



U.S. Citizenship
and Immigration
Services

(b)(6)

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)

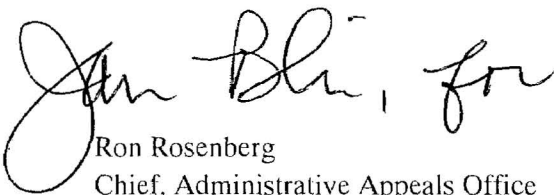
ON BEHALF OF PETITIONER:

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, filed April 15, 2013, 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 her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and that the petitioner failed to establish that it has standing to file the visa petition as the beneficiary's prospective employer. On appeal, the petitioner asserted that the director's bases for denial were 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 bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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.

In similar fashion, the evidence of record also does not lead the AAO to believe that the petitioner's claim that it would engage the beneficiary in an employer-employee relationship 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 lasts from October 1, 2013 to September 7, 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 "Bio Technology" from [REDACTED] in Indian and a master's degree in Bioinformatics from [REDACTED].

Counsel also submitted, *inter alia*, (1) a Contractor Agreement, dated February 13, 2013, executed by the petitioner and Inficare Inc.; (2) a Purchase Order from Inficare; (3) a letter, dated March 20, 2013, from the petitioner's vice president; (4) an organizational chart of the petitioner's operations; and (5) a document headed, "Itinerary of Services for [the beneficiary]."

The February 13, 2013 Contractor Agreement between the petitioner and [REDACTED] states the terms pursuant to which the petitioner may provide services through [REDACTED] and possibly intermediaries,

to a customer of Inficare, as provided in "Exhibit A." Exhibit A is the Purchase Order, also executed on February 13, 2013 by the petitioner and [REDACTED]. That document states that the petitioner will provide the beneficiary to work as a DataStage Consultant for the end-client, [REDACTED] in Sunnyvale, California for an estimated 12 months, beginning on February 14, 2013, which period either [REDACTED] or its client may terminate or extend.

The March 20, 2013 letter from the petitioner's vice president 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 performance of the job duties is a bachelor's degree, or equivalent, in computers, 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 and to receive periodic reports from her." He further stated, "We retain the right to control [the beneficiary's] daily activities and the manner and means of her work, if required," and that "[the beneficiary's] supervisor is shown on the enclosed organization chart of our company."

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 – (SDG)." 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 or at the California location where the beneficiary would work.

The document headed, "Itinerary of Services for [the beneficiary]" is signed by the petitioner's vice president. It states that the dates of the beneficiary's services will be from October 1, 2013 to September 7, 2016 and that she will work at the [redacted] location at [redacted] in Sunnyvale, California. It states, "Succession of contracts: [the petitioner] – [redacted]." It further states, "Duties: The Beneficiary will be working as a Systems Analyst. His [sic] duties will include [Field for duties left blank.]"

On April 23, 2013, the service center issued an RFE in this matter. The director outlined the specific evidence to be submitted. The evidence requested was primarily concerned with whether the petitioner had demonstrated that it has standing to file the visa petition as the beneficiary's prospective employer.

In response, counsel submitted, *inter alia*, (1) an Employment Agreement executed by the beneficiary and the petitioner's vice president on March 21, 2013; (2) a Statement of Work (SOW) executed by representatives of [redacted] and [redacted]; (3) a letter, dated March 26, 2013, from the president of [redacted]; (4) two affidavits; (5) copies of e-mails to which the beneficiary was a party; and (6) a letter, dated July 15, 2013, from the petitioner's vice president

The March 21, 2013 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." 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 SOW was executed by Inficare on March 20, 2013 and by [redacted] on May 22, 2013. The AAO observes that this agreement was ratified after the petitioner filed the instant visa petition. It states that the beneficiary would work on a [redacted] project in Sunnyvale, California from February 14, 2013 to August 14, 2013. The AAO further observes that the agreement was ratified with less than three months of that period remaining. As to the duties the beneficiary would perform, that agreement states, "[The beneficiary] is (are) skilled to perform the following Services: Datastage." It further states that the beneficiary is to report the status of work performed and all issues that arise to [redacted]

The March 26, 2013 letter from the president of Inficare states that the beneficiary is working at the [REDACTED] location in Sunnyvale, California. It states:

[The beneficiary's] primary duties are:

- o Design and develop ETL jobs
- o Performance tuning of ETL jobs
- o Leading and Maintaining offshore Team of 4 people
- o Understand the business requirements and ensure the delivery of the project

It further states: "[The beneficiary] will be supervised by her reporting manager Mr. [REDACTED] Project Manager[.] The letter also characterizes the project at the [REDACTED] location as a "long[-]term project."

