

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 29 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:  
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:

SELF-REPRESENTED

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, 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, submitted April 8, 2013, the petitioner describes itself as an information technology services firm. In order to employ the beneficiary in what it designates as a "Computer Systems/Systems Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it 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).<sup>1</sup>

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. LEGAL FRAMEWORK

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;

---

<sup>1</sup> Although the director briefly discussed the matter of whether the proffered position is a specialty occupation, she did not enter a finding on the issue.

- (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 record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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

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

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion



over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

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

---

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

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



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

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

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)).

---

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).

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

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

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

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

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

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

### III. EVIDENCE

The visa petition states that the period of requested employment is from October 1, 2013 to September 30, 2016 and that the beneficiary would work at the petitioner's Rolling Meadows, Illinois location. The Labor Condition Application (LCA) submitted to support the visa petition states that the beneficiary would also work at [REDACTED] in Minneapolis, Minnesota, and [REDACTED] in Harrisburg, Pennsylvania. It further states that the proffered position is a systems analyst position; that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information



Network (O\*NET); and that it is a Level I, entry-level, position.

With the visa petition, the petitioner submitted evidence pertinent to the beneficiary's employment history, but no evaluation of that employment history in terms of any educational equivalent. The petitioner also submitted evidence that the beneficiary received a bachelor's degree in Electronics and Communication Engineering from [REDACTED] in Hyderabad, Andhra Pradesh, India. It was not accompanied by an evaluation of that degree in terms of any U.S. educational equivalent. The petitioner also submitted evidence that the beneficiary earned a master's degree in an unspecified subject from [REDACTED]

The petitioner also submitted a letter, dated March 30, 2013, from the petitioner's president. As to the duties of the proffered position, the petitioner's president stated:

The [beneficiary] analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, she [sic] will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements. The actual computer programming may be performed with the assistance of the programmers.

More concretely, the petitioner's president stated:

**DAY-TO DAY RESPONSIBILITIES OF [the beneficiary]:**

- Develop packages using FileNET, Java, Salesforce and controlled its execution, by implementing the infrastructure that enables execution order, logging, variables, and event handling. % of Time: 20
- Create SSIS Packages to export and import data from CSV files, Text files and Excel Spreadsheets. % of Time: 20
- Effectively used SDLC methodologies to define the project, this included defining business and technical requirements and specs. % of Time: 20
- Work as a developer in creating Stored Procedures, packages, tables, and views and other SQL joins and statements for applications. % of Time: 10
- Work with various tasks related to unit testing, testing the applications. % of Time: 10

- Involves [sic] in writing the programs in several languages related to Java, J2ee, Webservices, IBM File NET, Salesforce, etc. % of Time: 20

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

As with any Systems Analyst, the usual minimum requirement for performance of the job duties is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience.

As to the beneficiary's qualifications, the petitioner's president stated:

[The beneficiary] is an excellent candidate to fulfill the requirements of this temporary professional position. [The beneficiary] holding Master's Degree from recognized university in United States of America.

And the beneficiary has gained experience for the last couple of years working in the United States and presently working with [the petitioner].

[Errors in the original.]

The petitioner's president did not identify the field of study from which the beneficiary received his master's degree. He did not provide any information about the equivalence of the beneficiary's Indian education and/or his employment experience in terms of a U.S. education and degree.

On May 14, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the proffered position qualifies as a specialty occupation position. The director outlined the specific evidence to be submitted. The director emphasized that the evidence submitted must demonstrate that the duties to which the beneficiary would actually be assigned would require a minimum of a bachelor's degree in a specific specialty or its equivalent.

