



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)

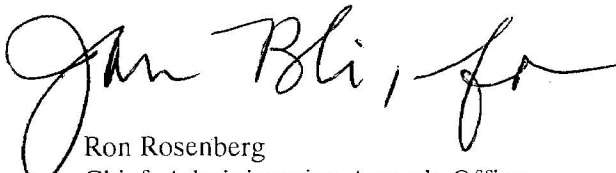
ON BEHALF OF PETITIONER:

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 denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will 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 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 has standing to file the instant visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii) and had not demonstrated that it would employ the beneficiary in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

## II. 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).

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) also states:

*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.

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.

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.

### III. EMPLOYER-EMPLOYEE ANALYSIS

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

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

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-

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

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

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<sup>1</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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



Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>2</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>3</sup>

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*

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

<sup>3</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and 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 visa petition states that the period of requested employment is from October 1, 2013 to September 7, 2016 and that the beneficiary would work at the petitioner's Dayton, Ohio location and at [REDACTED] in Pleasanton, California. The Labor Condition Application (LCA) submitted to support the visa petition reiterates that the beneficiary would work in those two locations. It also 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 Information Technology from [REDACTED] in India and a master's degree in Computer Science from [REDACTED]. Counsel also submitted (1) a Master Services Agreement, dated May 3, 2012, executed by the petitioner and [REDACTED] (2) a letter, dated

March 19, 2013, from the petitioner's vice president; (3) a document headed, "Itinerary of Services for [the beneficiary]"; and (4) an organizational chart of the petitioner's operations.

The May 3, 2012 Master Services Agreement between the petitioner and [REDACTED] states the terms pursuant to which the petitioner may provide workers to [REDACTED] to perform services for [REDACTED] clients. It states that those services will be described in subsequently executed Statements of Work (SOWs).

The March 19, 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 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 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 his work, if required," and that "[the beneficiary's] supervisor is shown on the enclosed organization chart of our company."



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 7, 2016 and that the establishment where her services will be performed is [REDACTED] at [REDACTED] in Pleasanton, California.

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, at the [REDACTED] location, or at some other location.

On April 23, 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 employment agreement executed by the beneficiary and the petitioner's vice president on March 22, 2013; (2) copies of e-mails to which the beneficiary was a party; (3) a printout of an e-mail directory entry; (4) a letter, dated May 1, 2013, from the managing partner of [REDACTED] and (5) a letter, dated May 16, 2013, from the petitioner's senior director.

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." 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 May 1, 2013 letter from the managing partner of [REDACTED] states that the petitioner will provide the beneficiary to [REDACTED], which will provide her to its client [REDACTED] to work on a project for [REDACTED] client, [REDACTED]. He stated that a copy of the master consulting services agreement with [REDACTED] cannot be provided because of a confidentiality clause in that agreement, but added that the agreement is "long-term." He also stated that neither [REDACTED] nor [REDACTED] issues letters on behalf of consultants.

[REDACTED] managing partner described the duties the beneficiary has been providing and will continue to provide as follows:

- Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance.



- Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Coordinate software system installation and monitor equipment functioning to ensure specifications are met.
- Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems.
- Read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements.
- Developed Hibernate based Dao layer and integrated them using Spring Dependency injection, Web modules.
- Used Maven tool for the Project management and for the purpose of compiling, running, deploying and to add external dependencies.
- Involved in Designing and Developing UI Interface using JSP, CSS, JavaScript, XML.
- Lot monitoring is done using XPOLOG and help in developing tool to reduce the time frame for identifying more logs within minimum time span.
- Configured TOAD to work with oracle and MySQL to work in the complicated queries required for the application layer development.
- Tested application performance and monitored with queries developed using Toad configured with Oracle.

The managing partner of [REDACTED] did not reveal how he obtained knowledge of the specific tasks the beneficiary has been performing for [REDACTED] on the [REDACTED] project.

In his May 16, 2013 letter, the petitioner's senior director confirmed that the petitioner will provide the beneficiary, through [REDACTED] and [REDACTED], to work on a project at [REDACTED] location. He also stated that the directory entry and the e-mails provided are sufficient to show that the beneficiary works at the [REDACTED] location and performs specialty occupation work there. He also stated, "While the Beneficiary will be located at the end-client's office, she will be supervised by our company and will remain directly employed by [the petitioner]. He did not state whether the beneficiary's immediate supervisor would work at the [REDACTED] location with the beneficiary.

