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

D2

[redacted]

Date: OCT 2 2 2012 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, ("the 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 remain denied.

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner describes itself as an IT consulting firm established in 1997 with 85 employees and $7,442,581 in gross annual income and $113,140 in net annual income. The petitioner seeks to employ the beneficiary as a programmer analyst and 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 determining that the petitioner had failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) 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) 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 October 25, 2010, the petitioner indicated it wished to employ the beneficiary as a programmer analyst from December 1, 2010 to November 30, 2013 at an annual salary of $54,200. The petitioner also provided a Labor Condition Application (LCA) certified on October 15, 2010, valid for a period beginning December 1, 2010 to November 30, 2013 for a Level I (entry-level), programmer analyst SOC (ONET/OES) code 15-1021,[1] to be located in Jefferson City, Missouri where the prevailing wage for a Level 1 programmer analyst is $39,645 and in Chesterfield, Missouri where the prevailing wage for a Level 1 programmer analyst is $43,534.

In the October 20, 2010 letter submitted in support of the petition, the petitioner stated that it is engaged in information technology consulting services and provides services to [redacted] companies and government entities. The petitioner noted that the beneficiary is being offered temporary employment as a programmer analyst and described the duties of a programmer analyst as:

> The incumbent is typically expected to analyze requirements of the users who will be working with the software being developed. This involves detailed data gathering and analysis regarding what the software is expected to do in the users' business or activity. The next element of the development is to undertake flowcharting of the program and developing appropriate algorithms (problem solving methods) using knowledge of computer systems, software/hardware architecture, the tools and platforms used in the development and the various development methodologies. The incumbent is then responsible for coding, testing and implementing the software.

[1] The petitioner's LCA identifies the SOC (ONET/OES Code) as 15 -1021.00 – computer programmers; however, the codes have been revised and the new SOC code for computer programmers is 15-1131.00.

Typically the incumbent is expected on a day-to-day basis to work approximately 50% of the time on data analysis and flowcharting, 20% of the time in developing algorithms and 30% of the time in software development and coding.

The petitioner stated that the usual minimum requirement of the job duties of the proffered position is a bachelor's degree in computer science/engineering or a related field. The petitioner provided its offer of employment to the beneficiary wherein it described the responsibilities of the beneficiary's position as including: "analysis, design, and development and testing of specialized software to fulfill our client's requirements" and "development and maintenance services in COBOL, MVS, CICS, JCL, VSAM, and DB2 environments."

On January 21, 2011, 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 submit copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the authorized officials of the ultimate end-client company where the work will actually be performed by the beneficiary and a detailed description of the duties the beneficiary will perform and a description of who will supervise the beneficiary.

In a February 18, 2011 response, the petitioner stated that the beneficiary had been offered employment by the petitioner to work at [redacted] at its client's location in Jefferson City, Missouri. In a separate letter the petitioner indicated it currently had 23 employees working at this location and that it conducted annual performance and salary reviews for each of its employees. The petitioner provided a project description and noted the estimated duration of the project as three years with the possibility of extensions. The petitioner also paraphrased the above description of duties as also the beneficiary's duties. The petitioner further submitted a September 11, 2007 consulting agreement entered into between Infocrossing and itself that listed the term of the agreement as four years. The record also included a statement of work between the petitioner and Infocrossing for a VSAM to DB2 Conversion project beginning June 7, 2010 through June 7, 2011 unless extended. The statement of work included Infocrossing's request of four teams of six IT resources each to assist in completing the project. Infocrossing noted in the statement of work that the petitioner's teams would work under the direct supervision of an Infocrossing project manager.

The director denied the petition on April 25, 2011, finding that the proffered position was not a specialty occupation because the end-client had not provided a description of the duties that the beneficiary would perform.

