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U.S. Citizenship  
and Immigration  
Services

DATE: NOV 19 2014 OFFICE: VERMONT 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,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director of the Vermont Service Center (hereinafter "the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 petition, the petitioner describes itself as a 70 employee "Software Development and Consulting, Services Provider"<sup>1</sup> established in [REDACTED]. According to the petitioner, it filed this petition in order to employ the beneficiary in what it designates as a full-time "Systems Analyst" at a minimum salary of \$56,000 per year. 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, concluding that the evidence of record failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

For the reasons that will be discussed in this decision, we conclude that the director's decision to deny the petition for its failure to establish the existence of an employer-employee relationship between the petitioner and the beneficiary was correct. Beyond the decision of the director, we find an additional aspect of the record of proceeding which would preclude approval of this petition even if the petitioner had established the requisite employer-employee relationship with the beneficiary. That is, there is insufficient evidence to establish that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND DOCUMENTARY OVERVIEW

According to the petitioner, it seeks approval of this H-1B specialty occupation petition so that it can assign the beneficiary to work at a particular end-client pursuant to (1) a contractual relationship between the petitioner [REDACTED] and a firm named [REDACTED] and (2) a contractual relationship between [REDACTED] and its client, [REDACTED] – which is the ultimate end-client for whom the beneficiary would provide his services. For brevity's sake, we will hereafter refer to [REDACTED] simply as the petitioner, to [REDACTED] as [REDACTED] and to the [REDACTED].

The petitioner is located in Cumming, Georgia. According to the petition, the beneficiary would provide his services to [REDACTED] at a location in Austin, Texas.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 5415, "Computer Systems Design and Related Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "5415 Computer Systems Design and Related Services," [https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=5415&search=2012 NAICS](https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=5415&search=2012%20NAICS) Search (last visited November 5, 2014).

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Systems Analyst" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay him a salary of \$56,000 per year. The petitioner specified its gross annual income as \$7,458,028 million and its net annual income as \$485,816. The LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level I prevailing wage rate.

#### **Documents filed with the Form I-129**

In its June 13, 2013 letter of support filed with the Form I-129, the petitioning company's Vice President described the proffered position as follows:

[The petitioner] would like to employ [the beneficiary] in the temporary, full-time, specialty occupation position of Systems Analyst. [The beneficiary] will expand or modify systems to serve new purposes or improve work flow. He will test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems. He will also develop, document and revise system design procedures, test procedures, and quality standards. He will provide staff and users with assistance solving computer related problems, such as malfunctions and program problems. He will review and analyze computer printouts and performance indicators to locate code problems, and correct errors by correcting codes. He will confer with clients regarding the nature of the information processing or computation needs a computer program is to address. He will coordinate and link the computer systems within an organization to increase compatibility and so information can be shared. He will also determine computer software or hardware needed to set up or alter system.

Specifically, in this assignment, [the petitioner] and [the beneficiary] will assist with the Department of Transportation Project for end-client, State of Texas at its location in Austin, Texas. [The beneficiary] will serve as Systems Analyst for this project, and have the following tasks:

- Migrating from old systems to new systems SQL developer - data migrations.
- Process work flows and reports PL/SQL, Not touching the Java code[.]
- Sit with customers retrieve and disseminate information[.]
- Testing[.]
- Prepares and implements database structure including but not limited to tables, indexes and storage structure.
- Works with the business analysts and programmer to design and implement database specifications.
- Creates and maintains physical design document[.]



- Analyzes and optimizes application performance.
- Assists with application support documentation[.]
- Assists Programmer with ETL (Extraction Transformation and Load) processes, as well as unit, integration testing Plans backup and recovery[.]
- Performs database audit when required[.]
- Applies data normalization rules in data modeling.
- Develops and modifies database procedures and functions for application business logic.
- Develops and modifies data loading and data comparison scripts Designs, implements, and documents database specifications.
- Creates logical data model diagrams such as entity-relationship diagrams and physical data model diagrams using data modeling tool.
- Creates and populates the data dictionary by documenting data elements and their attributes.
- Prepares scripts for database creation from physical data model.
- Plans and creates elements for physical database objects including but not limited to tables, indexes, storage structure and constraints.
- Analyzes the user requirements and prepares the data security implementation plan.
- Prepares the data conversion plans and executes the data conversions.
- Monitors database performance. Analyzes and optimizes application performance and tuning plan to execute it.
- Performs unit and integration testing.
- Uses and manages the version control of application code by using PVCS version manager software.