In response to the RFE, the petitioner submitted, *inter alia*, (1) a photocopy of a building pass; (2) printouts of e-mails to which the beneficiary was a party; (3) an organizational chart of the petitioner's operations; (4) printouts of what appear to be PowerPoint presentations pertinent to the petitioner's performance management and performance appraisal processes; (5) a Secondary Supplier Service Agreement executed between the petitioner and [redacted] dated March 2, 2011; (6) an employment agreement, issued by the petitioner and ratified by the beneficiary, dated February 1, 2013; (7) a document headed, "Addendum to Employment Contract Dated May 8, 2013 Between [the petitioner] and [the beneficiary]"<sup>5</sup>; (8) a document headed "Work Order" with a "create date" of May 15, 2013; (9) a letter, dated May 23, 2013, from a talent acquisition officer at [redacted]; (10) status reports covering weeks between May 13, 2013 and July 12, 2013; (11) time

---

<sup>5</sup> The AAO observes that the record does not contain the employment contract dated May 8, 2013.



sheets covering weeks between May 9, 2013 and July 14, 2013; (12) two affidavits dated July 15, 2013; and (13) a letter, dated July 18, 2013, from the petitioner's human resources manager.

The building pass submitted bears the beneficiary's name and likeness and the legend: [REDACTED] Other evidence suggests that this stands for [REDACTED] a division of [REDACTED]

Some of the e-mails pertain to the beneficiary's entering duty at [REDACTED] and some pertain to time sheets. Others pertain more directly to the beneficiary's work. They suggest that the beneficiary is engaged in work pertinent to computers.

For instance, a message, dated May 15, 2013, from [REDACTED] who has a [REDACTED] domain e-mail address and works in Technology Management/Imaging Services, is addressed to [REDACTED] with the beneficiary and others included as additional addressees. It asks [REDACTED] "Can you have somebody provide access to Sharepoint."

Another broadcast message, to the beneficiary and others, dated June 6, 2013, from [REDACTED] who also has a [REDACTED] e-mail address, states:

A key testing goal for this week is getting ingestion working for Correspondent. The team has been working through defects to make this happen. A solution has been identified for one of the key defects (300165), but additional work is needed before we can re-test in UAT – that works is outlined below. As a result, Correspondent ingestion testing is on hold. Correspondent will work on other test cases until we get through the items below.

Work Required:

- End-to-end validation in a development environment that the fix resolves the ingestion issue
- Assess any impact to the UID validation script that had previously been executed
- Assess and confirm that the proposed fix does not negatively affect any other functional areas
- Deploy Lending Grid component of fix to UAT

The goal is to get through this work yet today, as getting ingestion working is critical for the war room testing planned for next week.

Please let me know if there are any questions.

Thanks,

The organizational chart provided places the beneficiary under "Custom Development," which is under the petitioner's president.

The PowerPoint presentations provided state that the petitioner manages and rates its employees' performance. Specifically, they state:

**[The Petitioner's] Responsibilities**

- Supervision of the employees
- Schedule Meetings – daily calls, weekly status, report back to the office routinely
- Site visits to the employees work
- Giving training to the latest technologies and sending them to different training facilities to accomplish the job
- Evaluate performance once in every six months
- Employee benefits package – Explaining wages paid, medical, bonus, pay, relocation allowances, vacation, right-hire process

The May 2, 2011 Secondary Supplier Service Agreement indicates that [REDACTED] provides personnel to [REDACTED]. It states some of the terms pursuant to which the petitioner would provide workers identified in "the attached Exhibit B Work Order" to [REDACTED] to be provided, in turn, to [REDACTED] "to perform the Work described in Exhibit A." Exhibits A and B are not in the record. It also states that the fees to be paid for provision of services were established pursuant to "the Primary Agreement" between [REDACTED] and [REDACTED]. The Primary Agreement is also not in the record. The Secondary Agreement also states, "Under no circumstances is [the petitioner] authorized to assign or market any employees to [REDACTED] that are not listed on Exhibit B." It states that the petitioner shall remove its workers at any time for any valid legal reason upon request of either [REDACTED] or [REDACTED] but that "this arrangement shall in no way affect the right of [the petitioner], in its sole discretion as employer, to hire, assign, reassign, and/or terminate its own employees.

