

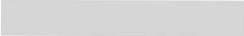
(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **MAR 25 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 21-employee "Software Development & IT Consulting" business established in [REDACTED]. In order to employ the beneficiary in a position in what it designates as a "Systems Analyst" position, 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 director denied the petition determining that the petitioner failed to establish that (1) the duties of the proposed position comprise a specialty occupation, (2) the petitioner has sufficient work for the requested period of intended employment, and (3) the petitioner will have the requisite employer-employee relationship with the beneficiary.

The record of proceeding before this office 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 Notice of Appeal or Motion (Form I-290B), counsel's brief and additional documentation.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. The appeal will be dismissed, and the petition will be denied.

I. FACTS AND PROCEDURAL HISTORY

In a letter, dated March 5, 2014, the petitioner stated that it is a "consulting firm providing systems and business solutions to business clients" and that it seeks the beneficiary's services as a systems analyst to work on a temporary basis at an annual salary of \$60,000. The petitioner listed the following duties and requirements associated with the proffered position:

1. Analyze science, engineering, business, and all other data processing problems for application to Electronic data processing systems. Analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software.
2. Translate business requirements into software specification for Java based applications and implement them using Java, and .Net; develop database schemas for backend database tables in Oracle so that they can be integrated with Java and/or other web based applications;
3. Conduct strategic audits on the effect of changing business environment on software applications and suggest suitable changes to software specifications

- to accommodate the new business rules; Gather information from business units and technical teams about the steps needed to implement the process improvements using Java and .net technologies;
4. Advise and consult on the implementation of systems business requirement; develop documentation to support the life cycle using business knowledge;
 5. Define programming requirement; formulate a detailed plan outlining steps to develop programs, using structured analysis and design;
 6. Convert project specifications, using flowcharts and diagrams, into sequence of detailed instructions and logical steps for coding into language process able by computer, applying knowledge of computer programming techniques and computer languages;
 7. Write detailed requirements of user needs, program functions, and steps required to develop or enhance system functionality; Document the program development process, logic, coding and corrections[;]
 8. Create Test Plans and test data, Conduct and evaluate Unit Testing to verify correct implementation of program/Module Specification; Create User, Reference, Training Manuals and Task Guides.

* * *

[F]or this Specialty Occupation of Systems Analyst we require a minimum of a Bachelor degree in Engineering, Computer Science, Science, Maths, Accounting, Business Administration or IT related field.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her education. In support of this assertion, the petitioner provided copies of a diploma and transcript that indicate that the beneficiary was granted a Master of Science degree in Computer Science from [REDACTED] in Louisiana and a Bachelor of Technology degree in Computer Science & Engineering from [REDACTED] in India. Although the petitioner submitted the beneficiary's foreign certificate, diploma, and transcript, an evaluation of the beneficiary's foreign credentials was not provided.

The petitioner submitted the required Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "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] Indiana. The LCA was certified for a validity period beginning September 1, 2014 to September 1, 2017.

The initial record further included a document with the heading "Itinerary of Work Location." The itinerary includes the petitioner's name and corporate address and identifies the client as [REDACTED] at the work location specified on the certified LCA. The itinerary identified the beneficiary and indicated her employment dates are from October 1, 2014 to September 1, 2017.

Upon review of the initial record, the director requested additional information including a more detailed description of the work to be performed as well as evidence to demonstrate that the petitioner has an employer-employee relationship with the beneficiary and has 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 letter, dated July 14, 2014, in response to the director's RFE, the petitioner asserted that it exercised control over the beneficiary's work assignments. The petitioner explained that the beneficiary will perform the duties of a systems analyst and will be working with [REDACTED] through [REDACTED]. The petitioner explained further that its clients are not willing to share contracts or issue letters describing the contractual relationships. The petitioner, however, submitted a work order issued by [REDACTED] and photocopies of the beneficiary's identification cards issued by the State of Indiana and [REDACTED]. The work order submitted bears a heading of [REDACTED] and indicates that it incorporates the terms of the subcontractor agreement between [REDACTED] and [REDACTED] dated January 12, 2013. The work order includes a list of subcontractor personnel assigned to perform services which lists only the beneficiary and identifies her role on the project as a "Developer." The start date of the work order is January 20, 2014 and the services to be performed are described as:

Converts a design into a complete information system. Includes acquiring and installing systems environment; creating and testing databases; preparing test case procedure; preparing test files; coding, compiling, and refining programs.

