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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

[redacted]

D2

Date: DEC 05 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 remain denied.

The petitioner describes itself as is a software development and consulting company established in 2005. It claims to employ 121 personnel, and to have earned an estimated $12,000,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, 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) Form I-290B, Notice of Appeal or Motion, with counsel's supplemental brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on September 2, 2009, the petitioner indicated that it wished to employ the beneficiary as a programmer analyst for three years, from August 27, 2009 until August 25, 2012 at an annual salary of $60,000. The Labor Condition Application (LCA) accompanying the petition listed the beneficiary's work location as Lansing, Michigan and identified the duration of the LCA as from August 25, 2009 until August 25, 2012.

In the August 27, 2009 letter submitted in support of the petition, the petitioner stated that it is a full-service technical and software development firm and provides software development, data processing consulting and business process re-engineering and Enterprise Resources Planning services to Fortune 500 clients in a range of industries. The petitioner noted that it recruited a variety of professionals under the title of programmer/analyst and that within this broad title, the programmer/analysts performed a wide variety of duties and depending on the particular sub-specialization, the specialized knowledge they needed varied. The petitioner provided a broad overview of the generic duties of a programmer/analyst and a summary of the job duties to be performed by the beneficiary. The petitioner indicated the duties of the beneficiary would include:

- Designing, programming and implementing software applications & packages customized to meet specific client needs.
- Reviewing, repairing and modifying software programs to ensure technical accuracy and reliability of programs.
- Analyze the communications, informational, database and programming requirements of clients; plan, develop, design, test and implement appropriate information systems.
- Review existing information systems to determine compatibility with projected or identified client needs; research and select appropriate systems, including

ensuring forward compatibility of existing systems.
- Train clients on use of information systems and provide technical and de-bugging.

The petitioner stated that the beneficiary had obtained the equivalent of a bachelor's degree in computer science from an accredited college or university in the United States. The petitioner referenced the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) chapters on "Computer Scientists and Systems Analysts" and "Computer Programmers" and asserted the industry standard requires candidates for these positions to have at least a bachelor's degree in computer science, electronics or a related area of information science. The petitioner also referenced the Department of Labor's *Dictionary of Occupational Titles* and the assignment of a specific vocational preparation (SVP) rating of seven for the position of software engineer. The petitioner further included its August 27, 2009 employment offer to the beneficiary indicating that the beneficiary would work for the petitioner's client in Lansing, Michigan.

On October 6, 2009, the director issued an RFE advising the petitioner, in part, that as it appeared to be engaged in the business of consulting, staffing, or job placement, the petitioner must clarify the petitioner's employer-employee relationship with the beneficiary. The director requested copies of signed contracts between the petitioner and the beneficiary, a complete itinerary of services and the names and addresses of the actual employer(s), and copies of signed contractual agreements, statements of work, or other agreements between the petitioner and the authorized officials of the ultimate end-client companies where the work would actually be performed. The director requested a comprehensive description of the beneficiary's proposed duties where the work would ultimately be performed.

In response, the petitioner, in a November 3, 2009 letter, stated that the beneficiary would be working on a project through Unified Business Technologies (UBT) at Michigan State University. The petitioner enclosed a copy of its contract with UBT and a contract between UBT and Michigan State University (MSU). The petitioner noted: "[e]ven though [the beneficiary] will be off-site, we will conduct periodic performance reviews and will directly supervise all aspects of his duties through an IT Manager at MSU." The petitioner also indicated that the beneficiary would be working on the Enterprise Business Systems Project at MSU and that although the project was to be completed in two years, in the vast majority of situations the purchase orders are extended and even if this did not happen in this matter, the beneficiary could easily be assigned to work on another of the petitioner's projects. The petitioner stated that the beneficiary would fill the position of programmer analyst and that all of its information technology positions required a minimum of a bachelor-level education with a major area of study in business, engineering, software, or other IT-related field and the specific area of study often depended on the specific job duties.

The petitioner provided a copy of its contract with UBT that contained a clause that if UBT is dissatisfied with the service of personnel furnished by the petitioner and requested that the personnel be replaced the petitioner would use its best efforts to replace the personnel. An August 17, 2009 purchase order attached to the contract identified the beneficiary as the consultant/employee, indicated the start date as August 31, 2009, and the period of the contract as "12 months extendable." The petitioner also provided an overview of the Enterprise Business

Systems Project which did not provide the number of personnel assigned to the project or identify the supervisors on the project. The record further included an October 18, 2007 agreement between UBT and MSU indicating that UBT would provide the services of its employees as requested by MSU and that the term of the agreement is one year with options to extend the agreement in one-year periods up to eight times.

