



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **SEP 16 2014** Office: VERMONT 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 5, 2013. On the Form I-129 visa petition the petitioner states that it is a business solutions consulting company with 40 employees, established in 2005. In order to employ the beneficiary in a position to which it assigned the job title "Software QA Analyst," the petitioner seeks to classify her 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 service center's director denied the petition on November 5, 2013, finding that the petitioner failed to establish that: (1) the proffered position qualifies for classification as a specialty occupation; and (2) it will have a valid employer-employee relationship with the beneficiary. On appeal, counsel for the petitioner asserts that the director's bases for denying the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

As we shall now discuss, based upon our independent, *de novo* review of the entire record of proceeding – including all of the submissions on appeal - we find that the director's decision to deny the petition on each of the two grounds for denial specified in his decision was correct.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Software QA (i.e., Quality Assurance) Analyst to work on a full-time basis at a salary of \$53,000 per year. The petitioner stated that the dates of intended employment are from October 1, 2013 until September 9, 2016.

In a support letter dated April 2, 2013, the petitioner indicated that the beneficiary will be assigned to work on an internal, in-house software development project for what the petitioner identified as "its proprietary software platform," named [REDACTED]. This support letter also provided a description of the job duties that the petitioner ascribes to the proffered position. (Our decision will directly address those duties later in its discussion of the specialty occupation issue.)

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

The petitioner further stated that the proffered position requires a minimum of a Bachelor's Degree in Engineering Science, Technology or a related field with emphasis in Computer Information Systems Operations Research or Information Technology.

The petitioner submitted a Labor Condition Application (LCA) that the Department of Labor (DOL) had certified for use with a job prospect with the job title "Software QA Analyst" for which the underlying position would belong within the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES) Code 15-1799 at a Level I (entry level) wage.

The petitioner also submitted a document entitled [REDACTED] Technical Document." The document provides a summary of the petitioner's [REDACTED] project plan. The petitioner provided a second digitally rendered document, entitled "Statement of Qualifications & Business Plan 2013/2014." This document is a PowerPoint presentation that provides a brief overview of the following topics: company profile, core services, guiding principles, staff augmentation, recruitment methodology, product development, technology expertise, infrastructure, client list, and value proposition. The petitioner also submitted an additional overview of the [REDACTED] product, a copy of the petitioner's lease agreement, and various documents pertaining to the petitioner's corporate status.

On July 31, 2013, the director issued an RFE requesting, in part, information regarding the in-house employment of the beneficiary in the [REDACTED] project and other types of evidence that the petitioner believed established it had sufficient specialty occupation work for the beneficiary to perform. The director outlined the evidence that could be submitted.

In response to the RFE, counsel for the petitioner provided the following explanation of the in-house project, [REDACTED] referring back to the petitioner's April 2, 2013 letter of support:

*As [the petitioner] has grown technically more diverse, "[the petitioner] has actively sought out opportunities to develop our own proprietary software platform. Moving in this same direction, [the petitioner] is in the process of creating a highly adaptable software product (platform) tailored specifically to the small and medium-size business technology market. **Our proprietary product in development, [REDACTED] is envisaged as a fully integrated professional services, automated software system that collects, stores, analyzes and manages information on employees, human resources, accounts management, employee management, sales, customers, resources, etc.... The unique feature of [REDACTED] will be the software's ability to integrate front office and back office solutions while using an adaptable business architecture. [REDACTED] as currently intended goes beyond a typical Applicant Tracking System (ATS) and Professional Services Automation (PSA) and runs the entire business with one integrated system. [The petitioner's] research has revealed that there are almost no comprehensive "out of the box" software applications available in the price range of \$1,000.00 - \$2,000.00 in the North American marketplace which automate the complete business process for small to mid-range IT companies.**"*

Moreover, as explained by the petitioner, "[the petitioner] has developed a

comprehensive business plan, obtained the requisite facilities in our Delaware Offices, and have allocated \$500,000 as an initial product development budget for 2013. We are now in the process of forming a technical team to collaborate and bring [REDACTED] to fruition."

(Emphasis in original).

