

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 15 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

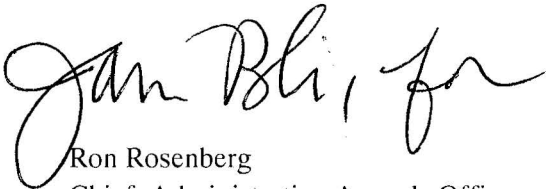
ON BEHALF OF PETITIONER:

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 (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

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

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

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

The AAO bases its decision upon its 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 the petitioner's submissions on appeal.

II. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

III. THE LAW

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).

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.

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client 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.

IV. EVIDENCE

The period of employment requested in the visa petition is from October 1, 2013 to September 16, 2016. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a systems analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in Computer Science and Engineering from [REDACTED] in India and a master's degree in Computer Science from [REDACTED] in [REDACTED] Massachusetts. The LCA states that the beneficiary would work at the petitioner's Dayton, Ohio location and at [REDACTED] in [REDACTED] Pennsylvania. The visa petition confirms that the beneficiary would work at "Dayton, OH and [REDACTED] PA [REDACTED]"

Counsel also submitted (1) a Subcontractor Agreement, dated April 25, 2012, executed by the petitioner and [REDACTED] Inc.; (2) a document headed Schedule-1, executed on March 18, 2013, by the petitioner and [REDACTED]; (3) a letter, dated March 25, 2013, from the petitioner's vice president; (4) a document headed, "Itinerary of Services for [the beneficiary]"; and (5) an organizational chart of the petitioner's operations.

The April 25, 2012 Subcontractor Agreement between the petitioner and [REDACTED] states the terms pursuant to which the petitioner may provide workers to [REDACTED] to perform services to be performed in subsequently executed "Schedules." In the "Schedule-1," the petitioner and [REDACTED] agree that the

petitioner will provide the beneficiary to [REDACTED] to work at the location of [REDACTED] client, [REDACTED] State of CT, at [REDACTED] PA [REDACTED]. It does not specify what duties he would perform there or even what his position title would be. Neither the subcontractor agreement nor the associated schedule makes explicit who would assign the beneficiary's duties and supervise his performance.

The petitioner's vice president's March 25, 2013 letter states:

Specifically, as a Systems Analyst, the beneficiary will analyze computer problems of existing and proposed systems and initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients' business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used, and format the output to meet user's needs. As a Systems Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

As to the educational requirement of the proffered position, the petitioner's vice president stated: "As with any Systems Analyst position, the usual minimum requirement for the proffered position is a bachelor's degree, or equivalent, in computer, engineering, or a related field."

As to the supervision of the beneficiary, the petitioner's vice president stated, "[The petitioner would retain] supervisory control of the Beneficiary, including the right to hire and fire her [sic] and to receive periodic reports from him." He further stated, "We retain the right to control [the beneficiary's] daily activities and the manner and means of his work, if required," and that "[the beneficiary's] supervisor is shown on the enclosed organization chart of our company."

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The document headed, "Itinerary of Services for [the beneficiary]" states that the dates of the beneficiary's services will be from October 1, 2013 to September 16, 2016 and that the establishment where her services will be performed is the [REDACTED] location at [REDACTED] in [REDACTED] Pennsylvania.

The organizational chart of the petitioner's operations lists "Systems Analyst" as one class of employees working for the petitioner and indicates that they are supervised by "Manager – [REDACTED]". It does not identify by name the person who will assign tasks to the beneficiary and supervise her performance of them or indicate whether that person will work at the petitioner's location, at the [REDACTED] location, or at some other location.

On May 10, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation and evidence that the petitioner would have an employer-employee relationship with the beneficiary if the visa petition is approved. The director outlined the specific evidence to be submitted.

In response, counsel submitted (1) an affidavit; (2) copies of e-mails to which the beneficiary was a party; (3) an employment agreement executed by the beneficiary and the petitioner's vice president on April 2, 2013; (4) a document entitled "Subcontractor Agreement"; (5) a letter, dated June 21, 2013, from [REDACTED]'s Director of HR & Operations; and (6) a letter, dated June 28, 2013, from the petitioner's vice president.

The affidavit provided is dated May 20, 2013 and is from [REDACTED] who states that he works at the [REDACTED] office as a Java developer, and that the beneficiary also works at the [REDACTED] office as a Java Developer.