The purpose for which this agreement was provided is not clear. Absent Exhibit B, which identifies all of the workers to be assigned pursuant to the agreement, the agreement has not been shown to have any relevance to the duties the beneficiary would perform, the location where he would perform them, or the education those duties would require. Nor has it been shown to demonstrate that the petitioner has any work at all to which it could assign the beneficiary. For all of these reasons, the May 2, 2011 agreement will not be further considered.

As to the duties the beneficiary is to perform, the February 1, 2013 ratified employment agreement from the petitioner to the beneficiary states only, "[the beneficiary] shall use [his] best energies and abilities on a full time basis to perform, at location designated by the [petitioner] and including customer offices, the employment duties assigned to [the beneficiary] from time to time."



The ratified employment agreement also states that the beneficiary is required to give the petitioner four weeks advance notice prior to terminating his employment with the petitioner, and further states:

In the event that you breach the termination notice or other provisions of this Agreement or that your employment is terminated voluntarily or for cause prior to the completion of one year of employment or prior to the completion of any project to which you are then assigned, you agree (1) to repay in full all actual travel and relocation expenses or other advances paid or reimbursed to you by the [petitioner] and you authorize the [petitioner] to deduct and withhold such repayment in full from any compensation or other amounts otherwise owed or payable to you; and (2) to pay the [petitioner] as liquidated damages in such amount is reasonable under the circumstances in right of the fact [sic] that significant damages and expenses will be suffered or incurred by the [petitioner] and in recognition of the difficulty and further expense of proving the exact amount thereof.

The addendum to the May 8, 2013 employment contract is, itself, undated. Although it is signed by the petitioner's human resources manager and the beneficiary, their signatures are also undated. As such, when the petitioner and the beneficiary agreed to the terms of that addendum is unclear. However, it was apparently after the petitioner and the beneficiary entered into the May 8, 2013 employment contract, which is not in the record. In any event, it describes duties to which the beneficiary would ostensibly be assigned and states that he is being hired to work as a systems analyst. The duties described in the addendum are substantially the same as those described in the petitioner's president's March 30, 2013 letter.

The May 15, 2013 document headed Work Order does not appear to have been generated by a company seeking the beneficiary's services. Rather, it appears to be an internal document generated by the petitioner. In any event, it indicates that the beneficiary was assigned to work as a developer at a Minneapolis work site from May 10, 2013 to March 31, 2014. However, the AAO observes that because the visa petition was submitted on April 8, 2013, the work order is not evidence of any work the petitioner had, when it filed the visa petition, to which it could have assigned the beneficiary.

The May 23, 2013 letter from a talent acquisition officer at [redacted] states that the beneficiary has been selected to provide services, through [redacted] for [redacted] at [redacted] in Minneapolis. It does not state when the beneficiary was selected to work in that capacity. As such, it is not evidence that, when the petitioner filed the instant visa petition, it had work for the beneficiary to perform. It attributes the following duties to the proffered position:

Design and develop ECM File NET, Java applications using ECM CE API's and PE API. Create workflows which will distribute the tasks to the users for their business processes. Work with web service in dealing with different business services. Write code using Java, J2EE, and JSP technology to meet the [redacted] standards.

The status reports provided list "Tasks accomplished this week" and contain such entries as "Fixed a validation defect assigned," "Added additional error message for ease to the user," and "Tested the fix and code is updated and verified in Testing environment." The time sheets provided show hours worked for each day covered and that the work was performed on "Image and Content Management Platform."