The petitioner re-submitted several of the documents that had been initially filed with the petition. The petitioner also submitted (1) copies of its tax returns for 2009, 2010, 2011, and 2012; (2) the petitioner's promotional materials; (3) what it tabbed as "Copies of five (5) executed Master Services Agreements (and Work Orders) between the Petitioner and some of its Vendors/Consulting Services clients"; (4) copies of the beneficiary's current paystubs; and (5) a credential evaluation for the beneficiary indicating she has obtained the equivalent of a Master's Degree in Computer Information Systems from an accredited institution of higher education in the United States.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director specifically found that the record does not establish the role of the beneficiary or whether the work meets the definition of specialty occupation work. The director denied the petition on November 5, 2013.

Counsel for the petitioner submits an appeal of the denial of the H-1B petition and supporting documentation. On appeal, counsel asserts that the evidence submitted into the record warrants approval of the petition, and that the grounds which the director specified as the bases for denying the petition were not supported by the evidence of record.

II. LAW AND ANALYSIS

A. Standard of Review

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

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

* * *

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

* * *

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

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

Id.

As footnoted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

In this regard, we note that satisfying the preponderance of the evidence standard is not just a function of the volume of evidence submitted by a petitioner. Rather, the quality of the evidence must also be weighed, that is, not just for its authenticity, but also for its credibility, relevance, and probative value.

B. Overview of Documentary Evidence

We will first address documentary evidence upon which the petitioner relies for establishing both (1) that it would have the requisite employer-employee relationship with the beneficiary required to qualify for filing the petition as a U.S. employer as defined by the regulations and (2) that the proffered position is a specialty occupation position.

As clearly expressed in the petitioner's own statements in the record, the petitioner premises this petition upon the work – and associated working-relationship – that the petitioner claims would be involved in the beneficiary's participation in what the petitioner describes as the creation and development of a computer software product to which it assigns the name [REDACTED]. Consequently, the nature of the evidence that the petitioner presents about this asserted software-development project is critical to the determination of this appeal.

As will be evident in our discussions below, we find that the evidence of record does not establish that, at the time of the petition's filing, the claimed [REDACTED] project had progressed to the point that, for the employment period asserted in the petition, it would actually generate the software-quality-assurance work that the petitioner asserted as the basis of the petition.

While we have reviewed all of the documentary evidence submitted into this record of proceeding – including all submissions on appeal – we shall only here address a number of them which we believe deserve special mention.

At the outset, we must note for the petitioner that, due to the *absence* of corroborative evidence, we accord no evidentiary weight to the petitioner's assertion that it has allotted \$500,000 to the [REDACTED] project for 2013. 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, even if we were to accept that declaration on face value, it would carry little weight. It does not specify how the money would be allotted to various portions of the project, or the timing and increments of expenditures from the \$500,000, or the amount(s) of the \$500,000 which would be allocated to the beneficiary's particular position and the period(s) and increments, if any, in which that money would be so allocated. Without such concrete information and explanation, we cannot reasonably determine how the claimed \$500,000 sum would impact upon the specialty occupation and employer-employee issues before us on appeal.

[REDACTED] Fact Sheet"

The cover page of this 12-page document is entitled "[REDACTED] Technical Document." The document is divided into the following subsections:

- "[REDACTED] Fact Sheet." This section includes an outline (about one and one-half pages) of the claimed [REDACTED] project.
- "[REDACTED] Practice." This 8-page section contains an additional outline of the [REDACTED] product. The outline includes subsections entitled "History"; "Tools expertise"; "Services offered"; "Product Development" (which focuses upon [REDACTED]). It also describes the petitioner's (Software Development Life Cycle) SDLC as "based on the following processes":

- Analyzing the specifications
- Market research
- Gathering requirements for the proposed solution
- Devising a plan or design for the software-based solution
- Implementation (coding) of the software
- Testing the software
- Deployment
- Maintenance and bug fixing

Pages 7 to the end of this [REDACTED] Practice" outlines [REDACTED] s "product evolution and Life Cycle," in 25 parts."

We find that this document, lengthy as it may be, does not have significant weight towards resolving in the petitioner's favor either of the issues now before us on appeal. With regard to the 25 life-cycle-development steps, we will offer some particular observations. We find that the content of this outline does not by itself establish any particular level of effort that may have been used in its production. It appears to be a general outline that could be used as a general template for a generalized outline of phases of any software development plan for the type of software that the petitioner claims that it is going to develop. As such, even considered with all of the other documentary evidence submitted by the petitioner, these 25 steps do little more than show general steps contemplated for the [REDACTED] development project. As skeletal as this "Life Cycle" document is, it does not convey whatever extent of deliberation or substantive planning may have been involved in its production; and it certainly does not establish the extent to which performance of the asserted duties of the proffered position would be involved. Further, no part of this 12-page document [REDACTED] Technical Document" contains sufficient concrete detail to show what substantive work the beneficiary would be performing at the beginning of the claimed employment period or thereafter during that employment period.

