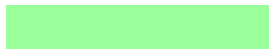





U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 06 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
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:

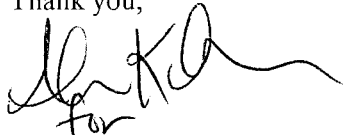


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Software Development Services" firm. In order to employ the beneficiary in what it designates as a "QA Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and failed to establish that it will have an employer-employee relationship with the beneficiary. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

### A. SPECIALTY OCCUPATION

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

#### B. EMPLOYER-EMPLOYEE

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

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

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

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

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

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

### III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a "QA [Quality Assurance] Analyst" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1799, Computer Applications, All Others from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position and that the beneficiary will be paid \$42,000 on an annual basis. The work locations identified on the LCA are Illinois and the petitioner's address in Illinois. The LCA is valid only for work in and near those locations.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in computer science from in India, and a master's degree in computer applications from , also in India. The record also contains evidence pertinent to the beneficiary's employment history. The evidence pertinent to the beneficiary's education and employment experience was not accompanied by an evaluation of the beneficiary's education, with or without his employment experience, in terms of its equivalence to any U.S. education and degree.

Counsel also submitted (1) a Mid Vendor Agreement, dated January 10, 2011, between the petitioner and (2) a letter, dated March 17, 2013, from the director of (3) a letter, dated March 27, 2013, from the petitioner's president; and (4) a letter, dated March 29, 2013, from the petitioner's "HR [human resources] & Business Manager."

The January 10, 2011 Mid Vendor Agreement between the petitioner and states that the petitioner is in the business of locating technical personnel for its clients, and wishes to use the services of such personnel from time to time. It sets out the general terms pursuant to which the

petitioner might provide such personnel to [REDACTED]. It states that, for any such personnel to be thus assigned, [REDACTED] will issue a Work Order identifying the worker to be provided, describing the project, and stating, *inter alia*, the duration of the services to be provided.

The March 17, 2013 letter from the director of [REDACTED] states that [REDACTED] has assigned several of the petitioner's workers to a project at the [REDACTED] Illinois location of its client, [REDACTED] and anticipates assigning three more of the petitioner's workers to projects. It does not state where those projects would begin, when they would end, or where the work would be performed, and does not identify the nature of the work to be performed.

As to the educational requirements it places on workers thus assigned, [REDACTED] director stated:

Due to the complex nature of these numerous underlying projects, our company necessarily requires that each contracted worker assigned to these projects with our company possess at least a bachelor's degree in an industry-recognized field or an equivalent educational degree or combination of education and experience.

[REDACTED] director provided no indication of the fields that [REDACTED] would consider to be "industry-recognized."

As to the supervision of the beneficiary, [REDACTED] director stated: "[The petitioner's] employees are assigned to projects at our facilities, never-the-less, it is [the petitioner's] responsibility to oversee these employees at our project sites." He did not indicate that [REDACTED] would utilize the beneficiary's services. Further, in the event that [REDACTED] were to utilize the beneficiary's services he did not indicate (1) the services the beneficiary would provide, (2) the location where the beneficiary would work, or (3) whether the petitioner would send a supervisor to work at the same site as the beneficiary who would assign the beneficiary's duties and supervise his performance of them.

The March 27, 2013 letter from the petitioner's president states: "[The petitioner] wishes to assign [the beneficiary] to a long[-]term software development project awarded to [REDACTED] on behalf of [REDACTED] Illinois." He characterized the March 17, 2013 letter from the director of [REDACTED] as confirming [REDACTED] intent to place the beneficiary on that project.