The e-mail exchange submitted indicates that the beneficiary is a Java developer at [REDACTED] Pennsylvania location. Many of the e-mails are from other members of the development team and were broadcast to numerous team members. They contain no indication of the specific duties performed by the beneficiary.

Three of the e-mails, however, were sent by the beneficiary. One was sent on May 7, 2013. The body of that message reads, in its entirety:

Hi Everyone,
Sorry for missing attachments.
Please find the attachments for Release notes of following screens:

RMC-Reporting Other Income Change
RMC-Other Income Type Addition
RMC-Other Income Details
RMC-Child Support
RMC-END Other Income

RMC-Money from Lawsuit or workers compensation

Please let me know if you have any issues

The beneficiary sent another e-mail on May 15, 2013. The body of that e-mail reads, in its entirety:

Hi [REDACTED]

Just FYI:

For the issue you have assigned me the page is breaking for all deletions, there are five scenarios:

- 1) deleting other income (other than child support).
- 2) deleting other income (child support screen).
- 3) deleting end income.
- 4) deleting Money from Law suit.
- 5) deleting end money from lawsuit.

I have fixed for first two issues, I found one more issue in same cases.

When I insert two records for same person using looping question and delete one record, It is not showing the page for second record too.

I talked to [REDACTED] regarding this. This is not working in other review screens as well.

Coming to deleting end income ,I don't have any other screen for reference. I mean the issue is also in other screens.

Hence for this two cases I need to write a new logic, for which I am talking this long.

The third e-mail sent by the beneficiary is dated May 16, 2013. The body of that e-mail reads, in its entirety:

Hi Everyone,

Please find the code changes made for fixing Other Income Review Screen in Release notes attached. Please let me know if any issues faced.

The employment agreement between the petitioner and the beneficiary states: "Employee agree [sic] that their duties shall be primarily rendered at [the petitioner's] business premises or at such other places as the [petitioner] shall in good faith require."

As to the duties of the proffered position, that agreement states:

The essential job functions or duties of this position are as follows:

Analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to

deliver more efficient and effective technological and computer related solutions to our business clients.

[The beneficiary] shall also perform such other duties as are customarily performed by other persons in similar such positions, as well as such other duties as may be assigned from time to time by the [petitioner].

It also states:

If [the beneficiary] is directed to render services away from [the petitioner's] business premises, [the beneficiary] shall report back to [the petitioner] 4 time(s) per month for an evaluation of progress, performance, and goals. [The beneficiary] will also be required to maintain timesheets of worked performed [sic] at other premises and will provide the timesheets to [the petitioner]. Employer contact for such reporting is: [This space was left blank.]

The document headed "Subcontractor Agreement" purports to be an agreement between [redacted] and [redacted]. The body of that document reads, in its entirety:

THIS AGREEMENT is made and entered into as of 14-Nov-12, by and between [redacted] LLP, a Delaware limited liability partnership, with an office at [redacted] Pittsburgh, PA [redacted], and [redacted] Inc., a Corporation organized under New Jersey law, with its principal office at [redacted] N/A N/A South Windsor CT [redacted] ("Subcontractor").

intent to authenticate by an authorized representative of such party and shall constitute acceptance of the terms of such Work Order by such party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and entered into by their respective duly authorized representatives as of the date first set forth above.

That document is not evidence of any substantive terms of an agreement between [redacted] and [redacted]

The June 21, 2013 letter from [redacted]'s Director of HR & Operations confirms that the beneficiary would work on the [redacted] project in [redacted] Pennsylvania. It states:

[The beneficiary's] primary duties include:

- Develop and implement new functionality and enhancements to existing applications using JAVA/JEE techniques
- Interact with the business users to gather requirements and create design specifications

- Work with other software developers to ensure coordination and consistency of development efforts and standards
- Fix defects opened by testers and redeploy the code

As to the duration of the [REDACTED] project, that letter states: "This project is expected to last to at least March 31, 2014, with expected extensions if necessary."

In his June 28, 2013 letter, the petitioner's vice president stated:

The beneficiary will not be working on in-house assignments. Although the beneficiary will be located at the end-client's office, he will be supervised by our company and will remain directly employed by [the petitioner].

The petitioner did not identify its employee who would ostensibly supervise the beneficiary or state whether that person would be located on-site with the beneficiary.