"Statement of Qualifications & Business Plan 2013-2014"

This 17-page set of PowerPoint slides, which promotes the petitioner's capabilities and services includes (1) a "Product Development" slide that identifies [REDACTED] as the petitioner's "Flagship Product" and (2) a "Product – [REDACTED]" slide that extols the capabilities that [REDACTED] will have.

We find that this set of documents has no probative value towards either establishing what substantive work the beneficiary would actually do if this petition were approved, or when she would perform such work, or the extent of time that any [REDACTED] work assigned to the beneficiary would require the software quality-assurance-analysis that the petitioner has asserted

as the basis of this petition. We note, in particular, that the "Product Development" and the "Product [REDACTED]" slides just present general attributes of the asserted product-to-be-developed.

There is no statutory, regulatory, policy, or precedent-decision basis for according any particular level of evidentiary weight to any and all business plans. Also, though, we are not aware of any "bright line" requirement for a document presented as a business plan to be regarded as one. We have reviewed the business plan elements of the "Statement of Qualifications & Business Plan 2013-2014" accordingly. While we will accept this document set as being what the petitioner claims it to be – i.e., its business plan pertinent to this petition – its content does not persuade us that the plan would result in the beneficiary being employed by the petitioner as claimed in the petition and for the period of time there claimed. We reach this conclusion based upon this submission's generalities and upon the fact that the "business plan" is not supplemented by documentary evidence that establishes that performance of the plan involves the beneficiary's services for any particular work within the scope described for the proffered position in the record of proceeding. While the petitioner may be satisfied with the details of the submission, we find that as generalized as they are and as unfocused as they are on the proffered position, they add no significant weight towards advancing either the petitioner's employer-employee or specialty occupation claims.

Combination of (1) photographs of the petitioner's office space; (2) copy of the petitioner's lease; (3) the petitioner's assertions about the team required for development of the [REDACTED] production; and (4) the petitioner's organization charts

As labelled by the petitioner, those photographs, depict the petitioner's office space as consisting of (1) a Reception Area; (2) a Conference Room (which is occupied by a table that appears to be big enough for only six chairs); (3) a Consultant Office, which does not hold more than one L-shaped desk (with associated office equipment and chair), and two visitor chairs; (4) a Break Room (with a table and four chairs, a kitchen-type sink with cabinet, a waste basket, and a refrigerator); and an Administrative Office (with a desk, shelves and a filing cabinet). These photos generally comport with the lease documentation provided by the petitioner, to include the office-space diagram included there.

We also note that the petitioner's April 9, 2013 letter of support, which accompanied the Form I-129 on its filing, states that the petitioner has allocated \$500,000 for "an initial project development budget for 2013," and that the petitioner was "in the process of forming a technical team to collaborate and bring [REDACTED] to fruition," and, "as such," was "actively seeking out a team of technical professionals including software quality assurance analysts, programmer analysts, business analyst, network systems administrators, and software engineers to further test, develop, and implement [REDACTED]" Also, the letter reiterates that the beneficiary "will perform her job duties from the [the petitioner's] [REDACTED] Delaware offices" – that is, within the office space referenced in the lease and reflected in the submitted photographs. Next, we refer the petitioner to (1) the number of positions that its Organization Charts specify for the "Product Development Team" and (2) the other positions in its Organization Charts.

The aspects of the record noted above raise the question of where the beneficiary and the other members of the [REDACTED] team would work during this "in-house" software development project.

While the petitioner's April 2013 letter of support states that it has "obtained the requisite facilities in our Delaware offices," the record of proceeding contains no documentary evidence to support this claim. Further, we are not persuaded by counsel's argument on appeal that we should infer that the petitioner has extended its lease, even though the petitioner has not provided requested proof of such extension. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Conflict between (1) the petitioner's claims about the responsibilities, educational requirements, and experience requirements of the proffered position, and (2) the implications of the Level 1 prevailing-wage designation in the Labor Condition Application (LCA) submitted by the petitioner

We must also note that the petitioner designated the prevailing wage for the proffered position as a wage for a Level I (entry level) position on the LCA.² This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.³ That is, in

² Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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.

³ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and

accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

Yet, we also observe that, in apparent conflict with that Level I prevailing-wage level, the petitioner asserts a requirement for a relatively high level of occupational knowledge and experience. For instance, in the petitioner's April 2, 2013 letter of support we read (emphasis added):

[D]ue to the high level of professional responsibility inherent in the instant position, the Petitioner's minimum requirement for this position requires a comprehensive understanding of computer science, information systems, and computer applications, through a Bachelor's Degree or equivalent experience.

Further, the "Qualifications" subsection at part III, the "Job Duties" section, of the aforementioned letter of support asserts the following set of qualifications, which appear to be substantially higher than would comport with the LCA here submitted, with its Level 1 "entry" level prevailing-wage rate:

C. Qualifications:

- Bachelor's Degree in Software Engineering, Industrial Engineering, or a related field or equivalent work experience is required.
- Five (5) years professional experience analyzing and improving quality process and methods with emphasis on decision-making functions.
- Proficiency in various SDLC methodologies is required.
- Employee must display a helpful demeanor, detail orientation, and teamwork behavior while working in a fast-paced, constantly-changing environment.

familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

Likewise, we also see that the "Essential Job Functions" section of the support letter suggests that the beneficiary must be so-well accustomed to the type of work required as to be "self-motivated," "comfortable taking initiative and handling the project," and able to "provide rapid response, and handle periodic heavy workloads." We find that such reliance upon the beneficiary's ability to act rapidly, comfortably, and on her own initiative also does not appear compatible with the Level 1 prevailing-wage level – the lowest of the four Levels assignable – for which the LCA was certified.

We find that this contradictory aspect of the record also weighs against the credibility of the petition.

Seven pages submitted by the petitioner from its Internet site of July 7, 2011

As these pages do not contain any information relating to [REDACTED] we find that they have no probative value towards establishing the proffered position as a specialty occupation. This is because, as noted earlier, the petitioner has based its specialty-occupation claim upon the work that it claims that the beneficiary would perform as part of a team developing the [REDACTED] product.

However, we further find an aspect of the petitioner's submission which weighs against the overall credibility of the petition itself. We note, first, the Internet pages include a copyright date, by the petitioner, of 2005. Next, we note that while the petitioner's submission does not include any mention of [REDACTED] the petitioner's current Internet site, as of September 11, 2014, includes the following statements about [REDACTED]

Product Page: [REDACTED]

[REDACTED] is a cost-effective and affordable Professional Services Automation software, capable of automating the entire functioning of the Sales, Recruitments, HR, Finance, Immigration and other activities of a Software Consulting Firm.

A solution that fits seamlessly to the wishes of every small business entity. Its capabilities will enable businesses to function in a simple, yet effective manner.

The system will have the ability to integrate and provide instant reports in multi networked environments and uses Client-Server Technologies, RDBMS, Router Technology, Data Warehousing, Quality Assurance mechanisms and other related technologies. The impressive list of features allows business managers to make instant business decisions on sales, Immigration, Product integration, accounting, Hiring etc.

© 2005. [REDACTED] All rights reserved

Copied September 10, 2014 from the Internet site [http://www.\[REDACTED\].m/html/product.htm](http://www.[REDACTED].m/html/product.htm).

Thus we note that the current Internet site asserts a 2005 copyright for the [REDACTED] portion. We take this fact as an indication that - years before the April 2013 filing of this petition - the

petitioner has been claiming [REDACTED] as a product that it was developing. (While certainly not decisive, the absence of this information from the petitioner's submission does reflect upon the petition's credibility.)

Because they are material to the proper disposition of this appeal, and in the interests of adjudicative economy, we hereby incorporate our comments and findings in this evidentiary overview as part of our analyses and bases for determinations in the remainder of this decision.

C. Lack of Standing to File the Petition as a U.S. Employer: The Employer-Employee Issue

We will first discuss why we have determined that the evidence of record does not establish that, in the context of this particular record of proceeding, the petitioner has satisfied the regulatory definition of a "United States employer."

The director framed this basis for denying the petition as follows:

After a careful review of the record, the totality of the evidence provided does not demonstrate that a valid employer-employee relationship will exist for the duration of the requested H-1B employment period.