As to the duties of the proffered position, the petitioner's president stated:

Responsibilities include, but are not limited to, analyzing, developing and executing formal test plans. Carry out procedures to ensure that all application products and services meet or exceed organization standards and business-user requirements. Responsible for delivering assignments within specified time frames, adhering to all established methodologies, standards and guidelines individually or as a member of a project team. Participate in requirements and design reviews to thoroughly understand business needs to ensure comprehensive testing scenarios are performed. Apply defined QA Processes to plan, design, implement, execute, evaluate and report



results of software testing under minimal supervision to ensure a quality product. Validate business requirements are fulfilled by the technical design and test scenarios. Perform comprehensive testing to prevent introduction of application defects into Regression, End to End, Client and Production environments. Report, monitor and verify application project defects as necessary. Gain application knowledge to efficiently and effectively perform position responsibilities. Provide feedback on and suggestions for improving QA Processes to QA management[.] Provide [the petitioner's] technical manager with bi-weekly project status reports and regular updates, including any technical programming support needed. Participate in technical education coursework and/or professional training as provided by [the petitioner].

As to the educational requirements of the proffered position, the petitioner's president stated:

We . . . require that our QA Analysts possess the minimum of a Bachelor's Degree or Bachelor's Degree equivalent in one of a variety of industry-recognized areas including Engineering, Computer Science, CIS, Business Administration, Mathematics, Management, Electronics, Communications, Technology or a related field.

In her March 29, 2013 letter, the petitioner's HR & Business Manager, [REDACTED], provided a duty description that is substantially similar to that in the petitioner's president's March 27, 2013 letter. She specifically stated:

As a QA Analyst, [the beneficiary] may be responsible for the following[:]

- Analyzing, developing and executing formal test plans.
- Carries out procedures to ensure that all application products and services meet or exceed organization standards and business-user requirements.
- Responsible for delivering assignments within specified time frames, adhering to all established methodologies, standards and guidelines individually or as a member of a project team.
- Participate in requirements and design reviews to thoroughly understand business needs to ensure comprehensive testing scenarios are performed.
- Apply defined QA Processes to plan, design, implement, execute, evaluate and report results of software testing under minimal supervision to ensure a quality product.
- Validate business requirements are fulfilled by the technical design and test scenarios.
- Perform comprehensive testing to prevent introduction of application defects into Regression, End to End, Client and Production environments.

- Report, monitor and verify application project defects as necessary.
- Gain application knowledge to efficiently and effectively perform position responsibilities
- Provide feedback on and suggestions for improving QA Processes to QA management

Mrs. [REDACTED] also stated:

[The petitioner] will at all time [sic] function as [the beneficiary's] employer and is responsible for his H-1B visa, taking care of all immigration matters, payroll, hiring, firing, insurance and employee benefits in accordance to relevant federal and/or state law. [The beneficiary] is directly accountable to [the petitioner] and is supervised by [the petitioner's HR & Business Manager], Mrs. [REDACTED]. [The petitioner] retains the right to assign additional work to [the beneficiary] and [the beneficiary's] direct Supervisor; Mrs. [REDACTED] shall oversee and maintain control over his work during the course of this long[-]term assignment.

Mrs. [REDACTED] did not reveal whether she would be assigned to the location where the beneficiary would work, to assign tasks to him and to supervise his performance of them.

On June 25, 2013, the service center issued an RFE in this matter. The service center requested evidence that the petitioner would employ the beneficiary in a specialty occupation and evidence that it would have an employer-employee relationship with the beneficiary. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation and the employer-employee requirements.

In response, counsel submitted (1) a copy of a Master Consulting Agreement, dated April 26, 2006; (2) a copy of the beneficiary's employment contract, dated March 18, 2013; (3) a Non Compete Agreement, also dated March 18, 2013; (4) a letter, dated September 9, 2013, from Entelli's director; (5) an organizational chart of the petitioner's operations; and (6) an undated letter from counsel.

The April 26, 2006 Master Consulting Agreement was executed by representatives of [REDACTED] and [REDACTED]. It sets out terms pursuant to which [REDACTED] agreed to provided "consulting and other services" to Shure. It makes explicit that those services will be described in Work Orders, one of which was to be attached to that agreement, and others of which might be executed in the future. The services to be provided were not otherwise described. No work orders were provided either with that agreement or subsequently. That agreement states that it is to continue for a term of two years unless terminated earlier, and that it may only be extended by a written agreement. No extension agreement was provided.

