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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: FEB 03 2014 OFFICE: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Petitioner:
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,

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.

On the Form I-129 visa petition, the petitioner describes itself as an IT solutions company established in 2010. In order to employ the beneficiary in what it designates as a SAP FICO systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.[1]

In the petition signed on March 20, 2013, the petitioner indicates that it wishes to employ the beneficiary as a SAP FICO systems analyst on a full-time basis at the rate of pay of $67,600 per year. In addition, the petitioner indicates that the beneficiary will be employed off-site at

In the support letter dated March 28, 2013, the petitioner states that "[w]e are offering [the beneficiary] employment with our company in the position of SAP Systems Analyst in the FICO (Finance & Controlling) specialty." The petitioner further states that "[t]he position responsibilities are divided between those duties particular to the assigned project and those duties performed between projects." In addition, the petitioner states that "[t]he particular project is for Tate & Lyle in Decatur, Illinois."

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

Furthermore, the petitioner claims that the beneficiary will perform the following duties in the proffered position:

Job responsibilities when on-site at the customer project:

- Job Focus: Assist the customer in SAP projects with specialization in the FICO domains.
- Gather requirements from business users related to the FICO business processes (finance, financial control, accounts receivable, and accounts payable) to be incorporated into SAP functionality.
- Assist in streamlining the customer's FICO business processes.
- Prepare software application and module "blue prints" and functional specification documents.
- Perform application configuration in the customer's SAP systems according to the project requirements.
- Collaborate with software developers and programmers in analyzing and building custom enhancements to the customer's SAP software and systems.
- Test the implemented business processes in the customer's SAP system.
- Work with the customer's business users in completing User Acceptance Testing ("UAT").
- Provide production support after project "go live" to the customer's SAP system in the areas of Finance and Controlling.

Job responsibilities if and when off customer projects or between projects:

- Provide assistance regarding the employee's particular SAP specialty area to other SAP professional employees of [the petitioner] who will be working at various client locations. (30% of work)
- Train new associates and interns of [the petitioner] in building their SAP technical consulting and development skills in the employee's particular area of SAP. (30% of work)
- Work with Senior Architects of [the petitioner] in building our own SAP-based software products that will assist in implementation of SAP software systems at client locations. (30% of work)
- Work with other associates of [the petitioner] as a team towards a common goal of building the company as a premier SAP software solutions provider. (10% of work).

The petitioner also states, "The offered position has the following education and experience requirements: U.S. or foreign bachelor's degree (or, sometimes, the equivalent through education and experience) in computer science, engineering, management information systems, or a closely related field of study; and one or more years of relevant experience in SAP systems and applications." In addition, the petitioner states that "[r]egarding degrees, we will accept business administration and finance-related degrees when the offered position involves those fields, if the candidate has the necessary IT skills sets." The petitioner further states that "[w]e sometimes will accept those candidates with relevant Masters [sic] degrees who may not have as much on-the-job experience."

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Finance degree, awarded on August 17, 2012, and transcript from The petitioner also submitted a copy of the beneficiary's foreign diploma and transcript. The petitioner indicated that the beneficiary was maintaining nonimmigrant status as an F-1 student and was currently employed by the petitioner pursuant to post-degree optional practical training.

In addition, the petitioner submitted the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Systems Analyst" - SOC (ONET/OES Code) 15-1121, at a Level 1 (entry level) wage. The beneficiary's places of employment are listed as the following:
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- A copy of the beneficiary's resume. Notably, the petitioner is not mentioned on the resume.
- Printouts from the petitioner's website.
- A copy of the petitioner's Articles of Incorporation and business license certificate from California.
- A copy of the petitioner's Federal Income Tax Return for 2012.
- A copy of the petitioner's lease agreement, effective January 9, 2013.
- An Offer Letter from the petitioner to the beneficiary, dated March 19, 2013. The offer letters indicates that the beneficiary will be "reporting directly to our Senior SAP Systems Analyst The letter also indicates that the beneficiary "will be working at our various client locations across the United States."
- A document entitled "Employment Benefits Details."
- An undated letter titled "Job Duties and Project Confirmation" from President of the petitioning company, to the beneficiary. In the letter, states that the beneficiary's "assignment will be with" In addition, states that he "will be working at their corporate office located at further states that "[t]his is a long term project" and "[t]he start date is 03/25/2013 and the project is expected to last beyond 12/2016." Moreover, states that the beneficiary will be responsible for performing the following duties in the proffered position:
  - Assist and any future clients in SAP software implementation projects as SAP FiCo (Finance and Controlling)

Systems Analyst.