The work order submitted does not specify the required education to perform the duties listed.

The petitioner also submitted a letter, dated June 13, 2014, signed by [REDACTED] the Global Head of Recruiting for [REDACTED] verified that [REDACTED] has a contract with the petitioner and that it had subcontracted the beneficiary in this matter to work on a project for [REDACTED] and that [REDACTED] is [REDACTED] client. [REDACTED] noted that the beneficiary is working on an ongoing project [REDACTED] will work at [REDACTED] office at the location on the certified LCA, and that her primary duties are:

- Analyze the use cases and convert them into technical specifications such as data model and service contracts.
- Develops complex.liferay portal using Java, J2EE, Struts MVC Portal, Soap/Restful Frameworks and JQuery as per emerging requirements, so that these components can be readily used across our current and in our future projects.
- Implement security by creating different user groups and assigning roles to the users.
- Utilize Oracle & MS SQL for the database development.
- Work with the build-and-deploy team for the proper deployment of the application.
- Co-ordinate with other IT teams such as the Database development team, User interface and Testing teams to accomplish goals.

The record also included the Master Services Agreement (MSA) between the petitioner and [REDACTED] dated May 13, 2013, which referenced an attached SOW. The SOW, signed by the petitioner on January 15, 2014, indicates that the petitioner will provide services to [REDACTED] the third party. The SOW identifies the beneficiary as the consultant and notes that she will work on the project as a "Senior JAVA Developer."

The petitioner also submitted a revised "Itinerary of Work Location," which identifies the client as [REDACTED] and adds a statement of work which provides the same description of duties as the petitioner initially submitted in its letter in support of the petition.

The record in response to the director's RFE also included the petitioner's tax and corporate documents, an employment offer and acceptance by the beneficiary, electronic mail transmissions between the beneficiary and other individuals, and the petitioner's organizational chart. The petitioner's organizational chart identified the beneficiary as a programmer/analyst reporting to a team lead. The petitioner further included letters from other companies confirming they routinely hired employees with bachelors or higher degrees to perform computer software development and support related work. The petitioner also submitted its advertisement for systems analysts which included an overview of work to be performed and listed the skills required as a "[b]achelor or [h]igher [d]egree in CS, Eng., Business Admin, or IT related." The petitioner also identified three individuals in the petitioner's employ as computer systems analysts and provided their diplomas, transcripts, letters written in support of H-1B petitions on their behalf, H-1B approval notices, and payroll records showing their employment by the petitioner.

Upon review of the record, the director denied the petition, determining that the record did not include sufficient evidence establishing the specific duties the beneficiary will perform for the actual end client, the [REDACTED]. The director further found that the record did not include sufficient evidence demonstrating the duration of the beneficiary's services required by the end client, the qualifications necessary to perform the work, or consistent information regarding the work location. The director determined that the record is insufficient to establish who will

maintain the right to control and supervise the beneficiary and how this right will be exercised at the end client worksite. The director concluded that the record does not establish actual specialty occupation work to be completed, "that the duties to be performed are those of a computer systems analyst and, thus a specialty occupation; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period."¹

On appeal, the petitioner references the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on computer systems analysts and highlights the section that reads "**For more technically complex jobs, a master's degree in computer science may be more appropriate.**" [Emphasis in brief submitted on appeal.] The petitioner then refers to the beneficiary's education in this matter. The petitioner references three additional exhibits as evidence which clarifies the beneficiary's duties at the client site and as evidence that demonstrates that it is the entity that has an employer-employee relationship with the beneficiary. The petitioner contends that these exhibits and the evidence submitted in response to the RFE establish that it "is in the business of Software Development & Information Technology Services, and the beneficiary is [its] employee, and [it has the] right to hire, fire, pay, supervise, ability [to] change the work location, and determine where she [will] work, and the proffered position is a Specialty occupation, and Specialty occupation work is available for the requested period of intended employment."