Both of the affidavits provided state that the affiants work as Java Developers with the beneficiary, who also works as a Java Developer. They state, apparently from personal knowledge, that the beneficiary performs the following duties:

- Coordinates complex information system developments or revisions and implements technical functions in the Java environment to achieve the desired results in the system enhancement.
- Follows approved life-cycle methodologies and perform [sic] coding using JAVA and other supporting technologies
- Configures FileNet system and create [sic] new workflows based on the requirements
- Develops and conducts program tests; develops code modules according to the requirements and verify [sic] that the programs function correctly and ensure [sic] that modification have [sic] not caused error in the other parts of the program, interfacing programs
- Resolves technical issues through debugging, research and investigation

The July 18, 2013 letter from the petitioner's human resources manager contains a duty description identical to that contained in the March 30, 2013 letter from the petitioner's president. As to the educational requirement of the letter, it states:

As with any Computer Systems/Systems Analyst, the usual minimum requirement for performance of the job duties is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience.

As to the location of the beneficiary's employment, it states that the beneficiary will work at the [REDACTED] location in Minneapolis, and:

Once he completes his assignment at the current place, he is going to report work [sic] at our location: [REDACTED] Rolling Meadows IL [REDACTED]

Recently we entered exclusive agreement with one [REDACTED] located at [REDACTED] Harrisburg, PA [REDACTED] won worth of \$2 - \$3 Million Dollars project. Some of our employees are working in that location now. We are anticipating more work from them.



In case if he [sic] changes his current client location, we abide the rules [sic] of USCIS in applying the LC amendment for the same.

As to the supervision of the beneficiary, the petitioner's human resources manager stated that the petitioner assigns the beneficiary's work daily or weekly as required, gets a status report from the beneficiary weekly, and evaluates his performance once every six months.

The director denied the visa petition on July 29, 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, the petitioner provided a letter, dated August 6, 2013, from its president. In that letter, the petitioner's president reiterated various assertions made previously.

#### IV. EMPLOYER-EMPLOYEE ANALYSIS

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."

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 Illinois, would assign the beneficiary to [REDACTED], located in Maryland, which would assign the beneficiary to work for [REDACTED] in Minneapolis, Minnesota. Although the petitioner's human resources manager stated that the petitioner would assign tasks to the beneficiary and supervise his performance, the record indicates that this supervision would be performed remotely, by telephone, mail, etc. There is no indication that the petitioner would send a supervisor to the site where the beneficiary would work. There is no indication that the petitioner, rather than [REDACTED] or [REDACTED] controls the project at the [REDACTED] location. Under these circumstances, it is not clear how the petitioner could assign the beneficiary's work, as it has never apparently been intimately involved in the project upon which the beneficiary is working and would work. Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Further, the June 6, 2013 e-mail from [REDACTED], who has a [REDACTED] e-mail address and does not appear to work for the petitioner, suggests that Ms. [REDACTED] assigns tasks to the beneficiary.

In these circumstances, it appears that personnel at the [REDACTED] location, who may be [REDACTED]'s employees, employees of [REDACTED] or employees of some other company, and not the petitioner's own employees, would likely assign the beneficiary's tasks, supervise his performance, and determine whether his performance of those tasks 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 has not, therefore, demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the petition denied for this reason.

#### V. ADDITIONAL BASIS FOR DENIAL

The record suggests additional issues that were not addressed in the decision of denial but that, nonetheless, also preclude approval of this visa petition. One such issue is whether the petitioner has demonstrated that, if the visa petition were approved, the beneficiary would work in a specialty occupation position.

As a preliminary matter, the AAO observes that the petitioner has not established the duties the beneficiary would perform if the visa petition were approved. That is, 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.

As was noted above, the evidence indicates that the beneficiary would perform services for [REDACTED]. However, the record contains no evidence from [REDACTED] stating the duties the beneficiary would perform and the educational requirements that [REDACTED] imposes on the performance of those duties.

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. For this reason alone, the evidence of record does not demonstrate that the proffered position is a specialty occupation.

Next, the AAO observes that the petitioner has never alleged that the beneficiary would work in a specialty occupation position because it has never asserted 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 president stated, in his March 30, 2013 letter:

[T]he usual minimum requirement for performance of the job duties is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience.

The petitioner's human resources manager reiterated that assertion in his July 16, 2013 letter.