The petitioning company's Vice President continues his letter with the following assertion about the petitioner's "right to control and employer/employee factors" over the beneficiary:

[The petitioner] is submitting detailed chain of assignment documents. Specifically, we are submitting copies of our Agreement with vendor, [REDACTED] as well as copies of letters and additional documentation confirming assignment from [REDACTED] to end-client, State of Texas under which [the petitioner] will assign the specialty occupation services of [the beneficiary] to the end-client's, State of Texas work site.

\* \* \*



[The beneficiary] was evaluated and selected for this position solely by [the petitioner]. [The petitioner] will hire him and retain the sole right to terminate his H-1B employment. [The beneficiary] will be on [the petitioner's] pay roll, and [the petitioner] alone will have all pay roll, insurance and related tax responsibility for his employment. His work will be supervised and otherwise controlled by [the petitioner]. Accordingly, [the petitioner] will have the right and is here exercising the right to control his employment by assigning him to this project. [The petitioner] will control the manner of completing the assignment and will remain the actual employer of the beneficiary throughout the duration of the requested period of stay.

\* \* \*

For the duration of the H-1B assignment [the petitioner] alone will retain sole responsibility for the supervision, management and execution of all employee benefits, determining the duration of his assignment, solely perform all pay roll and all employment tax functions, including payment of all employment taxes and wages. [The petitioner] will be responsible for conducting of all performance evaluations. [The beneficiary] will provide [the petitioner] with detailed performance reports and troubleshoot project impediments and scheduling with his [petitioning company's] Project Manager. The [petitioner's] Project Manager will control how and when the contractual project assignment on which [the beneficiary] is working for [the petitioner] will be completed. [The petitioner] alone will make all determinations of promotion and/or firing of [the beneficiary] as his performance and [the petitioner's] business needs dictate.

\* \* \*

[The beneficiary] will remain under the direct supervision of Resource Manager Mr. [REDACTED] Mr. [REDACTED] can be reached at his email ID: [REDACTED] and at phone: [REDACTED]

The petitioner also states that "the position of Systems Analyst requires a minimum of a Bachelor's Degree or equivalent in Business Administration, Computer Science, Information Technology, Engineering, or a related field. All persons similarly employed with [the petitioner] currently meet or exceed these minimum educational requirements."

The documents filed with the initial petition also included, among others:

- The required Labor Condition Application (LCA). It was certified for work at [REDACTED] Austin, TX [REDACTED], which the petition identifies as [REDACTED] business address and the location where the beneficiary would perform his duties. The LCA also specified Computer System Analysts as the related occupational group for the position for which the LCA would be used.

- A copy of a June 3, 2013 email from [REDACTED] to [REDACTED] confirming that Mr. [REDACTED] is "interested in bringing [the beneficiary] on-board." This email in turn was forwarded to [REDACTED] Kentucky, by [REDACTED]. We note that the petitioner has not established who [REDACTED] is in relation to the petitioner and the beneficiary. Thus, this document bears no probative value.
- A June 10, 2013 letter from [REDACTED] verifying that the beneficiary "will be assigned to work as a Systems Analyst through vendor [REDACTED] at State of TX located at [REDACTED] Austin, TX [REDACTED]" and further noting that "[the beneficiary] will be a full time employee of [the petitioner] and [the petitioner] reserves the complete right in regard to the assignment of their employee, [the beneficiary] to any other project/employer."
- A copy of a document entitled "Sub-Vendor Agreement" between the petitioner and [REDACTED]
- A copy of a document entitled "Employment Agreement," signed by the petitioner and the beneficiary.
- A copy of a document entitled "Benefits Summary" issued to the beneficiary by the petitioner.
- A blank "Biweekly Status Report" from the petitioner.

