED] and notes that once the beneficiary completes the assignment he will work at [REDACTED] in one of the petitioner's offices. The petitioner contends that as the first task order provided indicated the duration of the task order was twelve months with a possible extension that another purchase order was not necessary for the beneficiary to continue providing his services. The petitioner states that it provided another purchase order after the director requested additional evidence in the matter. The petitioner resubmits some of the previously provided evidence.

### III. LAW AND ANALYSIS

#### A. Employer-Employee Relationship

Beyond the decision of the director, the petitioner has not 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.

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.<sup>3</sup> Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 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.<sup>4</sup>

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

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).

<sup>4</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly

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, 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

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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)).

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, 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 has not provided key documents for our review. That is, the record does not include the contractual arrangements between [REDACTED]. The record does not include task orders from the end-client in this matter. USCIS must determine by reviewing the contracts between all contractors whether the petitioner retains the right to control the beneficiary's work, retains the right to supervise and direct the beneficiary's work, and most importantly retains the right to require that the work remain within the context of the occupation that has or will be approved for H-1B classification. In this matter, the petitioner has not provided the contracts, work orders or purchase orders that would show the indicia of control that the end-client's relationship with the beneficiary would entail. It is worth emphasizing that the record of proceeding contains no contract between the so-called end-client, [REDACTED], and any entity.

The AAO finds that the evidence submitted by the petitioner is sufficient to establish that the beneficiary has been working at [REDACTED]. However, the AAO also finds that the evidence of record fails to establish that the petitioner has been exercising, or would in the future exercise, actual control over the beneficiary's day-to-day work at [REDACTED]. For example, the electronic transmissions submitted reflect the beneficiary's day-to-day involvement and communications with individuals at [REDACTED] not the petitioner's personnel. Also, the discussions in the copied electronic transmissions reflect, that, at least in matters there addressed, the beneficiary is acting independently from any substantive supervision from the petitioner. In addition, the petitioner has submitted conflicting information regarding the direct supervision of the beneficiary. The petitioner asserts that the beneficiary reports directly to the petitioner's president but also states that the beneficiary reports to its tech or practice leads. The petitioner does not identify the employment of any tech or practice leads. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the record does not include evidence that the beneficiary is applying or using any materials, services, or instrumentalities that belong exclusively to the petitioner. If the beneficiary used the petitioner's materials, services, or instrumentalities, this would then

naturally reduce the role that any client would have in determining the particular substantive work that the beneficiary would actually perform for the client.

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. 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 who exercises control over the beneficiary. Accordingly, the petitioner has not substantiated the employer-employee relationship.

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). For this reason also, the petition may not be approved.

#### B. Specialty Occupation

To meet its burden of proof on this issue, 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*, *supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing 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 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 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 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 that the duties of the proffered position comprise the duties of 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), as well as any hiring requirements that it may have specified, 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.*

Here, the record of proceeding is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. Specifically, there is no documentation or description of the position from [REDACTED] itself. The petitioner's submission of various position descriptions from [REDACTED] and [REDACTED] the middle vendors, is not sufficient to establish the nature of the position to be performed at the ultimate end-client, [REDACTED]. We note the statement in the March 25, 2013 letter prepared by a representative of [REDACTED] the company apparently contracting directly with [REDACTED]; "policy is not to give any kind of letter to any firm related to [the beneficiary's] assigned [sic]."

In this matter, the petitioner has not submitted work orders or other documents from the end-client and has submitted insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. We also specifically note the record's absence of any documents from the end-client that endorse any of the claims made about either the work to be performed for it by the beneficiary or the educational requirements for such work. 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)).

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 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.

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. The AAO affirms 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 that record that would also require dismissal of the appeal.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and reiterated on appeal 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.

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)(1), 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.<sup>5</sup>

In this matter, the petitioner identifies the proffered position as a computer analyst/systems analyst. In the chapter on computer systems analysts, 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
- 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

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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.

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<sup>5</sup> 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/>.

**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 Mar. 21, 2014).

The duties described by the petitioner in this matter depict a limited set of duties. The position, as described corresponds most closely to a general-purpose systems analyst. 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 Mar. 21, 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. Accordingly, a bachelor's degree in a specific discipline is not the minimum requirement necessary to enter into the occupation. In addition, although most systems analysts get 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)(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 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.

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 claims that the usual minimum requirement to perform the duties for a computer systems/systems analyst "is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience." This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

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

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 computer science 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. 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 *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. The petitioner does not provide other evidence establishing that a bachelor's degree in a specific specialty is the industry norm for computer systems analyst positions. 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)).

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 a general description of the duties of the proffered position. It is not clear from the 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*, 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 complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

Again, 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. 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 indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will 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, Nonagricultural Immigration Programs* (rev. Nov. 2009), which is accessible at the Department of Labor Internet site [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](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 normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, 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.<sup>6</sup> 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).

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<sup>6</sup> 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 Mar. 21, 2014).

Turning to the third criterion, the petitioner has not submitted 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 only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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 with sufficient specificity to show that they are more specialized and complex than the duties of computer systems analysts positions that are not usually associated with attainment of at least a bachelor's degree in a specific specialty or its equivalent.

In addition, 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.<sup>7</sup> This aspect of the petition is materially inconsistent with a position whose duties' performance would require knowledge usually associated with at least a bachelor's degree in a specific specialty.

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.

### C. Speculative Employment

The AAO also affirms the director's finding that the petitioner failed to establish that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R.

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<sup>7</sup> *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>8</sup>

The petitioner submitted a task order that had expired prior to the filing of the petition. When requested to provide evidence of existing work, the petitioner submitted a second task order which did not begin until May 9, 2013, a date after the petition was filed on April 15, 2013. The petitioner explains on appeal that it presented the second task order to demonstrate that the work subject to the first task order was still ongoing. The second task order, however does not state that it is for work that is ongoing but rather indicates that it is retroactive to May 6, 2013. Moreover, neither task order depicts the actual duties the beneficiary will perform. As neither task order describes the actual specific work to be performed at the end-client, [REDACTED] it is not possible to conclude that the petitioner had work that it had taken on or agreed to develop at its office for clients that would entail the need for the beneficiary's services to perform the duties of the position as described in the petition. 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.

The record does not contain evidence such as invoices, purchase orders, work orders, statements of work, and contracts which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the petitioner (or any potential end-user) which would establish that

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<sup>8</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

the beneficiary will be employed by the petitioner in the capacity specified in the petition. The petitioner's statements regarding work projects is not corroborated by documentation substantiating that projects exist and that the project(s) will generate employment for the beneficiary as a computer systems analyst.

Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested.

#### IV. CONCLUSION

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 must be denied for the above stated reasons, with each considered as an independent and alternate 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; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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