Since you have not demonstrated a valid employer-employee relationship, you do not meet the definition of a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

As we shall now discuss, we find that the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee" as set out at 8 C.F.R. § 214.2(h)(4)(ii).⁴

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

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

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

⁴ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 evidence of record does not establish that, at the time of the filing of the petition, it was more likely than not that, if the petition were approved, the beneficiary would in fact be employed by the petitioner in the work that the petitioner identified as comprising the proffered position and for the period of intended employment specified in the petition.

As will be obvious in our discussion below about the requisite employer-employee relationship, a fundamental condition for a petitioner's qualifying as a U.S. employer as defined above is that the petitioner establish that it is in fact using the petition as a means to engage the beneficiary to perform the work that the petition specifies that the beneficiary would perform if the petition is approved. However, as reflected in our preceding discussion of documentary deficiencies, the evidence of record in this case does not establish that, when filed, the petition was actually based upon software-quality-assurance-analysis work for the beneficiary that had been secured for the period of employment stated in the petition. Yet the attainment and performance of such work by the beneficiary – and for the period of employment specified in the petition - is the basis upon which the petitioner would assertedly pay the beneficiary, supervise her, and maintain all of the indicia of control upon which the petitioner must rely to establish that common-law touchstone of "control" necessary for an employer-employee relationship in the H-1B specialty-occupation context.

As should be obvious in the discussion which follows about the common law method of analyzing the issue of employer-employee relationship, absent persuasive evidence that, for the employment period specified in the petition, the asserted [REDACTED] software development and deployment project would in fact engage the beneficiary in the [REDACTED] work that the petition asserted as the basis of the petition, the record will not establish that the beneficiary and the petitioner would be relating to each other as employer-employee in the common law sense. After all, in the context of this particular petition, all of the common-law indicia of a work-control relationship between the petitioner and the beneficiary depend upon the beneficiary actually working on the [REDACTED] project as described in the petition.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to

section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions.

See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

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.

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

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

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly 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))).

§ 214.2(h).⁷

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).

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

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

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."

Again, we find that the record of proceeding lacks sufficient, relevant documentation regarding the petitioner's claimed [REDACTED] activities and the actual [REDACTED] work that the beneficiary would perform to substantiate the claim that the petition was filed for work, within the scope of the proffered position as described in the petition, that had been secured for the beneficiary for the period of employment requested in the petition. In this regard, we also find that, if the petitioner is also claiming that it would provide the beneficiary with other, non-[REDACTED] work in the proffered position as described in the record – and it is not clear that this is the case – the record of proceeding does not establish the existence of any such work for the beneficiary. In particular, we find that the evidence of record of the petitioner's past contractual relationships with clients and vendors that do not relate to the beneficiary or to the [REDACTED] project or to the particular position for which this petition was filed has little evidentiary value towards satisfying either the employer-employee requirements or the specialty occupation requirements of the particular petition now before us.

As already discussed, the core of the petition is the petitioner's assertion that the beneficiary will be assigned to work on an internal, in-house software development project for its proprietary software platform identified as [REDACTED] at its office in [REDACTED] Delaware. Specifically, in its April 2, 2013 letter, the petitioner claimed that this internal project is currently in the preliminary stages of development, and further claimed that "the beneficiary's services will be needed for an extended time on Petitioner's envisaged product development."

However, we find that the record of proceeding does not substantiate that this project has advanced to a phase where the particular services of the proffered position would be required. In this regard, we note that the evidence of record indicates that the beneficiary would be engaged as part of a team of distinctly different positions – but the record provides no documentary evidence of actual efforts to even recruit persons for those other team-positions, let alone any evidence as to when, in fact, they would be actually employed to work in the development of the [REDACTED] product. Further, we are not persuaded by any of the evidence of record that the [REDACTED] project has reached a stage that would involve the beneficiary's performance of the proffered position's services as described in the petition.

We also note that the credibility of the petition's claim of [REDACTED] software-quality-assurance analysis for the beneficiary to perform is reduced by such factors as (1) the petition's failures to delineate (a) specifically when the beneficiary's services would be required in the project-development process, (b) how the petitioner determined the need for those services for such times, and (c) what, in terms of actual substantive work, the beneficiary would perform at such times; and (2) the apparent disparity between the number of persons claimed as needed to form

the [REDACTED] development team, on the one hand, and the apparent absence of available office space, as documented by the office lease and the photographs of office space.