On appeal, counsel for the petitioner asserts that the evidence of record demonstrates that the beneficiary will be performing services in a specialty occupation and that the petitioner is not a token employer but is the beneficiary's actual employer who "hires, pays, fires, supervises, or otherwise controls" the beneficiary's work. Counsel resubmits the consulting agreement with Infocrossing and provides a June 10, 2011 letter signed by [redacted] references a Medicaid Management Information System (MMIS) and Fiscal Agent Services multi-year contract entered into with the State of Missouri Department of Social Services. [redacted] also lists the typical duties and responsibilities of the MMIS

- Analyze, research, develop, test, implement and support business software applications in conjunction with hardware using skills in COBOL, CICS, VSAM, DB2, JCL, and SQL.
- Analysis and review of enhancement requests and specifications.
- Review of the coded programs to ensure that they meet the requirements and standards.
- Coding of new programs as per client's specification & creating test data in DB2 for unit testing.
- Modifying existing programs to new standards & unit testing and implementation.
- Creating migration packages for system testing, user testing and implementation.
- Providing post implementation support and production support.

[redacted] states that the typical educational requirement is a bachelor's degree or higher with relevant experience. [redacted] notes that this letter can be used as proof of its intent to hire qualified applicants from the petitioner on an as needed basis and that [redacted] has accepted the beneficiary to work on the MMIS project. The petitioner also provides evidence that the State of Missouri had awarded a contract to Infocrossing.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the applicable statutes and regulations. 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), United States Citizenship and Immigration Services (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*, 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. In response to the director's RFE, the petitioner provided the same description and evidence that it had entered into a consulting agreement with another IT consulting firm. The Statement of Work attached to the consulting agreement identified the project as a VSAM to DB2 Conversion project. Only on appeal does the petitioner submit a letter from Infocrossing identifying the beneficiary as an individual who has been accepted to work on a project for Infocrossing. In addition, the description of duties in the letter from Infocrossing is a broad description encompassing the "typical duties and responsibilities of the MMIS Programmer Analyst." Accordingly, the record does not provide sufficient information from either the petitioner or the end-client, Infocrossing, regarding the specific job duties to be performed by the beneficiary. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner and Infocrossing on appeal would in fact be the duties to be performed by the beneficiary, the AAO will nevertheless analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(i).

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.[2] It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the *Handbook* does not indicate that such a position categorically qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4, and "Computer Programmers," http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4 (last visited October 5, 2012). Regarding the educational requirements for a computer programmer, the *Handbook* states:

[2] 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/.

> Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Regarding the educational requirements for a computer systems analyst, the *Handbook* reports:

> A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

The above excerpts do not provide a basis to establish that a bachelor's or higher degree, or the equivalent, in a specific specialty is a normal minimum entry requirement for the programmer analyst occupation. Rather, the occupation accommodates a wider spectrum of educational credentials.

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.

Moreover, the petitioner indicates in its initial letter in support of the petition that the usual minimum requirement for a programmer analyst is a Bachelor's degree in Computer Science/Engineering. It must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in two disparate majors does not denote a requirement in a specific specialty. Further, the June 10, 2011 letter signed by [redacted] who identifies the beneficiary as a prospective worker on the MMIS project, states that the "[t]ypical educational requirement is Bachelor's degree or higher with relevant experience." Notably, there is no requirement that the individual performing the work have a bachelor's degree or higher in a specific discipline. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of any degree with a generalized title, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

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. On appeal, in support of the petitioner's assertion that the degree requirement is common to its industry in parallel positions among similar organizations, the petitioner submits copies of fifteen advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the information consulting business. The advertisements provided, however, do not establish that at least a bachelor's degree in a *specific specialty* or its equivalent is required. Upon review, five of the advertisements indicate that a general bachelor's degree is required, five of the advertisements indicate that a high school diploma and experience in programing is required, and five of the advertisements indicate that a bachelor's degree in computer science or a related field is required. Accordingly, there is a wide variance in the educational requirements for the advertised positions. The petitioner has also failed to establish that the advertising organizations are similar in that they share the same general characteristics as the petitioner. Such factors to consider when evaluating the similarity of the advertising organizations 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 of the organization (to list just a few elements that may be considered). The petitioner does not provide any evidence that it is similar to the advertising organizations. Moreover, the petitioner and counsel 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 documents, the AAO finds that they do not establish that requiring a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for positions parallel to the proffered position.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *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").

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The record lacks sufficiently detailed and consistent information to distinguish the proffered position as unique from or more complex than other generic programming analyst positions that can be performed by persons without a specialty degree or its equivalent. In addition, as observed above, 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.