#### **Documents submitted in response to the RFE**

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 26, 2013. The petitioner was asked to submit probative evidence to establish, in part, that a valid employer-employee relationship will exist between the petitioner and the beneficiary. In addition, the petitioner was asked to submit documentation to establish sufficient work for the three-year period requested on the Form I-129. Finally, the petitioner was asked to submit additional documentation to establish the beneficiary's qualifications for the proffered position. The director outlined some of the types of specific evidence that could be submitted.

Among other documents submitted in response to the RFE were: (1) a table detailing the principle job functions of the proffered position along with the requisite specialized knowledge required for each duty, the approximate percentage of time allocated to each job duty, and examples of relevant coursework completed through which requisite specialized knowledge has been obtained; (2) an August 28, 2013 affidavit from [REDACTED] an employee of [REDACTED] stating that the beneficiary has been assigned as Systems Analyst at [REDACTED] and further noting that Mr.



Reddy "supervise[s] [the beneficiary] and have monitored him successfully performing the above tasks"<sup>2</sup>; (3) an updated letter from [REDACTED] Professional Recruiter, [REDACTED] verifying that the beneficiary is a "full time employee of [the petitioner] and has been assigned to work as a Systems Analyst through vendor [REDACTED] at The Department of State Health and Human Services, State of Texas"; (4) a June 19, 2013 Sub-Vendor Agreement between the petitioner and [REDACTED] (5) a Work Order between [REDACTED] and the petitioner referencing the beneficiary and the work site location at [REDACTED], Austin, TX; (6) a June 13, 2013 offer-of-employment letter from the petitioner to the beneficiary, signed by both parties; (7) an Employee Performance Review for the period of June 24, 2013 to August 26, 2013; (8) Biweekly Status Reports from June 24, 2013 to August 2, 2013; (9) copies of earning statements issued to the beneficiary by the petitioner; (10) invoices issued by the petitioner to [REDACTED] for "consulting services provided" by the beneficiary between June and August 2013; (11) timesheets referencing [REDACTED] and the beneficiary for work performed between June and August 2013; and (12) a copy of the beneficiary's badge referencing "Contractor" and "Texas Department of State Health Services".

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on September 11, 2013.

On appeal, counsel submitted a supportive brief, duplicate copies of documents previously submitted, and evidence establishing the beneficiary's residence in Austin, Texas, where [REDACTED] is located.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will now address the director's determination that the petitioner failed to establish that it will have an employer-employee relationship with the beneficiary. The record supports the conclusion that the evidence fails to establish that the petitioner will have "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." 8 C.F.R. § 214.2(h)(4)(ii).

As a preliminary matter, we find that proper resolution of this issue is to be determined by the evidentiary record that the petitioner has developed with regard to the beneficiary's [REDACTED] project work. We say this because we find that the record of proceeding contains insufficient evidence to support a reasonable finding that the petitioner had secured any specific work for the beneficiary at its own location. Absent showing at the time of petition filing that the petitioner had definite, non-speculative work for the beneficiary at its own location, there is no basis for a determination that the petitioner and the beneficiary would have an employer-employee relationship on that kind of basis. After all, the existence of work for the beneficiary is a basic element of a petitioner's claim that it would be employing the beneficiary if the petition were approved. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.

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<sup>2</sup> The "tasks" Mr. [REDACTED] lists in his affidavit are the same duties listed in the petitioner's June 13, 2013 letter quoted above.



533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner maintains that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work at the end-client, [REDACTED]. The petitioner submitted documentation indicating that there is a professional services agreement between the petitioner and [REDACTED]. As outlined in the Sub-Vendor Agreement, the petitioner is the sub-vendor for [REDACTED]. However, the petitioner did not submit documentation sufficient to outline in detail the nature and scope of [REDACTED] relationship with [REDACTED], the purported end-client.

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).

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>3</sup>

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>4</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>5</sup>

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<sup>3</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).

<sup>4</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>5</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and



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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Additionally, 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).

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."