Although the petitioner submitted a document entitled "[REDACTED] Technical Document," there is no independent documentation in the record of proceeding that manifests actual [REDACTED] work available for the beneficiary. Additionally, there is no independent documentation in the record explaining how the project's future stages or the analysis by which such stages and their timing, as set forth in the "[REDACTED] Technical Document," were forecast (e.g., Test concept by Q1 of 2013; Finalize the product and project plan by Q3 of 2013; Market, sell and support by Q2 of 2014; and Launch Professional Version by July 2015).

We note counsel's assertions on appeal that the director failed to adequately review this documentary evidence.⁸ However, we have thoroughly reviewed these documents, yet find them lacking in substantive detail regarding the nature of the beneficiary's actual duties as they would ultimately relate to the proposed [REDACTED] project. While we note the petitioner's assertions that it reviewed the "small IT Consulting Business market" and found that there are no competing software products available at the same price point it proposes for its [REDACTED] project, there is no independent, objective evidence to support these statements. Moreover, while the "[REDACTED] Technical Document" states the project's initial budget (\$500,000) staffing requirements (7-10 people) and project duration ("Over 1.5 years, ongoing"), it does not provide details such as the composition of the 7-10 person team and the beneficiary's role therein. While we acknowledge this document as presenting a general overview of the [REDACTED] project in outline format, this document, as well as the business plan, is not sufficiently precise and substantive to establish that the beneficiary would be employed as asserted in the petition.

In addition, the petitioner did not provide any evidence of the job duties to be performed by the beneficiary if the [REDACTED] project fails or is completed prior to September 9, 2016. In fact, the petitioner stated that its employees "will rotate between product development and product customization," and further stated that "[i]n the event the Beneficiary is assigned to perform product customization services or related information technology consulting services, our company confirms that it will follow proper USDOL and USCIS requirements including filing a new Labor Condition Application (LCA) governing the new place of employment and filing an amended H-1B petition with the USCIS should that prove necessary." Thus, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects to which the beneficiary would be assigned outside the [REDACTED] project.

The agency made clear long ago that speculative employment is not permitted in the H-1B

⁸ Despite counsel's contentions on appeal, we find, for the reasons outlined above, that the aforementioned documents are insufficient to establish eligibility in this matter. Counsel submits no new evidence on appeal to overcome the deficiencies noted by the director. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

program. For example, 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).

For the reasons set forth above, we find that there is 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, in the proffered position and for the requested period of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Consequently, we cannot reasonably conclude that the petitioner is engaging the beneficiary to perform work in the United States – as the existence of such work for the beneficiary has not been established.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. While we have considered the petitioner's attestations that it alone would control the beneficiary and his work, because the evidence of record does not establish either actual work that would require the beneficiary's services, or the actual scope of such services that would be required, we cannot conclude that it is more likely than not that the petitioner would have the requisite employer-employee relationship.

In short, we will not speculate about relevant indicia of control in a case, as here, where the evidence of record does not establish that the claimed in-house project work would actually be available to the beneficiary as claimed in the petition. The evidence of record, therefore, 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 evidence of record simply does not establish the petitioner as performing the essential U.S. Employer function of engaging the beneficiary for actual work in the proffered position that had been secured for the beneficiary at the time of the petition's filing.

The petitioner has not provided documentary evidence sufficient to establish actual work that the beneficiary would do and the actual nature of any business relationship that would exist between the beneficiary and the petitioner with regard to such work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). For this additional reason, the petition may not be approved.

D. Specialty Occupation

To meet its burden of proof for establishing the proffered position qualifies as a specialty occupation the petitioner must satisfy the following statutory and regulatory requirements, by a preponderance of evidence of course.

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

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

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

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

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

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

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

As reflected in the preceding section's discussion and findings, a materially determinative aspect

of the evidence of record is its failure to establish that, at the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the beneficiary. Thus, we concur with the director's determination that the evidence submitted fails to establish non-speculative employment for the beneficiary for the period specified in the petition.

This feature of the evidence of record is also a determinative factor in our concluding that the evidence of record fails to establish the proffered position as a specialty occupation.

The petitioner stated on the Form I-129 that the beneficiary would be employed as a Software QA Analyst. As previously noted, the LCA designation selected by the petitioner for the Software QA Analyst position corresponds to the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES) Code 15-1799 at a Level I (entry level) wage.