The beneficiary's March 18, 2013 employment contract states that the beneficiary will perform duties assigned to him at locations to be designated by the petitioner. It states that the beneficiary's



performance would be reviewed after six months of employment and annually thereafter. It further states:

**Direction of [the beneficiary]:** [The beneficiary] agrees to follow and abide by all applicable policies and procedures of [the petitioner]. [The beneficiary] understands and acknowledges that [the petitioner] is [the beneficiary's] direct supervisor and retains at all time [sic] the right to direct [the beneficiary] as to which tools and technology [the beneficiary] will use on the job. Further, [the petitioner] will retain the right to require that [the beneficiary] to perform [sic] work in the order or sequence directed by [the petitioner] and retains the right to assign additional tasks to the [beneficiary] as [the petitioner's] management sees fit. [The beneficiary] shall provide [the petitioner's] manager and supervisor with bi-weekly status reports regarding any and all on-going projects assigned. [The beneficiary] recognizes that the end client shall assume ownership interest in the ultimate technical project/product created. [The petitioner's] employees will perform technical services under the general direction of the client, but the manner and means by which services are provided are at the sole discretion [of the petitioner and the petitioner's] employees.

The March 18, 2013 Non Compete Agreement states:

[The beneficiary] shall perform such system analysis, software design and development, computer programming, program testing, and implementation, consulting, technical writing or other specialized technical work as direct to perform by [the petitioner] for [the petitioner] or its client(s), and agrees to work at premises designated by [the petitioner].

The September 9, 2013 letter from Entelli's director reiterates the duty description contained in the petitioner's HR & Business Manager's March 29, 2013 letter. It also states that it would utilize the beneficiary's services on a project at [REDACTED] Illinois; that the project is expected to last for two years but may be extended indefinitely; and that the minimum educational requirement for the position in which the beneficiary would work is a bachelor's degree in computer science or a related field.

The petitioner's organizational chart shows that the petitioner employs Quality Analysts, and that they are supervised by the petitioner's Project Manager. It shows that the petitioner also employs an HR Manager, but that the HR Manager is not in the Quality Analysts' chain of command. The HR Manager supervises no information technology personnel. Other than outsourced operations, the petitioner's HR Manager supervises only recruiters.

In her undated letter, counsel asserted that the evidence submitted demonstrates that the instant visa petition is approvable.

On appeal, counsel asserted that the evidence submitted is sufficient to demonstrate that the proffered position should be approved. Counsel stated that a brief or additional evidence, or both, would be submitted within 30 days. No such brief or additional evidence is in the record.

#### IV. SPECIALTY OCCUPATION ANALYSIS

We observe that the petitioner's president indicated that a bachelor's degree in any branch of engineering, computer science, computer information systems, business administration, mathematics, management, electronics, communications, technology, or a related field would be a sufficient educational qualification for the proffered position. As was explained above, in order to qualify as a specialty occupation position, a position must require a minimum of a bachelor's degree *in a specific specialty* or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in either of two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in engineering, computer science, computer information systems, business administration, mathematics, management, electronics, communications, or technology. The issue here is that it is not readily apparent that these fields of study are closely related or that they are all related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that engineering, computer science, computer information systems, business administration, mathematics, management, electronics, communications, and technology are closely

related fields or (2) that each of those fields is directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

We observe, in addition, that the petitioner's president indicated that a bachelor's degree in any branch of engineering or an otherwise unspecified bachelor's degree in business administration would be a sufficient educational qualification for the proffered position.

A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Similarly, the assertion that the duties of the proffered position can be performed by a person with a degree in any engineering discipline, also implies that the proffered position is not, in fact, a specialty occupation.

More specifically, the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. 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 a degree with a generalized title, such as business administration or engineering, 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).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

As the evidence of record fails to establish how the fields of engineering, computer science, computer information systems, business administration, mathematics, management, electronics, communications, and technology delineate a specific body of highly specialized knowledge or a specific specialty or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of that array of fields is tantamount to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed.