The petitioner also submitted an October 27, 2009 letter signed by a senior SAP HR consultant, later identified as the beneficiary's colleague on the Enterprise Business Systems Project, indicating that the beneficiary had been working on the project since September 1, 2009 as an SAP HR ESS/MSS/Portal consultant. The October 27, 2009 letter noted that the beneficiary's knowledge of SAP tools experiences on the different environments had been helpful to the development and modifications needed to support the EBSP application. In an October 28, 2009 letter signed by the program manager at UBT, the program manager stated that the petitioner, not UBT, is "responsible for the supervision, direction and control of their employees, payment of wages, hiring, firing, providing benefits, compliance with worker's compensation and other applicable employer-employee related laws and regulations." The program manager indicated further that UBT considered the beneficiary to be the petitioner's employee, that the beneficiary is currently working on-site at MSU as a SAP HR ESS/MSS/Portal Architect/Admin, and that his duties include analysis, software design, and development and testing of this business system application. The program manager indicated that the beneficiary is supervised by an IT manager at MSU and that the beneficiary's job duties in the position required at least a bachelor's degree or foreign or experiential equivalent as the minimum requirement for the position and that this was the industry standard. The letter did not indicate that the bachelor's degree must be in a specific discipline.

The director denied the petition on December 22, 2009.

On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation and references an April 22, 1993 AAO decision in support of the assertion. Counsel contends that the documentation submitted supports a finding that MSU is the end client in this matter and that the position is a specialty occupation. Counsel also submits a December 18, 2009 letter signed by the director of the Enterprise Business Systems Project at MSU who states that the beneficiary performs the following duties on the project:

- Interact with functional and technical team to define the requirements for the SAP Portal.
- Setup SAP Portal content including HR ESS/MSS components.
- Setup the J2EE stack of SAP Portal 7.0 to serve the need of ESS & MSS.
- Setup the Adobe Document Server, Interact with the SAP Basis team in establishing the monitoring including ESS and MSS scenarios through SAP Portal.
- Interacts with the security team in establishing and customizing the security schemas of ESS and MSS and general purpose roles through SAP Portal.
- Document the processes and transfer knowledge to other project team members.

The MSU director does not specify the educational requirements to perform the above listed functions.

Counsel also submits a position evaluation prepared by [redacted] dated December 18, 2009. [redacted] opines that it is an industry standard to "contract with employees according to a more generalist description, and then assign them to specific end-client projects in which specific tools and platforms will be utilized . . . (thus resulting in a more specific job description . . .)." Based on his review of the petitioner's initial general description of the duties of the position, [redacted] notes his belief that the petitioner's position of programmer analyst required a bachelor's level education in an appropriate technical field such as computer science, information systems, computer engineering, or related field. [redacted] also indicates that he reviewed MSU's description of the duties performed by the beneficiary and the project to which the beneficiary is assigned and opines: "[t]he process of software requirements analysis and design, executed within an environment of this nature and magnitude, could only be properly executed via application of a bachelor's-level background, comprising concepts and techniques of advanced mathematics and algorithms, engineering, computer applications, computer science, computer information systems, IT, the technical sciences, and/or related areas, as gained via prior academic study and/or employment." [redacted] concludes that the job duties of the project and the occupation are clearly at the specialty level. [redacted] also claims that the duties described by the end client are essentially a more specific version of the general programmer analyst position initially described by the petitioner.

Preliminarily, counsel's reference to a 1993 AAO decision is not probative in this matter. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision, other than to state that both include the titled position computer programmer. 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. Further, the petitioner's submission of the December 18, 2009 letter from the end client for the first time on appeal will not be considered. 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 (BIA 1988). The AAO acknowledges counsel's claim that the beneficiary was unable to provide this letter in response to the RFE; however, the beneficiary is not responsible for establishing that the proffered position is a specialty occupation, as the beneficiary of a visa petition is not an affected party. *See* 8 C.F.R. § 102.3(a)(1)(iii)(B). Notwithstanding [redacted] opinion that it is an industry standard to offer a generalist's position to a beneficiary and then refine the position once the end client project is identified, 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r

1998). To comply with the requirements of an H-1B petition, the petitioner must submit evidence of the specific duties of the actual position when the petition is filed.

The AAO will now consider whether the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (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 [(2)] which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is

preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. 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 this matter, the petitioner initially provided a broad overview of the duties of the proffered position. The petitioner did not specify any particular project to which the beneficiary would be assigned. In response to the director's RFE, the petitioner indicated that the beneficiary had been assigned to a project through Unified Business Technologies (UBT) at Michigan State University. To establish that the actual duties of the beneficiary comprised the duties of a specialty occupation, the petitioner provided a letter from the beneficiary's colleague on the project which provided a general overview of the duties relating to the project and a letter from the program manager of UBT indicating that the beneficiary had been assigned to a project and which also provided a generic description of the beneficiary's duties for the project. Neither letter indicated the performance of the duties of the project required a bachelor's degree in a specific specialty. The UBT program manager specifically indicated that the duties described required a general bachelor's degree. It is not possible to discern from the overview of the information provided by the petitioner or the information provided by UBT and the beneficiary's colleague that the beneficiary's assignment and actual day-to-day duties entail primarily H-1B caliber work. Further, even if the petitioner were to demonstrate, which it did not do, that the

beneficiary will work as a programmer analyst for MSU for the duration of the petition, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The Programmer Analyst occupational category is addressed in two chapters of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The *Handbook* describes computer programmers as follows:

> [C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.
>
> Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.
>
> As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .
>
> * * *
>
> [M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers

[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http: www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

> hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook*'s section on computer systems analysts reads, in pertinent part:

> In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client–server applications, and multimedia and Internet technology.
>
> * * *
>
> [W]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.
>
> Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation. . . .