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 evidence in the record of proceeding establishes that performance of the particular proffered 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.

At the outset, we refer the petitioner back to all of this decision's earlier discussions and findings related to our determination that, even considered in its totality, all of the evidence of record that the petitioner has submitted in favor of the petition simply does not establish that, at the time of the petition's filing, the petitioner had actually secured work for the beneficiary in the proffered position as described within the record of proceeding and for the period of employment specified in the petition – here, October 10, 2013 to September 9, 2016. Approval of an H-1B specialty occupation petition may not be granted on the basis of work that, at the time of petition filing, was not definitely secured for the position and work period specified as the basis of the petition. Also, evidence of speculative and indefinite work does not provide a sufficient basis for us to discern where and when the beneficiary would be employed and the substantive work that she would perform.

Thus, in the particular evidentiary context of this petition, it is not possible for us to reasonably conclude that the substantive nature of the work to be performed by the beneficiary, if the petition were approved, would be as the petition depicted for the [REDACTED] project – but such is the premise upon which the petitioner based its specialty occupation claim. This failure to establish that the beneficiary's actual day-to-day duties would be as asserted in the petition 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 not a petitioner's title, but 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.

Again, a position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this reason, this petition has failed to provide a body of evidence for which the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) would produce a favorable outcome. For this reason, then, the appeal will be dismissed, and the petition will be denied.

However, in the interest of a more comprehensive and instructive decision, we will now discuss the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) as if the evidence of record had established that the petition had been filed for actual employment within the proffered position as it was described within the record of proceeding.

We open by noting again that the LCA submitted by the petitioner had been certified for a job opportunity within the "Computer Occupations, All Other" occupational group, and for a Level 1 (entry level) prevailing-wage (the lowest of the four assignable levels).

We will first address the duties of the proffered position as presented in the record of proceeding.

In the aforementioned support letter of April 2, 2013, the petitioner asserted the following with regard to the proffered position:

A. Primary Function: Perform complex system testing to ensure that all the products and services meet Company quality standards and Product requirements. Thoroughly test complex, project-level software to ensure proper operation and freedom from defects.

B. Duties and Responsibilities:

- Must be able to perform all duties and responsibilities of Quality Assurance Analyst.
- Write test plans and test cases and execute them.
- Track defects and paths to closure in product development, software application development, information systems, and operations systems.
- Review software design, change specifications, and plans against contractual and/or process requirements.

- Apply proven analytical and problem-solving skills to help validate IT processes through careful testing in order to maximize the benefit of business investments in IT initiatives.
- Participate in establishing software quality standards for life cycle, documentation, development methods, testing and maintenance.
- Interface with software developers to discuss system specifications and desired results.
- May participate in system/product design sessions.
- Ensure that project and process control documentation are compliant with requirements and objectives.
- Perform software testing, verification and validation. This includes software and software work-product early defect detection and removal, testing (e.g. types, levels, strategies, tools and documentation) and verification and validation methods and techniques.
- Maintain appropriate confidentiality regarding Product and Company information and ensure proper destruction of confidential documents.
- Perform other duties as required.

We find that the above description of the duties that the petitioner presents as comprising the proffered position does comport with the general Computer Occupations, All Other occupational group that the petitioner's LCA specified.

However, we also find that neither the above descriptions nor any evidence in the record of proceeding develops the proposed duties, or the position that they are said to comprise, in terms of relative specialization, complexity, and/or uniqueness. In this regard, we note that the evidence of record does not document or apply any objective standard by which the proffered position or its proposed duties would measure as so complex, specialized, and/or unique as to distinguish the proffered position or its duties from particular positions or the particular nature of duties of particular positions in the Computer Occupations, All Other occupational group that do not require either (a) the services of a person with at least a bachelor's degree in a specific specialty or (b) the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. (As this discussion and findings have particular applicability to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A) and to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), we hereby incorporate them by reference into our later discussions of those criteria.)

We will now review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing 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 the petition.

We recognize the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ However, we note that there are occupational categories which are not covered

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet at

in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

Although employment for hundreds of occupations are covered in detail in the [the *Handbook*], this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupations Information Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

Thus, the narrative of the *Handbook* indicates that there are occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these occupations are not developed.)¹⁰ The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed. Review of the *Handbook* indicates that it contains no information with regard to positions within the pertinent occupational group, that is, Computer Occupations, All Other.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 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 satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The petitioner has not supplied such additional probative evidence on this issue.