- Gather requirements from business users related to Finance and Controlling, AR (Accounts Receivable) and AP (Accounts Payable) business processes.
- Assist in streamlining their finance and controlling business processes.
- Prepare blue print documents and functional specification documents.
- Perform configuration according to the project requirements in the SAP systems of
- Work with developers/programmers in building custom enhancements to the SAP software.
- Test the implemented business processes in SAP.
- Work with business users in completing User Acceptance Testing (UAT)[.]
- Provide production support to the SAP systems after project go-live in the areas of finance and controlling.

- An undated letter titled President of the petitioning company, to the beneficiary.

- A letter from to the beneficiary. The letter is dated March 22, 2013. In the letter, states that "[t]his letter is supplemental to Agreement made between dated 20 March 2013 ('the Agreement')." In addition, states the following:

  START DATE: 1 April 2013

  The above shall be removed and replaced with:

  START DATE: 25 March 2013

  The letter is signed by for the petitioning company.

- A Contract Agreement between the petitioner and [2] The agreement is signed by President for the petitioning company. The agreement includes a document entitled The AAO notes that under the "Duration" section of the agreement, it states that "[t]his Agreement shall remain in force for the period detailed in Agenda 1 unless terminated in accordance the terms herein." The AAO also observes that Agenda 1 indicates the following:

[2] The AAO observes that the petitioner did not submit all of the pages of the Contract Agreement. No explanation for failing to provide the entire document was provided.

SPECIFIED CONSULTANT:	[The beneficiary]
SERVICE PROVIDER:	[The petitioner]

* * *

CLIENT NAME:	
CLIENT ADDRESS:	
CLIENT'S CLIENT:	
WORKING ADDRESS:	
NATURE OF BUSINESS/CLIENT:	Consultancy
IT CONSULTANCY SERVICES:	SAP FI CO
CONTRACT NUMBER:	
CONTRACT PERIOD:	13 Weeks
START DATE:	1 April 2013
END DATE:	30 June 2013

* * *

PROJECT DURATION:	The project in which the Consultant is providing Services to is expected to continue until December 2013. The End Date specified in Agenda 1 has been budget approved and confirmed by the Client. Once the Client and End Client approve budget for part two of project, Red Commerce will issue a

subsequent extension
document to the Agreement.

Notably, the document does not indicate that the beneficiary will provide services as a SAP FICO systems analyst as stated by the petitioner. Furthermore, the AAO observes that the petitioner has not provided an extension document to the agreement. Thus, according to Agenda 1, the project will end on June 30, 2013 (approximately four months after the petitioner's requested start date for H-1B employment).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 24, 2013.[3] The petitioner was asked to submit (1) evidence to establish that a specialty occupation position exists for the beneficiary; (2) documentation to clarify the petitioner's employer-employee relationship with the beneficiary; and (3) evidence to establish that the beneficiary is qualified to perform services in a specialty occupation. The director outlined the specific evidence to be submitted.

On June 12, 2013, in response to the director's RFE, the petitioner provided additional supporting evidence, including the following documentation:

- Job vacancy announcements.
- A printout of Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories from the *Federal Register,* Vol. 69, No. 247.
- A copy of "[redacted]" from [redacted] NSC Director (Nebraska Service Center, December 22, 2000).
- A letter from [redacted] at [redacted] The letter is dated June 3, 2013. In the letter, [redacted] states that "[the beneficiary], through [the petitioner] as his employer is performing contractor work for [redacted] at our office in [redacted] In addition, [redacted] states that "[the beneficiary's] assignment started on March 26, 2013." [redacted] further states that "[t]his is considered to be a long term position and his end date is yet to be determined." Moreover, he claims the following:

  > [The beneficiary] will be working as SAP Finance and Controlling (FiCo) consultant for our SAP projects. His duties will include, but will not be limited to:

[3] With the initial submission, the petitioner did not provide information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks when on-site at a client project. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

- Assist [redacted] in SAP software implementation project as SAP FI System Integrator
- Gather requirements from business users related to Finance and Controlling, Accounts Receivable and Accounts Payable business process
- Prepare Blueprint documents and functional specification documents
- Perform configuration according to the project requirements in the SAP system of [redacted]
- Work with developers/programmers to build custom enhancements to the SAP software
- Test the implemented business process in SAP
- Work with business users in completing the User Acceptance Testing (UAT)
- Provide production support to the SAP systems after the project go-live.