As evident in the excerpts above, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials. The AAO observes as well that this corresponds with the petitioner's indication that a bachelor-level education with a major area of study in business, engineering, software, or other IT-related field would be acceptable and that the specific area of study often depended on the specific job duties.

To reiterate, the information in the *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree or its equivalent in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties in this matter do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

The AAO acknowledges counsel's reference to the Department of Labor's *Dictionary of Occupational Titles* (*DOT*) and the assignment of an SVP rating of seven for the position of software engineer. However, the AAO does not consider *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

The AAO has also reviewed the opinion of [redacted] provided on appeal. Although [redacted] indicates his belief that the generally described position of a programmer analyst requires a bachelor's degree in a specific discipline, he does not include the results of formal surveys, his research, statistics, or any other objective quantifying information to substantiate his opinion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. [redacted] opinion is insufficient to overcome the *Handbook's* finding that programmer analyst positions do not normally require at least a bachelor's degree or its equivalent in a specific specialty. Moreover, [redacted] does not appear to take into account that the petitioner in response to the director's RFE indicated that a minimum of a bachelor-level education is required with a major area of study in business, engineering, software, or other IT-related field. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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, acceptance of a general degree will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Further, [redacted] does not acknowledge and neither the UBT representative nor the MSU representative indicates, that the duties of the project to which the beneficiary was assigned require the attainment of a bachelor's degree or higher in a specific discipline.

As the *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The AAO has considered the opinion of [redacted] and reiterates that the opinion is insufficient to assist in establishing that a bachelor's degree in a specific specialty is an industry-wide standard for parallel positions in organizations similar to the petitioner.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." Again, the evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed and consistent information to distinguish the proffered position as unique from or more complex than other generic computer software positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner also fails to establish that it normally requires a bachelor's in a specific specialty. The record does not include specific information supported by documentation that the petitioner normally hires only individuals with specific degrees to perform the duties of the proffered position. 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)). Therefore, 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 its position's 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. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties as generically described requires a higher degree of IT/computer knowledge than would normally be required of other information technology professionals not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Moreover, the description provided by UBT in response to the director's RFE and the UBT's representative's acknowledgment that a general bachelor's degree is sufficient to perform the duties of the position is tantamount to an acknowledgment that the proffered position is not a specialty occupation. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements 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 the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's employer or agent. Under the test of *Nationwide Mutual Ins. Co. v. Darden (Darden)*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"), 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." *Darden*, 503 U.S. 318 at 322-323 (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. at 440 (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)).[2]

Therefore, in considering whether or not one is 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)(2) (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)).

Factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also*

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[2] 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. 1994), *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).

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 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note 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 may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).[3]

Applying the *Darden* test 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." First, under *Defensor*, it was determined 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. *See Defensor v. Meissner*, 201 F.3d at 388. Similarly, in this matter, the petitioner's contract with UBT allows UBT to terminate the work order for the beneficiary's services if it is dissatisfied with the beneficiary's performance. Moreover, although the petitioner claims that it will monitor the beneficiary's performance, the petitioner also acknowledges that MSU personnel will directly supervise the beneficiary's day-to-day work. Thus, the record in this matter does not include sufficient indicia establishing that the petitioner will actually control the beneficiary's work and the specific duties of the position. The beneficiary will not work on the petitioner's premises, the duties of the assignment have been described generally, and the beneficiary may be replaced at the request of a third party. Other than putting the beneficiary on its payroll and providing benefits, it is not clear that the petitioner will control the beneficiary's work assignment with the end user.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer"

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[3] 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.

represented by the petitioner in a documented agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or even that the termination of the beneficiary's employment is the ultimate decision of the petitioner. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Further, beyond the decision of the director, the petitioner has not established that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's requested employment period.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

> The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added.]

The petitioner in this matter has not established that it has sufficient H-1B caliber work for the beneficiary for the duration of the H-1B employment period. As the work order for the beneficiary's services terminates August 31, 2010, prior to the end date of the beneficiary's requested H-1B classification, it is not possible to establish conclusively that the beneficiary will work in Lansing, Michigan for the entire duration of the petition. Although the petitioner claims that it has in-house projects to which the beneficiary could be assigned, if the work order with UBT is not extended, the record does not include evidence of those projects. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.

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

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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