The exhibits on appeal include an electronic mail transmission to the beneficiary from a [REDACTED] representative, noting [REDACTED] policy prohibits providing a hardcopy letter, but which confirms the beneficiary's work at the client site located at the address identified on the LCA, that the work is an information technology project implemented by [REDACTED] and that the beneficiary is working as a JAVA developer. The petitioner also included a letter, dated August 20, 2014, signed by a representative of [REDACTED] stating that the beneficiary is employed as a Java Developer for the petitioner. The representative provided a list of the beneficiary's responsibilities which paraphrased the duties set out in the [REDACTED] letter, provided in response to the director's RFE. The letter-writer noted that "ultimate supervision" of the beneficiary is provided by the petitioner. The petitioner also provided a letter in support of the appeal, dated August 27, 2014. The petitioner repeated its initial description of duties for the proffered position and reiterated that it is the entity that exercises control over the beneficiary's work and work assignments.

The petitioner also references previous guidance issued by the California Service Center regarding the documents necessary to establish a valid employer-employee relationship. The petitioner asserts that the director did not follow this guidance by evaluating the totality of the record and applying the preponderance of the evidence standard.

¹ As will be discussed below, we find that the director is incorrect if she meant to convey that all computer systems analyst positions by virtue of their occupational classification qualify as specialty occupations.

II. STANDARD OF REVIEW

In light of the petitioner'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 our 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.

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 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*, we find that the director's ultimate decision in this matter was 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.

III. SPECIALTY OCCUPATION

A. The Law

The primary issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

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

entry into the occupation, as required by the Act.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a computer systems analyst). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. We find that the petitioner has failed in each of these regards.

First, we note here 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.

B. Analysis

We reviewed the record in its entirety and concur 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.*

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, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has provided sufficient evidence of the actual proffered position, including a detailed description of the duties and the educational requirement to perform those duties, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. As referenced above, the petitioner has not done so here. Rather, the record includes three different versions of the beneficiary's proposed duties, none of which include the requirements of the ultimate end-client, the [REDACTED]

Nevertheless, we will review the three different versions to attempt to discern what duties the beneficiary will actually perform. The work order submitted between [REDACTED] and [REDACTED] indicates generally that the beneficiary as a developer will convert a design into a complete information system and will acquire and install systems environment, will create and test databases, prepare test case procedure, prepare test files and code, compile and refine programs. This overview is inadequate as it does not provide sufficient substantive information regarding the beneficiary's daily duties to conclude that the beneficiary will primarily perform specialty occupation duties. [REDACTED] on appeal, states generally that the project requires the beneficiary to develop a portal using routine computer language and programs and will implement security by creating different user groups and work and coordinate with other teams to accomplish goals. Again, the generic statements by [REDACTED] do not convey an understanding of the beneficiary's actual proposed duties. Moreover, neither [REDACTED] specify the educational requirements necessary to perform the duties they generally describe.

As referenced above, the record does not include a description of the project and the required work to be performed to complete the project by the ultimate end-client the [REDACTED]. The petitioner has not submitted the Master Services Agreement between [REDACTED]. Nor does the record include a Master Services Agreement between [REDACTED]. Thus, the record does not include any information regarding restrictions, limitations, or requirements on the software professionals who will actually perform the work for the ultimate end-client. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without this information, we cannot ascertain the extent of the beneficiary's proposed duties and whether her duties require 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.

Thus, upon review of the totality of the record, the petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary

would be performing services primarily as a computer systems analyst.² The petitioner has also failed to establish that, at the time the petition was filed, it had secured non-speculative work for the beneficiary that corresponds with its claims regarding the nature of the work it described in its submitted position description. As the petitioner in this matter has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. We affirm the director's determination that the petitioner has not provided a description of the actual work the beneficiary will perform for the end-client and has not established the proffered position is a specialty occupation. 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, even if the duties as described by the petitioner fall within the occupation of a computer systems analyst position, the petitioner has not submitted probative evidence establishing the proffered position is a specialty occupation.

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

² We observe that the intermediary vendors, [REDACTED] refer to the beneficiary's position as a senior JAVA developer, a developer or a JAVA developer, respectively. The petitioner does not clarify the difference between the beneficiary's work as a developer, if in fact that is the work she will perform and the beneficiary's proposed work as a computer systems analyst. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Occupational Outlook Handbook (Handbook) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

In this matter, the petitioner identifies the proffered position as a computer 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 systems analyst 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

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.

³ Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

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. Dept'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. 19, 2015).