As to the term of the project, the petitioner's senior director observed that the letter from [REDACTED] indicated it is "long-term," and stated that the petitioner anticipates that the beneficiary will remain at [REDACTED] throughout the period of requested employment. He did not reveal any other basis for that expectation.

The directory entry provided indicates that the beneficiary has a [REDACTED] e-mail address and works at the [REDACTED] location at [REDACTED] in Pleasanton, California.

The e-mails provided show that the beneficiary interacts with other technical employees at [REDACTED] and that she performs coding duties. They do not indicate, with any more specificity, the duties the beneficiary performs.

The director denied the visa petition on June 4, 2013, finding, as was noted above, that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer.

On appeal, counsel submitted (1) three vacancy announcements, (2) a portion of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to systems analyst positions, and (3) a brief.

Counsel did not sign the appeal brief. Instead, the petitioner's vice president signed it. In the brief, the petitioner's vice president cited the vacancy announcements, the e-mails, the O\*NET Internet site, and the *Handbook* section provided as evidence that the beneficiary would work in a specialty occupation position throughout the period of requested employment and that the petitioner would have an employer-employee relationship with the beneficiary. He also stated that the evidence is sufficient to support both propositions.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

In the instant case, the evidence shows that, if the visa petition were approved, the petitioner, which is located in Ohio, would assign the beneficiary to [REDACTED] an Illinois corporation, which would assign the beneficiary to work for [REDACTED] whose location is unknown to the AAO, to work on a project of [REDACTED] in California. 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 and supervise her 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 actually exercising control over the beneficiary's work.

In these circumstances, it appears that personnel at [REDACTED] who may be [REDACTED] employees or may be employees of [REDACTED] or of some other company, rather than the petitioner's own employees, would likely assign the beneficiary's tasks, supervise her performance, and determine whether that performance is satisfactory. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the



beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The petitioner did not, therefore, have standing to file the instant visa petition. The appeal will be dismissed and the petition denied for this reason.

#### IV. SPECIALTY OCCUPATION ANALYSIS

The remaining basis for the decision of denial is the director's finding that the petitioner has not demonstrated that, if the visa petition were approved, the petitioner would employ the beneficiary in a specialty occupation position.

As a preliminary matter, the AAO observes that the petitioner has never alleged that the beneficiary would work in a specialty occupation position because it has never alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. To the contrary, the petitioner's vice president's March 19, 2013 letter 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.

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 will proceed with its analysis of the specialty occupation basis of the director's decision.

As was discussed above, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. In the instant case, whether [REDACTED] has control of the project at [REDACTED] location, and whether it assigns duties to the technical staff working on that project and supervises their performance, or whether [REDACTED] merely provides workers to [REDACTED] to utilize on a project which [REDACTED] plans and controls, is unclear. In any event, however, the record contains no evidence from either [REDACTED] or [REDACTED] describing the duties the beneficiary would perform if the visa petition were approved. Whichever of them is considered to be the end-user of the beneficiary's services, the record contains no evidence from that end-user.

The record does contain a duty description provided by the petitioner's vice president, and a somewhat different duty description provided by the managing partner of [REDACTED]. Neither of those descriptions, however, was accompanied by any evidence that the petitioner's vice president or the managing director of [REDACTED] has any personal knowledge of the specific duties the beneficiary has performed in the proffered position. Without any demonstrated basis for those statements pertinent to the duties of the proffered position, they cannot be assumed to be an accurate description of the duties the beneficiary actually performs or would perform if the visa petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The visa petition must also be denied for this reason.

Again, however, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will continue with the analysis of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). This analysis will be performed pursuant to the assumption, made *arguendo*, that either the duty description provided by the petitioner's vice president, or the duty

description provided by the managing partner of [REDACTED] or both, are accurate statements of the work the beneficiary would perform if the visa petition were approved.

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.<sup>4</sup>

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:

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<sup>4</sup> 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.



- 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. 2, 2014).

As was stated above, the specialty occupation issue is being analyzed based on the assumption, made *arguendo*, that either the duty description provided by the petitioner's vice president, or the duty description provided by the managing partner of [REDACTED] or both, are accurate statements of the work the beneficiary would perform if the visa petition were approved. The duties the petitioner's vice president and the managing partner of [REDACTED] attributed to the proffered position are consistent with the duties of computer systems analysts as described in the *Handbook*. The AAO finds that, if those duty descriptions are presumed to be accurate, the proffered position is a computer systems analyst position as described in the *Handbook*.