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from June 24, 2013 to June 11, 2016. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED] Austin, TX [REDACTED]

To begin, we observe that petitioner has provided incomplete and imprecise information regarding who will supervise the beneficiary. While the petitioner states that the beneficiary will be supervised by [REDACTED], no information has been provided establishing Mr. [REDACTED] role within the petitioning company. Further, there is no evidence that any management-level member of the petitioner's staff is located at the beneficiary's worksite or maintains any office space at the beneficiary's [REDACTED] worksite. Most notably, the petitioner's statement is in direct contradiction to the affidavit provided by [REDACTED] who stated that he, an employee of [REDACTED] who has been "assigned as a Consultant to work at [REDACTED], "supervised" and "monitored [the beneficiary] successfully performing the above tasks." Mr. [REDACTED] information suggests that day-to-day control over the beneficiary and his particular work, including assignment, supervision, and evaluation of the quality and acceptability of the beneficiary's work, does not reside with the petitioner.

The record does not establish that the petitioner has any substantive involvement in (1) determining the beneficiary's daily work schedule; (2) assigning particular tasks to the beneficiary during the course of the project work to which he is assigned; or (3) directing and evaluating the content, pace, and quality of the beneficiary's day-to-day project-work. While we note the performance reviews that the petitioner exercises with the beneficiary, there is no indication anywhere in the record that [REDACTED] is either a party to those reviews or is in any way bound by them or influenced by them.

We also find it materially significant that the June 13, 2013 "Offer of Employment Letter" has the following pertinent term, which is not indicative of the petitioner exercising any real degree of actual day-to-day oversight, supervision, or control over the beneficiary's work assignments and specific tasks as the [REDACTED] project progresses:

[W]hile on offsite assignments at [the petitioner's] client locations or otherwise, you will be reporting to [the petitioner's] Resource Manager that is assigned to you by [the petitioner]. You will report project status on a biweekly basis.

The above provision does not establish that the petitioner will have a direct influence on how the beneficiary's role in the [REDACTED] project would unfold day-to-day in terms of his actual work and task assignments and their associated performance guidelines on timelines and means and manner of performance.

We have fully considered all of the evidence that the petitioner has provided about its role in administering pay, benefits, tax ramifications, and other consequential aspects of the beneficiary's s



employment. However, 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 – and these seem to be within the petitioner's realm - other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, where will the work be located, and who has the right or ability to affect the project work 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. As reflected in our comments on the documentary record, there is a significant weight of evidence in these other areas that would align as factors not favoring an employer-employee determination for the petitioner. However, as should also be clear in this decision so far, the record of proceeding is simply not sufficiently comprehensive to provide a conclusive determination on the employer-employee issue. An evidentiary record that fails to fully disclose all of the relevant factors will not establish that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary.

Next, we note that, for H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The submitted Employment Agreement indicates that the beneficiary may be assigned to one of the petitioner's external clients but does not provide any further specific information. The Employment Agreement does not convey that (1) a specific place of employment, (2) for a particular client on a defined project, (3) with an established duration, had been established prior to the filing of the H-1B petition. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

With the initial petition, the petitioner submitted a Sub-Vendor Agreement between itself and [REDACTED]. Notably, the Sub-Vendor Agreement states:

[REDACTED] desires to retain Sub-Vendor [the petitioner] to supply in certain instances, and Sub-vendor desires to supply in certain instances, Contract Workers to the Customer, based on the terms and conditions of this Agreement. . . . Upon acceptance of Sub-vendor's candidate based on Customer's Requirement, Sub-vendor will receive a Work Order through the System or via email notifying Sub-vendor of acceptance of such candidate."

While a Work Order referencing the beneficiary was submitted on appeal, the work order fails to establish the Company needing the petitioner's services, the nature of the project and the number of months [REDACTED] wishes to have the petitioner work on the project. Nor has documentation been provided regarding the educational requirements or the duties of the work to be performed relating to the referenced work order. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary



becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Further, no documentation was submitted by counsel specifying the specific services needed by [REDACTED] and by extension, the petitioner and the beneficiary.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. It must be noted that the record indicates that the beneficiary will be physically located at the Austin, Texas office of [REDACTED]. The petitioner is located approximately 955 miles away in Cumming, Georgia.

Upon complete review of the record of proceeding, we find that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner has not submitted sufficient evidence to corroborate its claim. 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).

Accordingly, the appeal will be dismissed and the petition will be denied, on this basis.

### III. SPECIALTY OCCUPATION NOT ESTABLISHED

Beyond the decision of the director, we find an additional aspect of the record of proceeding which would preclude approval of this petition even if the petitioner had established the requisite employer-employee relationship with the beneficiary. There is insufficient evidence to establish that the proffered position is a specialty occupation. For this additional reason the petition cannot be approved.