In addition, he states that "[t]his position requires a Master's Degree in Finance/Accounting or at least a Bachelor's Degree in Finance/Accounting with prior experience working as a SAP FiCo Consultant with expertise in configuration of SAP FiCo modules." Notably, the requirements for the position as stated in this letter are not consistent with the academic requirements for the proffered position as asserted by the petitioner in the letter of support dated March 28, 2013. No explanation was provided. Further, the AAO observes that [redacted] does not indicate the proffered position of SAP FICO systems analyst but rather a "SAP FI System Integrator." No explanation for the variance was provided by the petitioner or by [redacted]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on June 19, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted copies of the documentation previously submitted with the initial petition and in response to the RFE, along with new evidence.[4]

[4] With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the

The issue before the AAO is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has 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." 8 C.F.R. § 214.2(h)(4)(ii).

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).

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sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation. However, as will be discussed in this decision, the petitioner has not establish eligibility for the benefit sought.

Moreover, the AAO will briefly note that the letter from [redacted] dated July 1, 2013, is almost identical to the June 3, 2013 letter from [redacted] More specifically, the wording of the letters matches virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the validity and credibility of the statements.

Furthermore, the AAO observes that the letter does not indicate the beneficiary will serve as a SAP FICO systems analyst but rather as a "SAP FI System Integrator." In addition, the requirements for the position as stated in the letter differ from the petitioner's claimed academic and experience requirements as stated in the March 28, 2013 letter of support. No explanation for the discrepancy was provided.

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 (LCA) 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 legacy 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

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[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).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in 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," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" 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). That being 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).

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] Therefore, 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).[7]

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,

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[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)).

[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).

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).

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

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

In the instant case, the petitioner claims that it "has the right to control over the employee-beneficiary in a typical employer-employee manner." The AAO has considered the assertions of the petitioner within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. 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)). 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."

As a preliminary matter, the AAO notes that the record of proceeding contains materially inconsistent information regarding the beneficiary's place of employment. In the Form I-129, the petitioner indicates that the worksite for the beneficiary is [redacted] However, in the LCA, the petitioner indicates that the beneficiary's places of employment are [redacted] In the Offer Letter (dated March 19, 2013, several days prior to the H-1B submission), the petitioner states that the beneficiary "will be working at our various client locations across the United States." Thus, the Offer Letter does not convey that (1) a specific place of employment, (2) for particular client on a defined project, (3) with an established duration, had been established immediately prior to the filing of the H-1B petition. The petitioner did not acknowledge or provide any explanation for the discrepancies.

In the March 28, 2013 letter of support, the petitioner states that it "will place the beneficiary on its regular employee payroll, as it does with other employees of the company." In addition, the petitioner states that "[t]he beneficiary will be taxed as an employee of [the petitioner], and [the petitioner] is responsible for the appropriate employer-employee taxes." Furthermore, the petitioner asserts that it "will provide our standard employee benefits to the beneficiary."

The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an Offer Letter (dated March 19, 2013) from the petitioner to the beneficiary.

Upon review of the document, the AAO notes that it fails to adequately establish several critical aspects of the beneficiary's employment. For example, the Offer Letter does not provide specific information regarding the services the beneficiary will be expected to perform and where he will work. The agreement states that the beneficiary "will be working at our various client locations across the United States." According to the Offer Letter, the beneficiary may be placed at various locations and not necessarily in as indicated in the instant petition. The Offer Letter also does not provide the requirements for the position. While an offer letter may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

In addition, the Offer Letter states that the beneficiary "will be eligible for full benefits including medical, dental, vision, life insurance and accidental death and dismemberment insurance." The petitioner provided a document entitled "Employment Benefit Details." The document, however, only provides a bullet point list that does not include detailed information regarding eligibility requirements and criteria.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the position. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In the March 28, 2013 letter of support, the petitioner claims that the beneficiary is the source of the instrumentalities. The petitioner further states that "[the petitioner] also determines what computer skill sets will apply to a particular project based on project needs." The petitioner did not provide any further information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to fully address or submit probative evidence on the issue.