The two affidavits submitted were both executed on July 1, 2013. Both assert that the affiants work at the office of [REDACTED] one as ETL Technical Lead and one as [REDACTED]. Both affiants state that they work with the beneficiary and that the beneficiary has worked at [REDACTED] since February 14, 2013 and is a Senior ETL Analyst. The affiant who indicated that he is the [REDACTED] is [REDACTED].

The July 15, 2013 letter from the petitioner's vice president discusses the evidence submitted, and reiterates the assertion that the petitioner will supervise the beneficiary. It notes that the organizational chart previously provided shows that the beneficiary reports to the petitioner's SDG Manager. It does not identify the beneficiary's immediate supervisor by name or reveal whether the petitioner's immediate supervisor would work at the [REDACTED] location. It does not indicate whether [REDACTED], whom the president of Inficare stated would supervise the beneficiary, is the petitioner's SDG Manager.

The petitioner's vice president cited the affidavits discussed above, an identification badge issued to the beneficiary by [REDACTED] the presence of the beneficiary's name in a [REDACTED] directory, and the e-mails provided as evidence that the beneficiary is performing specialty occupation duties. The AAO observes that the identification badge and the directory entry shed no light on the duties the beneficiary is performing.

One of the e-mails provided is dated June 10, 2013. It was broadcast by [REDACTED] from a [REDACTED] e-mail address, to numerous people. It states: "Plz validate the results for [REDACTED] and let us know the results." In reply, the beneficiary stated:

QA team,

Attached are the QA run stats for source sequencer, [REDACTED]
which is part of [REDACTED].

I have a known issue for transformation. [REDACTED]

The DS is rejecting 54 records, whereas [REDACTED] is inserting the same. I have attached the spreadsheet, mtl_material_transactions, which has data comparison and screenshots. I have verified the data for one record (this record was taken from yesterday's run and might not be there now and there was no difference between the data, no sure, why DS is rejecting. We are still looking into this issue.

Please refer to attached email, which talks about this issue in detail.

Please validate the results.

Thanks
[the beneficiary]
Sr.ETL Developer

The other e-mail provided is dated June 21, 2013 and was addressed, by [REDACTED], to the beneficiary, with copies to [REDACTED] and [REDACTED], all of whom have [REDACTED] e-mail addresses. That e-mail states:

[REDACTED]

Plz find the tasks,

- 1) Remove remote exec from the jobs.
- 2) Fix restartability issues
- 3) Run end to end with and without restartability.
- 4) Run end to end multiple times and make sure that the timestamps are getting incremented.

That e-mail indicates that [REDACTED] assigns tasks to the beneficiary.

The director denied the petition on July 30, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation and had not demonstrated that it has standing to file the visa petition as the beneficiary's prospective employer. In that decision, the director appeared to indicate that, in order to satisfy the requirement of *Defensor v. Meissner, supra*, the petitioner must submit evidence produced by the end-user of the beneficiary's services.

On appeal, counsel submitted a brief. 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 evidence submitted is sufficient to show that the petitioner is the beneficiary's prospective employer. The petitioner's vice president also asserted that the petitioner need not necessarily provide evidence produced by the end-user of the beneficiary's services. He stated that the instant case is distinguishable from *Defensor* in that *Defensor* provided employees to its clients, whereas the petitioner provides services. Counsel also asserted that the evidence submitted is sufficient to demonstrate that the proffered position qualifies as a specialty occupation position.

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. To the contrary, the March 20, 2013 letter from the petitioner's vice president indicates 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.

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 assertion by the petitioner's vice president that the educational requirement of the proffered position may be satisfied by an otherwise undifferentiated degree in engineering is tantamount to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and does not, therefore, qualify as a specialty occupation position. 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* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* states the following about 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

¹ 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 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

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. 9, 2014).

Although the petitioner's vice president has asserted that the petitioner provides services, rather than workers, the evidence in the record suggests, to the contrary, that the petitioner will provide the beneficiary to work on a project at the location of [REDACTED] in California. In this situation, the duties that would be assigned to the beneficiary by the end-user of her services, and the educational requirements imposed by that end-user on the performance of those duties, determine whether the proffered position is a specialty occupation position.

The two affidavits discussed above both state that the beneficiary's position is Senior ETL Analyst. In this context, ETL likely refers to the extraction, transformation, and loading of data. As such, that job title appears to refer to a type of systems analyst, or perhaps a programmer-analyst. The beneficiary's signature line on her June 10, 2013 e-mail response, however, indicates that she is a Senior ETL Developer, which is apparently a type of software developer. A software developer position entails duties somewhat different from those of a systems analyst. The evidence therefore conflicts as to the beneficiary's position title. However, as was explained above, a position title is not dispositive of whether a position involves specialty occupation duties.