As to the duration of the [REDACTED] project, the petitioner's vice president stated:

The Beneficiary's assignment at [REDACTED] is expected to last for the entire requested validity period. As indicated by the work order from [REDACTED] to the petitioner, submitted with the petition, the Beneficiary's project is scheduled for an initial period of 12 months, but may be further extended. The vendor letter from [REDACTED] enclosed as Exhibit 2, additionally states that the project is expected to receive extensions.

The director denied the petition on July 10, 2013 finding that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. In that decision, the director stated:

The entity ultimately employing the alien or using the alien's services must [submit evidence that describes] in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties.

The director further asserted that, without such evidence from the end-user of the beneficiary's services, USCIS is unable to determine that the beneficiary would perform specialty occupation duties.

On appeal, counsel submitted, *inter alia*, (1) copies of three vacancy announcements, (2) a copy of a section of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to Computer Systems Analyst positions, (3) a document headed, "Exhibit A, Form of Work Order," and (4) a brief.

The document headed, "Exhibit A, Form of Work Order," purports to document an agreement made between [REDACTED] and [REDACTED] to provide the beneficiary to work on a project beginning on March 25, 2013.¹ That document does not state how long that project would continue. It states that the beneficiary's position would be "Developer."² It also states:

Description of Services:

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

Counsel did not sign the appeal brief. Instead, the petitioner's vice president signed it. In that brief, the petitioner's vice president asserted that the petitioner normally requires a bachelor's degree or the foreign equivalent for the proffered position, but did not indicate that the requisite degree must be in any specific specialty. The petitioner's vice president cited the vacancy announcements, the e-mail exchange, and the *Handbook* section provided as evidence that the beneficiary works and would work in a specialty occupation position and asserted that the evidence submitted is sufficient to demonstrate that the proffered position qualifies as a specialty occupation position.

The petitioner's vice president also stated: "[T]he petitioner is in the business of providing consulting services, not workers, to its clients." He further asserted that, because the petitioner provides services rather than workers, "it is the minimum educational requirements of the Petitioner which define the Beneficiary's work as a specialty occupation."

V. SPECIALTY OCCUPATION ANALYSIS

The AAO will first address the specialty occupation basis of denial. As a preliminary matter, the AAO observes that the petitioner has never effectively asserted that the proffered position is a specialty occupation, because the petitioner has not asserted that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent or. To the contrary, the March 25, 2013 letter from the petitioner's vice president states that an otherwise undifferentiated bachelor's degree in engineering, or in any field related to engineering, would be a sufficient educational qualification for the proffered position.

¹ In fact, the beneficiary's name is misstated on that document as "[REDACTED]." However, the AAO assumes that the work order pertains to the beneficiary.

² In addition, that agreement states, "[REDACTED] shall have the right to hire, without any compensation to [REDACTED] any individual who has continuously performed Services for a period of at least six months for [sic] [REDACTED] under a Work order subject to this Agreement." The AAO observes that for [REDACTED] to hire the beneficiary while he is in H-1B status pursuant to a visa petition filed by the petitioner would be contrary to the terms of the beneficiary's H-1B employment.

The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

The petitioner, who bears the burden of proof in this proceeding, fails to establish that engineering or any and all engineering specialties are 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.

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, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook*, cited by the petitioner's vice president, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1121, Computer Systems Analysts from O*NET. The AAO reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of computer systems analysts:

What Computer Systems Analysts Do

Computer systems analysts study an organization's current computer systems and procedures and design information systems solutions to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

Duties

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

Computer systems analysts use a variety of techniques to design computer systems such as data-modeling, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. Analysts conduct in-depth tests and analyze information and trends in the data to increase a system's performance and efficiency.

Analysts calculate requirements for how much memory and speed the computer system needs. They prepare flowcharts or other kinds of diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up. Most analysts do some programming in the course of their work.

Most computer systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

Because systems analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

Systems designers or ***systems architects*** specialize in helping organizations choose a specific type of hardware and software system. They translate the long-term business goals of an organization into technical solutions. Analysts develop a plan for the computer systems that will be able to reach those goals. They work with management to ensure that systems and the IT infrastructure are set up to best serve the organization's mission.