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 president and its human resources manager 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. For this reason alone, the evidence of record does not demonstrate that the proffered position is a specialty occupation.

For the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will turn 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 U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook 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.<sup>6</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.

---

<sup>6</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.

## Duties

Computer systems analysts typically do the following:

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

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. 23, 2014).

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.



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.

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

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.

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 parallel positions that are in organizations that are in the petitioner's industry and that are otherwise 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 of 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 the duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Therefore, the evidence of record does not establish that this position is significantly different from other 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>7</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, as was noted above, both the petitioner's president and its human resources manager stated that a degree in any engineering discipline would be a sufficient educational requirement for the proffered position. This makes clear, as was explained above, that the petitioner does not require a minimum of a bachelor's degree in a specific specialty or its equivalent for the position.

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

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

The duties of the proffered position as described by the beneficiary's coworkers, including coordinating application development and revision, implementing technical functions, coding applications, creating new workflows, developing and performing program tests, and debugging applications, 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.

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

---

<sup>7</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").

positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

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 additional reason.

Further, although the period of requested employment is from October 1, 2013 to September 30, 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 through the end of that period. The record contains no evidence from [REDACTED] or [REDACTED] stating how long the beneficiary's services will be required in Minneapolis. Even the "Work Order," which appears to have been generated by the petitioner, indicates that the project was projected to end on March 31, 2014.

The petitioner has indicated that after the beneficiary leaves the [REDACTED] project, he will report to the petitioner's location. The petitioner has provided no evidence that it has any work for him to perform there or, if it does, that the work will qualify as specialty occupation work.

The contract pertinent to [REDACTED] has not been shown to have any relevance to the beneficiary, as was observed above. Although the letter from the petitioner's human resources manager dated July 18, 2013 letter states that the petitioner recently acquired a contract with "one [REDACTED] located at [REDACTED] Harrisburg, PA [REDACTED]" he did not show that the [REDACTED] has agreed to utilize the beneficiary's services when he leaves his current project. Further, if the beneficiary were to work on that project, the duties he would perform in Harrisburg have not been shown to be specialty occupation duties.<sup>8</sup>

Thus, even if the visa petition were otherwise approvable, it could not be approved for any period during which the petitioner has not indicated that it would have specialty occupation employment for the beneficiary.

Another basis for denial pertains to the beneficiary's qualifications for the position.

The record shows that the beneficiary has a bachelor's degree in electronics and communication engineering from a university in India, but it contains no evaluation of that education and degree in terms of an equivalent U.S. education and degree. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4),

---

<sup>8</sup> Further still, the petitioner has not shown that, if the beneficiary were to work on the project in Harrisburg, the duties the end-user would assign to him would qualify as Level I Systems Analyst duties, which is the only type of position for which the LCA submitted in this case has been certified.



absent such an evaluation, that degree does not show that the beneficiary is qualified to work in any specialty occupation position.

The record indicates that the beneficiary received a master's degree from a U.S. university, but there is no indication as to the subject matter of that master's degree. Absent any indication of the subject matter of that degree, it is not evidence that the beneficiary has a minimum of a bachelor's degree or its equivalent in a specific specialty closely and directly related to the proffered position. Further, the petitioner has not asserted that the beneficiary's master's degree is in a specific specialty.

The record indicates that the beneficiary has been employed in the computer industry, but it does not demonstrate that his employment is equivalent, in whole or in part, to a minimum of a bachelor's degree in a specific specialty or its equivalent. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), absent a competent evaluation, that employment experience cannot be used to show that the beneficiary has a minimum of a bachelor's degree in a specific specialty or its equivalent.

The evidence of record is insufficient to show, pursuant to the requirements of the salient regulations, that the beneficiary has a minimum of a bachelor's degree in a specific specialty or its equivalent, and is insufficient, therefore, to show that the beneficiary is qualified to work in a specialty occupation position. The visa petition must be denied for this additional reason.

## VI. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.