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 17, 2016. As previously mentioned, the petitioner stated on the Form

I-129 that the beneficiary will work at The petitioner submitted a Contract Agreement between the petitioner and , which states that "[t]his Agreement shall remain in force for the period detailed in Agenda 1 unless terminated in accordance the terms herein." The petitioner included Agenda 1 from Notably, the document does not indicate that the beneficiary will provide services as a SAP FICO systems analyst. Furthermore, the agreed upon end date for the beneficairy's services is June 30, 2013. The AAO observes that the document states that "[o]nce the Client and End Client approve budget for part two of the project, will issue a subsequent extension document to the Agreement." However, the record of proceeding does not contain an amendment or supplement to extend the beneficiary's services. Rather, the only supplement provided changed the start date from April 1, 2013 to March 25, 2013. Thus, according to Agenda 1, the project will end on June 30, 2013 (approximately three months *prior* to the petitioner's requested start date for H-1B employment).

In response to the RFE, the petitioner submitted a letter from IS-IT Category Manager at In the letter, states that "[the beneficiary], through [the petitioner] as his employer is performing contractor work for at our office in " In addition, states that "[the beneficiary's] assignment started on March 26, 2013." further claims that "[t]his is considered to be a long term position and his end date is yet to be determined." did not acknowledge that the Agenda 1 document from indicates that the beneficairy's services are scheduled to end on June 30, 2013.

Moreover, states that "[t]his position requires a Master's Degree in Finance/Accounting or at least a Bachelor's Degree in Finance/Accounting with prior experience working as a SAP FiCo Consultant with expertise in configuration of SAP FiCo modules." Notably, the requirements for the position as stated in this letter are not consistent with the academic requirements for the proffered position as asserted by the petitioner in the letter of support dated March 28, 2013. No explanation was provided.

The AAO also observes that refers to the beneficiary's position as a "SAP FI System Integrator." In addition, he provides a bullet point list of the beneficiary's duties, which contains vague tasks such as assist in SAP software implementation project, gather requirements from business users, and prepare blueprint documents and functional specification documents. The list of duties fails to provide the beneficiary's specific role in performing such tasks.

The AAO notes that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification for a three-year period. However, the documentation does not establish that the project will continue through September 17, 2016. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. 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'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. It must be noted that the record indicates that the beneficiary will be physically located at The petitioner is located approximately 1,960 miles away in California.

The director provided a list of the types of evidence to be submitted, which included a request that the petitioner submit documentation such as an organizational chart, a description of the performance review process and/or other similarly probative documents. Upon review of the record, the AAO observes that the petitioner elected not to provide an organizational chart, a description of its performance review process, or related evidence.

In the March 19, 2013 Offer Letter, submitted with the initial petition, the petitioner states that the beneficiary will be "reporting directly to our Senior SAP Systems Analyst "[8] The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner provide such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., brief description of job duties, location).

In the RFE, the director requested the petitioner provide information regarding the beneficiary's role in hiring and paying assistants. In the response, the petitioner elected not to address this issue or provide any information on this matter. Here, the petitioner was given an opportunity to clarify the beneficiary's role on this issue, but it failed to submit any probative evidence on the issue. Subsequently, in the appeal, the petitioner stated that the beneficiary has no role in hiring and paying assistants.

The petitioner is employed by the petitioner pursuant to post-degree optional practical training. The petitioner submitted the beneficiary's curriculum vitae to USCIS for review. Notably, the petitioner is not mentioned on the curriculum vitae. Based upon the curriculum vitae, there is no indication that the petitioner is or has been the beneficiary's employer.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter 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 does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having

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[8] It must be noted for the record that in the March 19, 2013 Offer Letter, the petitioner states that the beneficiary will be "reporting directly to our Senior SAP Systems Analyst However, in the undated letter titled "Job Duties and Project Confirmation" from of the petitioner company, states that the beneficiary is expected to reach out to his "supervisor (a Senior Architect with [the petitioning company]." No explanation was provided for the variation in the job title.

an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

There is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the petition cannot be approved, and the appeal must be dismissed.

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Furthermore, the AAO notes that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the legacy INS 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.

In response to the director's RFE, the petitioner submitted a letter dated June 3, 2013 from who works for the end-client (according to the petitioner). In the letter, provided a list of the beneficiary's duties, along with the academic requirements for the position.

Upon review of the record, the AAO notes that the petitioner and the end- client did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the record fails to specify which tasks are major functions of the proffered position. Moreover, the evidence does not establish the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, the record does not establish the primary and essential functions of the proffered position.