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the 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 illogical and absurd 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 rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, Cisco) may require as the ultimate employment of the beneficiary. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

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 company's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the former INS 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. In other words, as the nurses in *Defensor v. Meissner* would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id* at 387-388.

The record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

Nevertheless, in the interests of a more comprehensive review of the deficiencies of the petition with regard to the specialty occupation issue, we will continue.

We will first enter this finding before analyzing the evidence of record under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A): the range of acceptable degree majors or academic concentrations specified by the petitioner weighs against its argument that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

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

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

Again, in the letter of support, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree or equivalent in Business Administration, Computer Science, Information Technology, Engineering, or a related. However, 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, 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

computers 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.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of the disciplines (including any and all engineering fields) are closely related fields, or (2) 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.

Furthermore, the petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

As discussed *supra*, 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. 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).<sup>6</sup>

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<sup>6</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.



Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

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. For this reason, too, the petition must be denied.

We turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding. In doing so, we first recall the position's duties as stated its June 13, 2013 letter of support filed with the Form I-129:

- Migrating from old systems to new systems SQL developer-data migrations.
- Process work flows and reports PL/SQL, Not touching the Java code[.]
- Sit with customers retrieve and disseminate information[.]
- Testing[.]
- Prepares and implements database structure including but not limited to tables, indexes and storage structure.
- Works with the business analysts and programmer to design and implement database specifications.
- Creates and maintains physical design document[.]
- Analyzes and optimizes application performance.
- Assists with application support documentation[.]
- Assists Programmer with ETL (Extraction Transformation and Load) processes, as well as unit, integration testing Plans backup and recovery[.]
- Performs database audit when required[.]
- Applies data normalization rules in data modeling.

- Develops and modifies database procedures and functions for application business logic.
- Develops and modifies data loading and data comparison scripts Designs, implements, and documents database specifications.
- Creates logical data model diagrams such as entity-relationship diagrams and physical data model diagrams using data modeling tool.
- Creates and populates the data dictionary by documenting data elements and their attributes.
- Prepares scripts for database creation from physical data model.
- Plans and creates elements for physical database objects including but not limited to tables, indexes, storage structure and constraints.
- Analyzes the user requirements and prepares the data security implementation plan.
- Prepares the data conversion plans and executes the data conversions.
- Monitors database performance. Analyzes and optimizes application performance and tuning plan to execute it.
- Performs unit and integration testing.
- Uses and manages the version control of application code by using PVCS version manager software.

In response to the RFE, the petitioner refined the description of the position and its constituent duties into the following list of job responsibilities, associated percentages of time involved in their performance, and description in detail:

- Migrating from old systems to new systems SQL Developer-data migrations[.] 20%

This job responsibility is applicable during launching a new product. This is achieved in 4 phases: 1. Plan: Collecting Customer



requirements by reading Customer Blue Prints of the products, and understanding subsequent process followed by Customer. 2. Implement: Evaluate the solution using a high level programming flow language. 3. Evaluate: Collect data per Part evaluation Plan and perform analysis on the performance of the queries and the data quality. 4. ACT: Based on the Quality Evaluation data develop optimal inspection plan, document, and submit a Part approval package to the customer.

- Process work flows and reports PL/SQL and testing them, Not touching the Java code[.] 20%

Once new software has been developed it goes through a rigorous phase of implementation, first step being moved to staging environment. Here it is UAT (User Acceptance Testing) tested for any bugs and then moved to the Test environment. Here the code is tested using various tools for load bearing, stress testing and General coding standards. Once approved it finally gets pushed to Production environment and is monitored closely. To improve quality and performance implement Engineering Change Requests from Customers and revise quality documentation per the change.

- Prepares and implements database structure including but not limited to tables, indexes and storage structure. 20%

During design and Process changes, complete software life cycle of the product, from supplier to customer has to be evaluated to establish a clean change point.