Software quality assurance (QA) analysts do in-depth testing of the systems they design. They run tests and diagnose problems in order to make sure that critical requirements are met. QA analysts write reports to management recommending ways to improve the system.

Programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers.

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 Apr. 2, 2014).

The petitioner's vice president has acknowledged, and various other items of evidence support that, if the visa petition were approved, the beneficiary would work, at least initially, on the [REDACTED] project in [REDACTED] Pennsylvania.

The petitioner's vice president asserts that the petitioner provides services, rather than employees, to other companies. However, the evidence in the record suggests that, to the contrary, the petitioner intends to provide the beneficiary, though [REDACTED] to work on a project for [REDACTED]. There is no indication that the petitioner has any control over that project. There is no indication that the petitioner is providing software development services, rather than providing its worker, to [REDACTED] through [REDACTED]. The petitioner appears to be providing its worker, through an intermediary, to work on a project for another company. In this situation, where the other company will be assigning tasks to the beneficiary and supervising his performance, in accordance with the discussion of *Defensor*, *supra*, it is eminently the tasks that the other company would assign to the beneficiary that determine whether the proffered position is a specialty occupation position.

The record does contain some evidence pertinent to the tasks the beneficiary would perform for [REDACTED]. The work order from [REDACTED] to [REDACTED] states that the duties of the proffered position are to convert a design into a complete information system, including acquiring and installing a systems environment, creating and testing databases, preparing test case procedures, and preparing test files; and coding, compiling, and refining programs. According to that description, rather than designing an information system, the beneficiary would be effectuating, through coding, testing, etc., another person's information system design. That suggests that the beneficiary would not work as a systems analyst as described in the *Handbook*, which states that systems analysts design such systems, rather than only coding, testing, and correcting them.

An affidavit in the record, provided by an individual who states that he works with the beneficiary, states that the beneficiary works as a Java developer. The work order from [REDACTED] also characterizes the position as a developer position. The *Handbook* describes the duties of Software Developers as follows:

What Software Developers Do

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by asking how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it too difficult to use, software developers go back to the design process to fix the problems or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called information technology (IT) project managers. These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

The following are types of software developers:

Applications software developers design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

Systems software developers create the systems that keep computers functioning properly. These could be operating systems that are part of computers the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those in phones or cars.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Software Developers," <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2> (last visited Apr 2, 2014).

Again, the *Handbook* indicates that software developers, rather than only coding based on another person's system design, are involved in the design of systems. The proffered position, as described in the work order from [REDACTED] would involve coding, testing, and correcting such systems, but not designing them. The proffered position does not appear to be a developer position.

However, the *Handbook* describes the duties of computer programmers as follows:

What Computer Programmers Do

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

Duties

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors

- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Apr. 2, 2014).

The duties that the beneficiary would perform if the visa petition were approved, as described by [REDACTED] which would be the end user of the beneficiary's services, are entirely consistent with the duties of a computer programmer as described by the *Handbook*. The AAO finds that the proffered position is a computer programmer position.

The *Handbook* states the following about the educational requirements of computer programmer positions:

How to Become a Computer Programmer

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

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

Licenses, Certifications, and Registrations

Programmers can become certified in specific programming languages or for vendor-specific programming products. Some companies may require their computer programmers to be certified in the products they use.

Other Experience

Many students gain experience in computer programming by completing an internship at a software company while in college.

Advancement

Programmers who have general business experience may become computer systems analysts. With experience, some programmers may become software developers. They may also be promoted to managerial positions. For more information, see the profiles on computer systems analysts, software developers, and computer and information systems managers.

Important Qualities

Analytical skills. Computer programmers must understand complex instructions in order to create computer code.

Concentration. Programmers must be able to work at a computer, writing lines of code for long periods of time.

Detail oriented. Computer programmers must closely examine the code they write because a small mistake can affect the entire computer program.

Troubleshooting skills. An important part of a programmer's job is to check the code for errors and fix any they find.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Apr. 2, 2014).