The petitioner in this matter has provided such a broad overview of duties without relating specific duties of the project to which the beneficiary will be assigned that it is not possible to conclude whether it expects the beneficiary will be a programmer analyst, a software quality assurance analyst, or a general purpose analyst. As referenced above, the intermediary vendors identify the beneficiary's position as a developer or JAVA developer, further confusing the beneficiary's role at the end client. Upon review, there is simply not enough consistent, probative information regarding the actual duties of the proffered position to assess the actual duties.

However, we observe that 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. 19, 2015).

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 its computer systems analyst is a "Bachelor degree in Engineering, Computer Science, Science, Maths, Accounting, Business Administration or IT related field." The petitioner's acceptance of a general degree in either the physical sciences or business administration is tantamount to an admission that the proffered position is not in fact a specialty occupation.

We find, 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 accounting 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," we do 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.

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.

In this matter, the petitioner implies on appeal, that the beneficiary's educational background establishes that the proffered position is a specialty occupation. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

Absent evidence that the proffered position requires a degree in a specific discipline to perform 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. In this matter, the petitioner has not provided such evidence.

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. We acknowledge the petitioner's submission of three letters from individuals who claim to work for companies that are in the petitioner's industry. However, while the individuals writing the letters confirm that their companies "routinely hire employees with Bachelors or Higher degrees or its equivalent for doing computer software development & support related work," these individuals do not claim that the bachelor's degree must be *in a specific discipline* as a minimum requirement to perform the duties of a computer systems analyst.

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 broad description of the duties of the proffered position. As determined above, it is not possible to ascertain what the beneficiary will actually do on a daily basis for the end client. 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.

We also observe 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 she will receive specific instructions on required tasks and expected results; and that her 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.

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.⁴ 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).

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

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

⁴ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her 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=26900&year=14&source=1> (last visited Mar. 19, 2015).

candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulation, the petitioner provided documentation regarding the education and employment of three of its employees as systems analysts. We observe that the petitioner is in the business of placing individuals with other companies for the purpose of providing IT consulting services. Thus, it is apparent that the title that the petitioner gives to a particular position does not reflect that the duties of these positions will be the same, as the individuals are assigned to different companies. Notably, the pay statements for individuals that the petitioner claims hold the same position as the proffered position have addresses in Michigan, Maryland, and Alabama. The beneficiary is assigned to an end client in Indiana. The job duties for the positions that these individuals hold, as described by the end clients where they are employed, were not provided. Thus, upon review of the record, the petitioner has not submitted sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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, we again note that 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.⁵ 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.

IV. SPECULATIVE EMPLOYMENT

We also affirm 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. 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.

The agency made clear long ago that speculative employment is not permitted in the H-1B program.⁶ 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).

⁵ *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.

⁶ 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.

In this matter, even if the beneficiary was assigned to work in accordance with the work order between [REDACTED] and even if her duties would comprise the duties of a specialty occupation, (which the record has failed to establish), the record does not establish that the beneficiary would be employed for the duration of the requested employment period, October 1, 2014 to September 1, 2017. 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 the beneficiary will be employed by the petitioner in the capacity and for the duration specified in the petition. The petitioner's statements regarding potential work projects is not corroborated by documentation substantiating that projects exist and that the project(s) will generate employment for the beneficiary even 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.

V. EMPLOYER-EMPLOYEE RELATIONSHIP

Next, 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." *Id.*

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

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

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

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

- (1) Engages a person to work within the United States;

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

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

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

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.⁷

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

⁷ 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).

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 318-319.⁸

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).⁹

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).

⁸ 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)).

⁹ 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).

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.

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."

Although the petitioner submitted evidence such as the master agreement and letter from [REDACTED] discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment from the end client, [REDACTED] or from [REDACTED]. The record does not include evidence from the end client such as a description of the project, the required work to be performed to complete the project, and who will control the beneficiary. The petitioner has not submitted the Master Services Agreement between [REDACTED] [REDACTED]. Nor does the record include a Master Services Agreement between [REDACTED] [REDACTED].

On appeal, the petitioner contends that the beneficiary is employed by the petitioner and that the petitioner controls the beneficiary's salary and conditions of employment.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed

in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, 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). Merely claiming in its letters that the petitioner 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. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as a letter from the end client, the petitioner did not submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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." 8 C.F.R. § 214.2(h)(4)(ii).

VI. CONCLUSION

When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the 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.