Moreover, while the petitioner has identified its proffered position as that of a SAP FICO systems analyst, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position,

which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.[9] Factors considered by the AAO when determining

[9] The AAO notes that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO does not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, 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. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, as discussed, the petitioner states, "The offered position has the following education and experience requirements: U.S. or foreign bachelor's degree (or, sometimes, the equivalent through education and experience) in computer science, engineering, management information systems, or a closely related field of study; and one or more years of relevant experience in SAP systems and applications." In addition, the petitioner states that "[r]egarding degrees, we will accept business administration and finance-related degrees when the offered position involves those fields, if the candidate has the necessary IT skills sets." The petitioner further states that "[w]e sometimes will accept those candidates with relevant Masters [sic] degrees who may not have as much on-the-job experience." Upon review of the record, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirement of a general degree and

these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[10] The petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.[11] However, contrary to the assertions of the petitioner, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupation:

> 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 know how to write computer programs.
>
> **Education**
> Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).
>
> 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.

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experience is equivalent to a bachelor's or higher degree in a specific specialty.

[10] All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

[11] For additional information regarding computer systems analyst positions, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1.

> Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.
>
> Some analysts have an associate's degree and experience in a related occupation.
>
> Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.
>
> Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Systems Analysts, available on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4.

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.[12] That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that (relative to others within the occupation) the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

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[12] 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 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.

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.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including an associate's degree and degrees not in a specific specialty.

The narrative of the *Handbook* states that some analysts have an associate's degree and experience in a related occupation. The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree in normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees. Notably, the AAO observes that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement.

The text of the *Handbook* suggests that a baccalaureate degree or higher may be a preference among employers of computer systems analyst in some environments, but that some employers hire employees with less than a bachelor's degree, including candidates that possess an associate's degree or a bachelor's degree in an unrelated specialty. Thus, the *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

In response to the director's RFE, the petitioner cites a legacy U.S. Immigration and Naturalization Services (INS) memorandum from the Nebraska Service Center Director, [redacted] The memorandum is entitled *"Guidance Memorandum on H1B Computer Related Positions,"* from [redacted], NSC Director, to Center Adjudication's Officers (Nebraska Service Center, December 22, 2000).

The AAO finds that the petitioner's reliance on this December 22, 2000 service center memorandum is misplaced as the memorandum is irrelevant to this proceeding. By its very terms, the memorandum was issued by the then Director of the NSC as an attempt to "clarify" an aspect of NSC adjudications; and, framed as it was, as a memorandum to NSC "Adjudication's Officers," it was addressed exclusively to NSC personnel within that director's chain of command. As such, it has no force and effect upon the present matter, which was initially adjudicated by the California Service Center and is now before the AAO for review. Furhter, the NSC no longer adjudicates H-1B petitions and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Even if the AAO were bound by this memorandum either as a management directive or as a matter of law, it was issued more than a decade ago, during what the NSC Director perceived as a period of "transition" for certain-computer related occupations; that the memorandum referred to now outdated versions of the *Handbook* (the latest of those being the 2000-2001 edition); and that the memorandum also relied partly on a perceived line of relatively early unpublished (and unspecified) AAO decisions in the area of computer-related occupations, which did not address the computer-related occupations as

they have evolved since those decisions were issued more than a decade ago.[13] In any event, the memorandum reminds adjudicators that a specialty occupation eligibility determination is not based on the proffered position's job title but instead on the actual duties to be performed. For all of the reasons articulated above, the memorandum is immaterial to this discussion regarding the job duties of the petitioner's proffered position and whether the petitioner has satisfied its burden of establishing that this particular position qualifies as a specialty occupation.

In addition, the petitioner asserts that DOL regulations as they relate to the "PERM" program for permanent labor certification, and as set forth in the *Federal Register,* Vol. 69, No. 247 at Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004), are relevant to this proceeding. However, the AAO does not find the petitioner's claim to be persuasive in establishing that the proffered position qualifies as a specialty occupation.

The AAO notes that the *Federal Register* states that the purpose of the list of occupations at Appendix A is not for determining whether a position is a specialty occupation. In fact, the *Federal Register* specifically states that "*the list [Appendix A] is not intended to be used to qualify an alien for purposes of eligibility under the H–1B and H–1B1 program* (emphasis added)." Moreover, the *Federal Register* states that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Thus, the AAO finds no merit in the petitioner's contention that the information is relevant to this matter. The petitioner cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 specialty occupation petitions provide for the approval of an H-1B petition based upon Appendix A, or even indicate that an employer's recruitment regiment for a permanent labor certification (which involves DOL) are relevant to the adjudication by USCIS of H-1B petitions.