The June 21, 2013 e-mail makes clear that [REDACTED] who attested to one of the affidavits, assigns tasks to the beneficiary. The record contains no evidence that [REDACTED] is an employee of the petitioner. To the contrary, his affidavit states that he works at the [REDACTED] location, and he has a [REDACTED] e-mail address. This evidence indicates that he is likely an employee of [REDACTED].

The March 26, 2013 letter from the president of Inficare states that the beneficiary will be supervised by her reporting manager, [REDACTED] the Project Manager. Although made explicit, [REDACTED] e-mail address suggests he is an employee of [REDACTED]. In any event, no evidence in the record suggests that he is an employee of the petitioner.

The SOW provided makes explicit that the beneficiary is to report the status of work performed and all issues that arise to [REDACTED] (rather than to the petitioner). That is a clear indication that the project is managed, at least in part, by [REDACTED].

The evidence indicates that the petitioner, which is located in Ohio, will provide the beneficiary to [REDACTED] which will provide him to [REDACTED] to work on a project at the [REDACTED] location in Sunnyvale, California. The petitioner asserts that it supervises the beneficiary, but has provided no evidence that it has assigned a supervisor to the site where the beneficiary works. Given all of these factors, the AAO does not find credible the assertion that the petitioner, located in Ohio, would supervise the beneficiary's performance, in California, given that his duties would clearly be assigned by others.

In sum, the [REDACTED] project appears to be managed either by [REDACTED] by [REDACTED] or by a concerted effort of both companies. There is no indication that the petitioner exercises any control or has any management responsibilities over the [REDACTED] project. The AAO finds that the duties to which [REDACTED] and/or [REDACTED] would assign the beneficiary and the educational requirements that [REDACTED] and/or [REDACTED] place on the performance of those duties are the salient considerations in this matter.

The petitioner's vice president provided a detailed list of the duties he asserts that beneficiary would perform on the project at [REDACTED] location, managed by [REDACTED]. However, there is no indication that the petitioner's vice president has any basis for his assertions that the beneficiary would perform those duties. The record does not demonstrate that the petitioner's vice president has had any contact with [REDACTED] or [REDACTED]. The duties described by the petitioner's vice president therefore carry little weight.

The June 21, 2013 e-mail and the February 8, 2012 SOW are the only documents which provide evidence pertinent to the duties [REDACTED] and/or [REDACTED] would require of the beneficiary.²

² As was observed above, the SOW was not executed by both parties until May 22, 2013, after the petitioner filed the instant visa petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner

However, the SOW states only that the beneficiary is qualified to perform "Datastage." More concretely, the June 21, 2013 e-mail indicates that, on that date, [REDACTED] requested that the beneficiary "Remove remote exec from the jobs," "Fix restartability issues," "Run end to end with and without restartability," and "Run end to end multiple times and make sure that the timestamps are getting incremented."

The duties described in that e-mail and in that SOW are clearly computer-related duties. However, those duty descriptions are insufficiently detailed to show that she works as a systems analyst, rather than as, for instance, a programmer or a software developer. In fact, the beneficiary's signature line on her June 10, 2013 e-mail response suggests that she is a software developer, rather than a systems analyst. In any event, as was explained above, without a detailed description of the duties the beneficiary would perform in the context of her assignment at [REDACTED] the AAO is unable to determine that the beneficiary would work as a systems analyst.

Nevertheless, again, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will assume, *arguendo*, that the beneficiary would work as a computer systems analyst, so as to reach the petitioner's assertions pertinent to the requirements of such positions.

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

How to Become a Computer Systems Analyst

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Because that SOW was executed after the instant visa petition was submitted, it is not evidence of any employment the petitioner had, when it submitted the visa petition, to assign the beneficiary, and the AAO will not consider it for that purpose. The AAO is considering that SOW only for the light it sheds on the duties to which [REDACTED] would assign the beneficiary if the visa petition were approved.

Some employers prefer applicants who have a master of business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

Advancement

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

Important Qualities

Analytical skills. Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to figure out how changes may affect the project.

Communication skills. Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

Creativity. Because analysts are tasked with finding innovative solutions to computer problems, an ability to “think outside the box” is important.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited April 9, 2014).

The *Handbook* makes clear that computer systems analyst positions do not categorically require a minimum of a bachelor's degree or the equivalent, as it indicates that many systems analysts have a

liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis.

Further, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. The classification of the proffered position as a Level I position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty or its equivalent, especially as the *Handbook* suggests that some systems analyst positions do not require such a degree.

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)(I), 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 still, the AAO finds that, even assuming that the duties of the proffered position have been accurately described in the SOW and the June 21, 2013 e-mail, to the extent that they are described in the record of proceeding, the duties that ascribed 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)(I).