- Develops and modifies database procedures and functions for application business logic. Develops and modifies data loading and data comparison scripts[.] Designs, implements, and documents database specifications. 20%

Once business requirements are identified and documented, it is approved by the user and is ready for implementation. A technical specification is developed providing a breakdown of the process including software development process and necessary implementation and test plans. The development process follows the technical specification document and the code is developed in the Development environment. Then, it goes through various iterations and is tested thoroughly before being implemented in production and then closely monitored for any potential bugs.

- Monitors database performance. Analyzes and optimizes application performance and tuning plan to execute it. 20%

Part of DBA role and responsibility. Databases grow in size and need constant monitoring to scale to their hardware needs constantly. Applications also need to be monitored for performance, as they handle varying transaction and processes.

Based on the evidence that is provided, we do not find that it establishes relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise. While the petitioner may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Computer Systems Analysts positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. In particular, we note that the petitioner does not correlate its claims in these areas to any objective and authoritative standards that would corroborate the claims. 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As reflected in the sets of duty descriptions presented in the earlier-quoted petitioner's June 13, 2013 letter of support and in the RFE response, quoted directly above, the petitioner presents the duties comprising the proffered position in terms of numerous but relatively abstract and generalized functions. Likewise, the record does not clarify the substantive work and associated applications of specialized knowledge that would be involved in the referenced duties. Further, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required. Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more complex, specialized, and/or unique than those of computer programmer positions that do not require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent.

As the above discussions and findings are an intrinsic part of our analysis of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), we hereby incorporate them into the analysis of each criterion that follows below.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of



occupations it addresses.<sup>7</sup> As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Computer System Analysts" occupational category.

The *Handbook's* discussion of the duties and educational requirements of the Computer System Analysts occupational group states, in pertinent part, the following:

Computer System 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.

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<sup>7</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer System Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited Nov. 14, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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.

Most computer system 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.

\* \* \*

Although many computer system 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.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Nov. 14, 2014).



The statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook's* statement that "most" computer system analysts possess a bachelor's degree in a computer-related field, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of Computer System Analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

Additionally, with regard to positions that do require attainment of a bachelor's degree or equivalent, the *Handbook* indicates that a bachelor's degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer system analysts have liberal arts degrees and gained their programming or technical expertise "elsewhere."

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the computer system analyst occupational group is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, it is noted that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>8</sup>

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<sup>8</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)) (last visited Aug. 12, 2014) issued by DOL states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, 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 such 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating 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. Nor has the petitioner submitted any letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not 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.

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The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.



Next, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position that would distinguish it from computer systems analysts positions that can be performed by persons without a bachelor's or higher degree in any specific specialty. Put another way, we find that the petitioner simply has not presented evidence establishing that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's in a specific specialty or its equivalent is required to perform that position. Rather, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic computer systems analyst work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, we also here incorporate our earlier comments and findings with regard to the record's descriptions of the proposed duties.

The petitioner therefore has not established that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>9</sup>

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<sup>9</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry-level position relative to others within the same 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 the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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").

With respect to this criterion, the petitioner states that:

The depth of knowledge required to perform these System Analyst functions cannot reasonably be expected of anyone lacking a strong educational background in business administration, computer science, information systems or technology, engineering or a related field. For this reason, we impose a minimum educational requirement for the position and restrict hiring in this area to those candidates possessing a bachelor's or higher degree in such fields or related disciplines. We currently employ approximately 70 IT-professionals, all of whom possess such minimum educational qualifications or foreign-degree equivalents."

The petitioner did not submit any documentation in support of this assertion. 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner has thus not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Computer System Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such; and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the record's duty descriptions, the proposed duties as described in the record of proceeding do not establish levels of specialization and complexity such that the knowledge they would require is usually associated with attainment of any particular level of education in a specific specialty. We here incorporate those earlier comments and findings. While the evidence of record establishes the technical nature of the proposed duties as aligning with those of the Computer Systems Analysts occupational group, the record does not develop relative specialization and



complexity as characteristics of the proposed duties that would elevate them above the nature of duties of computer systems analysts positions whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Additionally, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Nov. 14, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this

higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

*Id.*

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered



position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Consequently, the petition must be denied on this basis also.

#### IV. CONCLUSION AND ORDER

We conclude that the evidence of record does not demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary. Beyond the decision of the director, we find that the evidence does not establish that the proffered position qualifies for classification as a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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