Furthermore, the AAO is not persuaded by the petitioner's claim that the proffered position is a specialty occupation because of the cited appendix. The appendix is a list of occupations for which a bachelor's degree or higher degree is a customary requirement. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite the petitioner's assertion to the contrary, the documentation is not probative of the proffered position qualifying as a specialty occupation.[14]

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[13] While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

[14] The issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession as that term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). Thus, while a position may qualify as a profession as that

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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." 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. 165 (Comm. 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO will review the record 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 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 a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference it previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

In response to the director's RFE, the petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

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term is defined in section 101(a)(32) of the Act, the occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

In the Form I-129 and supporting documents, the petitioner stated that it is an IT solutions firm established in 2010, with 27 employees. The petitioner further stated that its gross annual income is $2.3 million. Although requested on the Form I-129, the petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541512.[15] The AAO notes that this NAICS code is designated for "Computer Systems Design Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

> This U.S. industry comprises establishments primarily engaged in planning and designing computer systems that integrate computer hardware, software, and communication technologies. The hardware and software components of the system may be provided by this establishment or company as part of integrated services or may be provided by third parties or vendors. These establishments often install the system and train and support users of the system.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, – Computer Systems Design Services, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited January 31, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The petitioner submitted several job postings, but it did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

For instance, the advertisements include positions with [redacted] (a multinational media and information company "[w]ith over 55,000 colleagues in more than 100 countries"); [redacted]

[15] According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. *See* http://www.census.gov/eos/www/naics/ (last visited January 31, 2014).

(provides hardware, software and services to consumers, small- and medium-sized businesses and large enterprises, including customers in the government, health and education sectors); ((a company that designs, manufactures, markets and supports a comprehensive line of auxiliary products for the plastics processing industry). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Under this criterion of the regulations, the petitioner must demonstrate the degree requirement is *common to the industry* in parallel position *among similar organizations*.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner submitted a posting for a senior lead application support analyst position with which requires a degree, "plus a minimum of five years [of] telephone support or a combination thereof" and "[f]ive years [of] software testing or training experience." The petitioner also provided a posting for a business analyst III position with which requires a bachelor's degree (or equivalent experience) and a minimum of 6 years of related experience or a master's degree and a minimum of 4 years of experience. Moreover, the petitioner submitted a posting for a senior configuration analyst position for which requires a degree five years of "configuration experience providing pricing and/or benefits configuration support on or a similar payer system." Additionally, the petitioner submitted a job posting for a systems analyst position for which requires candidates to possess a degree, plus "1-2 years [of] experience with programming" and "3-5 years[of] experience supporting an preferably As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the AAO observes that the petitioner submitted advertisements indicating that a bachelor's degree in business and/or business administration is acceptable. 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 at 147 (1st Cir. 2007).[16]

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[16] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*,

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.[17]

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. 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 AAO 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.

In the instant case, the petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the programmer analyst position. Specifically, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Further, the petitioner how the duties of the proffered as described 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

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> 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

[17] Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of SAP FICO systems analyst for companies that are similar to the petitioner and in the same industry requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a SAP FICO systems analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Systems Analysts" at a Level I (entry level) wage. The wage level of the proffered position indicates that (relative to others in the occupation) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.[18]

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Therefore, the evidence of record does not establish that this position is significantly different from other computer systems analyst positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not normally required for entry into such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer systems analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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[18] For additional information on wage levels, *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.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or by the client / end-client) 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.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. 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. To interpret the regulations any other way would lead to absurd results: 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 a 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.* at 388.

The petitioner stated in the Form I-129 petition that it has 27 employees and was established in 2010 (approximately three years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. 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.

Upon review of the record, the petitioner has not provided 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. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." It is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, 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" and requires a significantly higher wage.

The petitioner has submitted inadequate 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. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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. For this additional reason, the appeal must be dismissed and the petition denied.

Moreover, the AAO will now address another basis for denial of the petition. More specifically, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as

provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a SAP FICO systems analyst at facility for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until September 17, 2016, the petitioner failed to substantiate the proposed employment at Tate & Lyle for the duration of the period requested. Thus, it appears that the beneficiary will work at multiple locations at some point during the requested period of employment and the petitioner failed to provide an itinerary when it filed the Form I-129 in this matter. Thus, the petition must also be denied on this additional basis.

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 (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 appeal will be dismissed 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, 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.