The *Handbook* makes clear that computer programmer positions, as a category, do not require a minimum of a bachelor's degree in a specific specialty or its equivalent, as it states that some employers hire computer programmers with only an associate's degree. The *Handbook* cannot, therefore, support the proposition that this particular proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Further, the AAO finds that, to the extent that they are described in the work order issued by [REDACTED] the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of technical knowledge in the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent,

in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner did submit three vacancy announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Specifically, the petitioner submitted advertisements for the following positions posted on the Internet:

1. Systems Analyst II for an unidentified retail client of a placement company requiring a bachelor's degree and "2+ to 5 Years" of experience including "Strong VBA Programming skills/experience; Strong MS Sql Server Database skills/experience; [and] extensive experience with Database drive applications with a Microsoft VBA front end – specifically MS Excel";
2. Systems Analyst for an unidentified company requiring an unspecified bachelor's degree and "5+ to 7 Years" of experience"; and
3. Computer Systems Analyst for T-Cetra requiring "Minimum education of either a Bachelor's degree and five (5) years of experience or a Master's degree and one (1) year of experience. Degree and experience may be in any Science, Engineering, IT or Computer related field and foreign educational equivalent is acceptable."

The job titles of those positions suggest that they are systems analyst positions. Further, the second and third vacancy announcements contain duty descriptions which, although not detailed, also suggest that the duties of the positions offered include conferring with prospective users and then planning or designing an information system, and that those positions may, therefore, be systems analyst positions. The proffered position, however, has been found to be a computer programmer position. As such, the vacancy announcements provided have not been shown to be for positions parallel to the proffered position, and have not been shown, therefore, to be relevant to whether positions parallel to the proffered position require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner has designated the proffered position as a Level I Computer Systems Analyst position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. However, all of the vacancy announcements provided require experience: the first vacancy announcement requires a considerable amount of experience; and the second vacancy announcement requires a considerable amount of very specific experience. None of the vacancy announcements provided appear, therefore, to be for Level I computer systems analyst positions. Even if the proffered position were demonstrated to be a systems analyst position, in order to attempt to show that parallel positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged to demonstrate that other Level I systems analyst positions, entry-level positions requiring only a basic understanding of computer systems analysis, require a minimum of a bachelor's degree in a specific specialty or its equivalent, the proposition of which is not supported by the *Handbook*.

Further still, the first and second vacancy announcements, although they state a requirement of a bachelor's degree, do not indicate that the requisite degree must be in any specific specialty nor even in any range of specialties. As such, they do not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Similarly, the third vacancy announcement indicates that a bachelor's degree in any science, engineering, IT or computer-related field would be a sufficient educational qualification for the position it announces.

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" 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 business management and engineering, would not meet the statutory requirement that the degree be "in the specific specialty." Section 214(i)(1)(B) (emphasis added). The array of subjects listed in that vacancy announcement is far too wide to be considered a requirement of a degree in a specific

specialty. In fact, that a degree in "any Science" would be a sufficient educational qualification is sufficient, in itself, to show that the first vacancy announcement does not contain a requirement of minimum of a bachelor's degree in a specific specialty or its equivalent.

Yet further, the first vacancy announcement indicates that an otherwise unspecified degree in engineering would be a sufficient qualification for the position it announces. 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). That the first vacancy announcement indicates that a degree in any branch of engineering would be a sufficient educational qualification for the position it announces is another reason it cannot be found to contain a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Even further, the thrust of the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is whether similar organizations *in the petitioner's industry* require a minimum of a bachelor's degree in a specific specialty or its equivalent for positions parallel to the proffered position. The vacancy announcements submitted have not been shown to be in the petitioner's industry, or in the industry of the end-client, and at least one, which is in some branch of the retail industry, is clearly not. For this additional reason, the vacancy announcements provided are not persuasive evidence that firms in the petitioner's industry require a minimum of a bachelor's degree in a specific specialty or its equivalent for positions parallel to the proffered position.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from five announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.⁴

⁴ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). As such, even if the job announcements supported the finding that the position of computer systems analyst for firms similar to and in the same industry as the petitioner required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly demonstrate that such an

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are parallel to the proffered position and located in organizations that are similar to the petitioner. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties 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 of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Therefore, the evidence of record does not establish that this position is significantly different from other computer programmer positions such that it refutes the *Handbook's* information to the effect that there is an array degrees acceptable for such positions, including degrees less advanced than a bachelor's degree. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category 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).

educational requirement is common throughout the petitioner's industry among companies similar to the petitioner for parallel positions.

The AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.⁵

The petitioner provided no evidence pertinent to anyone it has ever hired to fill the proffered position. As such, the petitioner has provided no evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Further, in the appeal brief, the petitioner's vice president stated, "the petitioner normally requires a Bachelor's degree or a foreign equivalent for the Systems Analyst position." He did not, however, state that the petitioner requires a minimum of a bachelor's degree *in a specific specialty* or its equivalent. Further still, in his March 25, 2013 letter, the petitioner's vice president appeared to indicate that a bachelor's degree in any branch of engineering would be a sufficient educational qualification for the proffered position. As was explained above, a requirement of an otherwise undifferentiated bachelor's degree in engineering is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. As such, the petitioner appears to have conceded that it does not normally require a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.

For both of the reasons explained, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

The duties of the proffered position as described in the work order from [REDACTED] including converting a design into an information system; acquiring and installing a systems environment; creating and testing databases; preparing test case procedures, preparing test files; and coding, compiling, and refining programs, have not been shown to be of a nature so specialized and complex that they require knowledge usually associated with the attainment of a minimum of a bachelor's

⁵ 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 a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. 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").

degree in a specific specialty or its equivalent. In fact, they appear to be duties generic to computer programmer positions, some of which, the *Handbook* indicates, do not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of such positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Further, although the period of requested employment is from October 1, 2013 to September 16, 2016, and the petitioner's vice president asserts that the beneficiary is expected to work on the [REDACTED] project throughout that period, the record contains no evidence that the [REDACTED] project will continue through September 16, 2016.

Specifically, the work order issued by [REDACTED] which was submitted on appeal, contains no indication of how long the project will continue or how long the beneficiary's services will be required. The June 21, 2013 letter from [REDACTED]'s Director of HR & Operations states, "This project is expected to last to at least March 31, 2014, with expected extensions as necessary." It contains no indication of the date the project is likely to terminate, if it is after March 31, 2014. Other than the assertion by the petitioner's vice president, then, the record contains no indication that the [REDACTED] project, or the beneficiary's involvement in it, is expected to continue through September 16, 2016.

Even if the petitioner had demonstrated that, while working on the [REDACTED] project, the beneficiary would perform specialty occupation duties, the evidence would still be insufficient to show for what period he will remain there. Even if the petitioner had demonstrated that the beneficiary is currently performing duties in a specialty occupation, the visa petition could not be approved for any period during which the petitioner has not demonstrated that it has specialty occupation work to which to assign the beneficiary.

VI. ADDITIONAL BASES FOR DENIAL

The record suggests additional issues that were not addressed in the decision of denial but that, nonetheless, also preclude approval of this visa petition.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), set out above, 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.⁶

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

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

"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 318-319.⁷

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).⁸

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*

⁷ 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))).

⁸ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

The evidence shows that, if the visa petition were approved, the petitioner, which is located in Ohio, would assign the beneficiary to [REDACTED] a New Jersey corporation, which would assign the beneficiary to work for [REDACTED] in Pennsylvania for an unknown period of time. Although the petitioner's vice president stated that the organizational chart in the record identifies the beneficiary's supervisor, it identifies that supervisor only as "Manager – [REDACTED]." The record contains no indication that "Manager – [REDACTED]" would accompany the beneficiary to Pennsylvania. Although the petitioner's vice president stated, "We retain the right to control [the beneficiary's] daily activities and the manner and means of her work, if required," the record contains no indication that the petitioner anticipates having one of its employees on-site with the beneficiary to assign his duties and supervise his performance. To the contrary, the employment agreement between the petitioner and the beneficiary indicates that, while assigned to the [REDACTED] project, the beneficiary would only contact the petitioner four times per month. This is inconsistent with the petitioner exercising control over the beneficiary's work.

In these circumstances, it appears that personnel at [REDACTED] rather than the petitioner's own employees, would likely assign the beneficiary's tasks, supervise his performance, and determine whether that performance is satisfactory. The AAO finds, therefore, that the petitioner would not have an employer-employee relationship with the beneficiary within the meaning of the salient regulations and associated case law. The visa petition will be denied on this additional basis.

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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]

In the instant case, the LCA states that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the O*NET. However, for reasons explained above, the AAO has found that the proffered position is a computer programmer position. Computer programmer positions are described at SOC code and title 15-1131.00, Computer Programmers from the O*NET. As such, the LCA submitted does not correspond to the instant visa petition. The visa petition will be denied on this additional basis.

VII. CONCLUSION

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The 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.