Next, the AAO finds that the evidence of record does not satisfy 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.

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 parallel positions that are in the petitioner's industry and 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 evidence of record also does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." 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 in the SOW and in the June 21, 2013 e-mail collectively constitute a position which requires 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 its duties. 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.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level I computer systems analyst position, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of computer systems analysis. This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* suggests that some systems analyst positions do not require such a degree.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than 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).

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.³

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).

³ 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").

Further, in his March 20, 2013 letter, the petitioner's vice president appeared to indicate that a bachelor's degree in any branch of engineering or in any related subject 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.

Further still, as was explained above, the salient inquiry is not the educational requirement the petitioner places on the performance of the duties, but the requirement imposed by the end-user of the beneficiary's services which, in this case, appears to be [REDACTED]. The record contains no indication of the educational requirement that [REDACTED] places on the performance of the duties to which it would assign the beneficiary.

For all 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.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position as described in the June 21, 2013 e-mail and the February 8, 2012 SOW, including "Datastag[ing]," "Remov[ing] remote exec from the jobs," "Fix[ing] restartability issues," "Run[ning] end to end with and without restartability," and "Run[ning] end to end multiple times [to] make sure that the timestamps are getting incremented," contain no indication of a nature so specialized and complex that they require knowledge usually associated with attainment of a bachelor's degree. In other words, even assuming that the proffered position is a systems analyst position, the proposed duties have not been described sufficiently to show that they are more specialized and complex than the duties of systems analyst 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).

Further, as was noted above, the petitioner filed the instant visa petition for a Level I computer systems analyst position, a position for a beginning level employee with only a basic understanding of computer systems analysis. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to computer systems analysis, especially as the *Handbook* indicates that some systems analyst positions require no such degree.

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, the period of requested employment is from October 1, 2013 to September 7, 2016, and the itinerary provided, signed by the petitioner's vice president, states that the beneficiary will work throughout that period at the [REDACTED] location. At issue is whether [REDACTED] or [REDACTED] which appears to manage the project at that location, has agreed to that placement for that period of time.

Neither [REDACTED] nor [REDACTED] is a party to the February 13, 2013 Purchase Order, and, in any event, that Purchase Order only indicates a term of one year, to expire on or around February 13, 2014.

It is not evident that either [REDACTED] or [REDACTED] had any input into the March 26, 2013 letter of [REDACTED] President and, in any event, that letter only characterizes the [REDACTED] project as "long[-]term." It does not provide any more concrete estimate of the length of time that project will continue. It is not evidence of any particular date through which the [REDACTED] project will continue.

As was explained above, as per 8 C.F.R. § 103.2(b)(1), the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). The petitioner must therefore demonstrate that, on April 15, 2013, when it filed the instant visa petition, it had specialty occupation work to which it could assign the beneficiary.

Eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the

Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (Jun. 4, 1998).

The SOW executed by [REDACTED] and [REDACTED] was ratified by [REDACTED] on May 22, 2013. It is not, therefore, evidence of any work the petitioner had on April 15, 2013 to which it could have assigned the beneficiary, and it will not be considered for that purpose.

Even if the petitioner had demonstrated that, while at the [REDACTED] location, the beneficiary would perform specialty occupation duties, the evidence would still be insufficient to show for what period she 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, on April 15, 2013, it had specialty occupation work to which to assign the beneficiary.

VI. EMPLOYER-EMPLOYEE ANALYSIS

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

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

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

employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁴

⁴ 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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.⁵

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).

⁵ 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)).

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).⁶

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

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

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

(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

⁶ 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).

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] which is located in Virginia, which would assign the beneficiary to work in California at the location of [REDACTED] for an unknown period of time. The March 21, 2013 employment agreement between the petitioner and the beneficiary indicates that the beneficiary has agreed to report to the petitioner four times per month. 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 – (SDG)." The record contains no indication that "Manager – (SDG)" would accompany the beneficiary to California. 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 her duties or otherwise supervise her performance.

To the contrary, an e-mail provided demonstrates that [REDACTED] who appears to work for [REDACTED] assigns duties to the beneficiary. The March 26, 2013 letter from the president of [REDACTED] states that [REDACTED] will supervise the beneficiary's work, but does not make clear for whom [REDACTED] works. The SOW executed by [REDACTED] and [REDACTED] however, makes explicit that the beneficiary is to report the status of work performed and all issues that arise to [REDACTED].

In sum, the evidence makes clear that if the visa petition were approved, [REDACTED] and/or [REDACTED] would assign the beneficiary's tasks and supervise her performance of them. 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. As such, the petitioner does not have standing to file the instant visa petition as the beneficiary's prospective employer. The visa petition will also be denied on this basis.

VII. CONCLUSION

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.