We do note however, that the Education section in the Summary Report in the Department of Labor's O*NET section on the pertinent occupational category includes the following information about persons in the occupational group who responded to a voluntary survey about the educational level required for positions within the occupational category:

Education

<http://www.bls.gov/ooh/>. The references to the *Handbook* are to the 2014-2015 edition available online.

¹⁰ The occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm labor contractors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

Percentage of Respondents	Education Level Required
64	Bachelor's degree
14	Associate's degree
9	Master's degree

See O*Net OnLine, Summary Report for: 15-1199.01 - Software Quality Assurance Engineers and Testers, at <http://www.onetonline.org/link/summary/15-1199.01> (accessed Sep. 10, 2014).

We caution, of course, that the above information does not address requirements for a degree in *any specific specialty*. However, it does indicate an important factor weighing against the petitioner's specialty occupation claim: that is, a position's inclusion within this occupational group is not sufficient to establish that the position's performance would require at least a bachelor's degree, or the equivalent, in a specific specialty.

In sum, as the petitioner did not provide persuasive evidence that the particular position for which this petition was filed is one for which a bachelor's or higher degree, or the equivalent, in a specific specialty, is normally the minimum requirement for entry. Thus, the evidence of record has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that share the three characteristics of being (1) in the petitioner's industry, (2) parallel to the proffered position; and, also, (3) in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, we incorporate by reference our previous discussion on the matter. Also, the record of proceeding does not contain any evidence from an industry professional association to indicate that a degree in a specific discipline is a minimum entry requirement. Further, the petitioner did not submit any letters or affidavits from firms or individuals in the industry.

Therefore, the petitioner has not satisfied the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We here refer the petitioner back to our earlier discussion and findings with regard to the fact that the evidence of record does not develop the requisite complexity or uniqueness as distinguishing features of the proffered position. The record simply lacks a sufficient factual basis for a favorable determination under this criterion.

Put another way, the petitioner in this matter fails to demonstrate how the duties described here require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. Moreover, the evidentiary record does not address why and how the proffered position distinguishes itself as more complex or unique than other positions within the pertinent occupational group which the O*NET indicates can be performed by persons without at least a bachelor's degree in a specific specialty.

Consequently, as the evidence of record does not show that the proffered position is so complex or unique relative to other positions in the pertinent occupation that can be performed by an individual without at least a bachelor's degree in a specific specialty, or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

We routinely review the record's evidence of the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position in order to assess this criterion.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. Accordingly, the petitioner has not satisfied the requirements of this criterion.

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

We here incorporate and refer the petitioner to our earlier comments and findings with regard to the limited extent to which the record of proceeding presented the duties said to comprise the proffered position. The evidence of record simply does not establish that the nature of the proposed duties possess the relative specialization and complexity required to satisfy this criterion. As reflected in our earlier discussions of (1) the extent to which the proposed duties are presented in the record and (2) the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the evidence of record simply does not develop the nature of the proposed duties as being so specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. In this regard, the petitioner should also note that, as we have discussed, neither the *Handbook* nor the O*NET (in its Summary Report section on the voluntary responses to its Education survey of persons within the pertinent occupational category) indicate that performance of the proffered position requires knowledge usually associated with attainment of at least a bachelor's degree or the equivalent in a specific specialty.

Furthermore, we also here incorporate and refer the petitioner to our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I wage (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the nature of the proposed duties has the requisite complexity to satisfy this criterion. We note, for instance, that a Level IV prevailing-wage position is appropriate for a "fully competent" position, and, as such, require a significantly higher prevailing wage. As previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has not submitted adequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In short, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

We acknowledge the petitioner's claim that the position qualifies for H-1B classification; however, an assertion without supporting evidence is insufficient for a petitioner to satisfy its burden of proof. As reflected above, aside and apart from the record's failure to establish that the beneficiary would actually perform the work asserted in the petition, the evidence of record does not establish that the even the substantive nature of the work that the petitioner claims that the beneficiary would perform is sufficient to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason also, it cannot be found that the proffered position qualifies as a specialty occupation. Thus, the appeal will be dismissed and the petition will be denied for this reason also.

III. CONCLUSION

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

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

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

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