The petitioner asserts that the beneficiary would work on a project at the location of [REDACTED]. No other end-user has ever been mentioned. However, the record contains insufficient evidence that any work exists for the beneficiary to perform at the location of [REDACTED] Illinois. The evidence provided to demonstrate a business relationship between [REDACTED] is a master consulting agreement which, by its own terms, expired in 2008. There is no evidence in the record from [REDACTED] that the agreement was ever renewed. All of the work to be performed pursuant to that agreement was to be evidenced by Work Orders. However, the record contains no Work Orders. As such, the record contains insufficient evidence that [REDACTED] has contracted with [REDACTED] to provide services to it during any part of the period of requested employment.

Because the petitioner has not demonstrated that it has any work to which to assign the beneficiary, it has not demonstrated that the work to which it would assign the beneficiary, if any, is specialty occupation employment. The proffered position cannot be found, therefore, to be a computer systems analyst position or a quality assurance analyst position, as the petitioner claims.<sup>1</sup> The substantive nature of the work to which the petitioner would assign the beneficiary, if any, has not been established.

---

<sup>1</sup> We observe however, that if the proffered position had been demonstrated to be a Computer Systems Analyst position or, more specifically, a Software quality assurance analyst position, this would not demonstrate that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. This is because the Department of Labor's *Occupational Outlook Handbook* makes clear that computer systems analyst positions do not as a category require a minimum of a bachelor's degree in a specific specialty or the equivalent, as it indicates that systems analysts may have a business or liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm> (last visited Aug. 5, 2014).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### V. EMPLOYER-EMPLOYEE ANALYSIS

The remaining basis for the director's decision of denial is her finding that the petitioner has not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective employer.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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



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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>2</sup>

---

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

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



Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>3</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>4</sup>

---

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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

<sup>3</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>4</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

---

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).

In the instant case, even if the petitioner had demonstrated that, as alleged, it would provide the beneficiary to Entelli which would assign him to work at the location of Shure to work on a project there the petitioner would not have established, pursuant to the *Darden* and *Clackamas* tests, that it would be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

The evidence suggests that [REDACTED] would be in charge of the project at [REDACTED] location, though, there is a lack of evidence of such a project. In any event, however, the record contains insufficient evidence that the petitioner would be in charge of developing any software at [REDACTED] location in [REDACTED] Illinois.

The petitioner asserts that it would be sending the beneficiary to work on software at [REDACTED] Illinois, for a company that is developing software there. The petitioner asserted that it would be in charge of the manner in which the beneficiary performs his tasks. If work were shown to exist to which the petitioner would assign the beneficiary at [REDACTED] it appears more likely that an employee of [REDACTED], if it is in charge of the project, would assign the beneficiary's tasks and supervise his performance of them. That the petitioner might receive periodic status reports and might perform periodic evaluations of the beneficiary's performance does not alter the fact that, pursuant to the scenario proposed, the beneficiary would be working at the location of a different company, performing work for that other company, which other company would almost certainly assign his tasks and supervise his performance of them. For this reason, even if the petitioner had demonstrated that it has work to which it may assign the beneficiary at the [REDACTED] Illinois, it would not have demonstrated that it would be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii), and would not have demonstrated that it has standing to file the instant visa petition. Even if the petitioner had demonstrated the existence of work for the beneficiary at the [REDACTED] location, the visa petition would be denied on this basis.

In any event, the petitioner has not demonstrated that it has work to which it will assign the beneficiary at the [REDACTED] Illinois. As such, it has not demonstrated the terms pursuant to which the beneficiary would work if, in fact, it assigned him to work in another location for another company. Because the petitioner has not demonstrated the terms pursuant to which the beneficiary would work, if at all, the petitioner has not demonstrated that it is the beneficiary's prospective employer with standing to file the instant visa petition. The appeal will be dismissed and the visa petition will be denied on this basis.

## VI. BENEFICIARY QUALIFICATIONS

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of the beneficiary's foreign degrees or sufficient evidence to establish that his degrees are the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

## VII. CONCLUSION

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

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