Counsel cited O\*NET as evidence of the educational requirements of the proffered position. On April 30, 2014, the AAO accessed the pertinent section of the O\*NET Internet site, which addresses Computer Systems Analysts under the Department of Labor's Standard Occupational Classification code of 15-1121. O\*NET does not state a requirement of a bachelor's degree for computer systems analyst position. Rather, it assigns computer systems analysts a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the O\*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that



occupation. Therefore, the O\*NET information is not probative of the proffered position's being a specialty occupation.

As was stated above, the AAO recognizes the *Handbook* as an authoritative source on the educational requirements of the occupations that it addresses. 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.

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 Apr. 2, 2014).

The *Handbook* makes clear that computer systems analyst positions do not, as a category, require a minimum of a bachelor's degree or the equivalent, as it indicates that some systems analysts have a liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis.

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, the AAO finds that, even assuming that the duties of the proffered position have been accurately described, to the extent that they are described in the record of proceeding, 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 – Incident Management for [REDACTED] requiring a bachelor's degree in "MIS/IT, business administration, or related discipline" and "3-6 years of directly related IT work experience, with strong conflict management, coordination, analysis and process background";
2. Entry Level Systems Analyst for an unknown company in an unknown industry requiring a "Bachelor's degree in a technical field such as computer science, computer engineering or related field"; and
3. Oracle Supply Chain Business Systems Analyst for a staffing firm's unidentified client in an unidentified industry requiring an unspecified bachelor's degree and "7+ to 10 Years" experience.

The third vacancy announcement states that the position it announces requires a bachelor's degree, but not that the degree must be in any specific specialty or even in any range of subjects. As such, it does not contain a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

The first vacancy announcement states that it requires a bachelor's degree, but indicates that an otherwise undifferentiated bachelor's degree in business administration would be a sufficient educational qualification for the position. A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent, and the first vacancy announcement does not state that the position it announces requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must show that 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. None of the positions announced in those vacancy announcements has been shown to be with an organization in the petitioner's industry.

Further still, as was noted above, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. 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. Of the three vacancy announcements submitted, the first and third require considerable experience, and do not, therefore, appear to be entry-level positions.

Finally, even if all three 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 three announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>5</sup>

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<sup>5</sup> 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).



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 that collectively constitute the proffered position 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 a few 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 was certified 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.<sup>6</sup> 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 19, 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.

As was explained above, the description of the duties provided by the petitioner's vice president and the description provided by the managing partner of [REDACTED] have not been shown to be accurate, in that neither the petitioner's vice president nor the managing partner of [REDACTED] has shown any basis for their assertions that the duties described are the duties the beneficiary would actually perform. However, even assuming, *arguendo*, that those duty descriptions are accurate, they would not indicate that the proffered position is a specialty occupation position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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<sup>6</sup> 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").



The duties of the proffered position as described by the petitioner's vice president, such as gathering information from users to define the exact nature of system problems, analyzing computer problems of existing and proposed systems, designing a system of computer programs and procedures to resolve the problems, etc., 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 degree in a specific specialty or its equivalent.

Similarly, the duties described by the managing partner of [REDACTED] including modifying existing software; storing, retrieving, and manipulating data for analysis of system capabilities and requirements; testing, maintaining, and monitoring computer programs and systems; etc., 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 degree in a specific specialty or its equivalent.

In fact, no evidence has been presented that the duties described by the petitioner's vice president and [REDACTED] managing partner are anything other than duties common to systems analyst positions in general, which positions, the *Handbook* indicates, may 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 systems analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

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.

For the reasons discussed above, the petitioner has not 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 petition must be denied for this reason.

Further, although the period of requested employment is from October 1, 2013 to September 7, 2016, the evidence of record is insufficient to show that the beneficiary will work on the [REDACTED] project throughout that period, or even that the petitioner has any work at all at which it would be able to assign the beneficiary throughout that period.

Specifically, the record contains no evidence from either [REDACTED] or Accenture that the project would continue through September 7, 2016, or of any other date through which it is intended to continue. Likewise, although the managing partner of [REDACTED] characterized the [REDACTED] project as "long-term," he provided no more concrete statement of the term of the project. He did not state that the project would continue through September 7, 2016, or through any other date. Further, even if he had provided such a date, he provided no information that would suggest that he might have a reasonable basis for forming such an opinion.

Even if the petitioner had demonstrated that, while at [REDACTED] the beneficiary would perform specialty occupation duties, the evidence would still be insufficient to show for what period she will remain there performing those duties. Further, the record contains no evidence pertinent to any other work the petitioner has to which it could assign the beneficiary. 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.

#### V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.