Specifically, even though the petitioner claims that the proffered position's duties are complex so that a bachelor's degree is required, the petitioner failed to demonstrate how the duties of a programmer analyst as generally 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 degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. The petitioner has failed to demonstrate how a specific and established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent are required to perform the duties of the particular position here proffered. We reference again, the letter submitted on appeal from Infocrossing which states that only a general bachelor's degree is required to perform a programmer analyst's duties.

Therefore, the evidence of record does not establish that this position is significantly different from other programmer analysts positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for such positions, including associate degrees as well as degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a programmer analyst or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of a programmer analyst is so complex or unique relative to other programmer analysts that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also fails to establish that it normally requires a bachelor's degree in a specific specialty. The petitioner in this matter submitted a current employee list, which showed that the majority of its employees in programming positions held bachelor's degrees; however, once again the requirement that an individual have a general bachelor's degree is insufficient to establish that a position is a specialty occupation. We have also reviewed the petitioner's submission of H-1B approvals for five of its employees and the employees' accompanying resumes. However, the petitioner does not provide the specific duties that the individuals performed in the approved job positions and does not provide documentary evidence, other than

resumes, of their educational backgrounds. That is, the record does not include supporting evidence that the individuals approved for H-1B classification were required to perform specific duties that required precise and specific coursework culminating in a bachelor's degree in a specific discipline. In addition, the petitioner has not provided evidence that any of the jobs are similar to the proffered position. 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).

While a petitioner may believe or otherwise assert that a proffered position requires a 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner, Supra.* In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. 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)).[3]

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[3] 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

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 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).[4]

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

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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).

[4] 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.

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 and statement of work with Infocrossing specifically requires that the petitioner's personnel work under the direct supervision of an Infocrossing project manager. The record in this matter does not include sufficient indicia establishing that the petitioner will control the beneficiary's work. The beneficiary will not work on the petitioner's premises, the duties of the assignment have been described generally, and the work order listing the beneficiary as the worker indicates the project will end on June 7, 2011, prior to the requested end date for the beneficiary's H-1B classification. Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment to 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" 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).

For this additional reason, the petition will remain denied.

Also 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 statement of work for the beneficiary's services terminates on June 7, 2011, 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 only in the locations provided on the LCA for the entire duration of the petition. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. 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.

Moreover, the petitioner has also failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) and the AAO will enter an additional basis for denial, i.e., the petitioner's failure 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 which 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 the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as

its location on the I-129H petition 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, the petitioner has listed two possible locations of the beneficiary's proposed employment, Jefferson City, Missouri, and Chesterfield, Missouri. The petitioner does not provide an itinerary listing when the beneficiary will perform work in either of these locations. Given the lack of an itinerary detailing where the beneficiary will perform work for the duration of the petitioner's requested period of employment, the petition must be denied on this additional basis.

Further, as noted above, the petitioner's LCA certified on October 15, 2010, is for a Level I (entry-level), programmer analyst SOC (ONET/OES) code 15-1021. When determining eligibility for H-1B classification, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The petitioner claims that the duties of the proffered position are complex and specialized. However, these duties when set against the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position.

That is, the petitioner's assertions regarding the proffered position are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. We observe that wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.[5] Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.[6] The U.S. Department of Labor (DOL) emphasizes that these

[5] *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

[6] A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more

guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.[7] A Level 1 wage rate is described by DOL as follows:

> **Level 1** (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 DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet- http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. NPWHC_Guidance_Revised_11_2009.pdf

The petitioner claims that the duties of the proffered position require the successful incumbent to perform specialized and complex tasks; however, the AAO must question the level of complexity and independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that 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.

Again, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the experience and skill necessary to perform the specialized and complex duties of the position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve

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than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1"or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

[7] *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H–1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position. We observe that the petitioner has provided different required prevailing wages. For the LCA in Jefferson City, Missouri, the petitioner states that the Level 1 wage is $39,645 and that the prevailing wage is $54,000. It is thus unclear what the prevailing wage is in Jefferson City, Missouri. Moreover, on the Chesterfield, Missouri LCA addendum, the petitioner states that the Level 1 wage is $43,534. While a prevailing wage may differ from region to region, the AAO finds that, fully considered in the context of the entire record of proceedings, including the requisite LCA, the petitioner failed to provide a consistent characterization of the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, *Supra*.

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. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

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