



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF JVRS-, INC.

DATE: APR. 10, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a “digital analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition. The Director concluded that the record does not establish that (1) the Petitioner will have a valid employer-employee relationship with the Beneficiary, and (2) the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits a brief and additional evidence, and asserts that the Director erred in her decision.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant, in pertinent part, as an individual:

[S]ubject 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 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 Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), 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 individual 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). 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. Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 nor U.S. Citizenship and Immigration Services 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 Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. 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.”

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). 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 Am.*, 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.¹

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

¹ 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).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

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 318-19.²

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).³

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, we 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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *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 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

² 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 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

³ 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 individuals).

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 448-49; EEOC Compl. Man. at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, we 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 323-24. 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).

B. Analysis

Upon review, we find that the Petitioner has not submitted sufficient evidence establishing that it will have an employer-employee relationship with the Beneficiary.

The Petitioner, located in Texas, asserted that the Beneficiary will work for the end-client, an insurance company, at the end-client's worksite in Michigan for the duration of the validity period requested (October 2016 through September 2019). Regarding the contractual chain, the Petitioner stated that it has an agreement with the vendor [REDACTED] (Vendor E), which in turn has an agreement with another vendor [REDACTED] (Vendor A), which has an agreement with the end-client.

In support of the petition, the Petitioner submitted, *inter alia*, the master services agreement (MSA) between the end-client and Vendor E, accompanied by the end-client's purchase order for the Beneficiary's services as a digital analyst. However, these documents are problematic in several aspects.

Foremost, the MSA states the following:

[Vendor E] shall have sufficient authority as to maintain a right of direction and control over the Contingent Labor assigned to [end-client's] locations, and shall retain sole authority to hire, terminate, discipline and reassign such sufficient direction and control over the Contingent Labor as is necessary to conduct [end-client's] business and without which [end-client] would be unable to conduct its

business, discharge any fiduciary responsibility that it may have or comply with any applicable licensure, regulatory, or statutory requirement of [end-client]. Such authority maintained by [end-client] shall include the right to accept or cancel the assignment of any Contingent Labor. Additionally, [end-client] shall have sole and exclusive control over the day-to-day job duties of all Contingent Labor and Vendor shall have no responsibilities with regard to the Contingent Labors performance of such day-to-day duties. Furthermore, Vendor shall have no control over the job site at which, or from which, the Contingent Labor perform their Services. Control over the day-to-day job duties of the Contingent Labor and over the job site at which, or from which, Contingent Labor perform their Services is solely and exclusively assigned to [end-client].

As evident from the above, the MSA makes clear that the end-client has “sole and exclusive control” over the Beneficiary’s daily job duties performed at its worksite. While the MSA indicates that Vendor E also has some degree of control over the Beneficiary (primarily in the form of hiring, terminating, disciplining, and reassigning him), Vendor E has no such control over his actual job duties performed at the client site. These provisions in the MSA strongly undermine any assertion that the Petitioner will control the Beneficiary’s employment and will otherwise have an employer-employee relationship with him.

The submitted purchase order does not support the finding that the Petitioner will have an employer-employee relationship with the Beneficiary, either. The purchase order, like the MSA, only recognizes Vendor E as the Beneficiary’s “supplier.” There is no indication in the purchase order or elsewhere in the record that the end-client expressly recognizes the Beneficiary as the Petitioner’s employee. The Petitioner’s statement on appeal that “[t]he End-Client . . . has provided Petitioner with the right to control the beneficiary” remains uncorroborated.

In addition, the purchase order is only valid for 880 MHR (man hours), which the Petitioner clarified runs through the beginning of January 2017. While the Petitioner claims the purchase order “is expected to be extended,” the Petitioner has not submitted evidence demonstrating the likelihood of extension.

The record also contains the MSA between the Petitioner and Vendor A.⁴ This MSA contains provisions in which the Petitioner agreed that it “[w]ill not direct inquiries to [end-client] regarding the services provided pursuant to these Terms,” and “[w]ill not discuss Contractees by name.” The Petitioner also agreed “to deal exclusively with Vendor with regard to the services provided pursuant to this Agreement and will not, directly or indirectly, deal with [end-client] in any way which circumvents Vendor’s contract to provide contract personnel to [end-client].” Through these and

⁴ This MSA is missing page 8.

In addition, the Petitioner did not submit a MSA between Vendor E and Vendor A to complete documentation of the contractual chain. Instead, the Petitioner submitted pages 1 and 5 of the “letter of agreement” between these parties.

other provisions, the Petitioner explicitly agreed that it will not have direct contact with the end-client regarding any services provided by the Beneficiary.

Moreover, this MSA indicates that Vendor A may assess the quality of Beneficiary's work. It states that, "[i]f necessary, Vendor will assess Subcontractor's performance according to Vendor's assessment criteria and objectives and may require Subcontractor to align its processes to conform to Vendor's criteria and objectives." The MSA further indicates that Vendor A will primarily supply and control the tools and instrumentalities Beneficiary will utilize on the job. It states, for example, that the Petitioner is granted limited "right to access Vendor's technology and services only for the purposes of serving [end-client]," and that such technology was constructed by the Vendor. These provisions, plus the contractual prohibition on direct communication between the Petitioner the end-client, further undermine any assertion that the Petitioner will control the Beneficiary's employment and will otherwise have an employer-employee relationship with him.

On appeal the Petitioner points to the letters from Vendor E and Vendor A, both of which state in conclusory terms that the Petitioner is the Beneficiary's "employer." Vendor E's letter states that the end-client and both vendors "have no employment relationship with [the Beneficiary]," and that the Petitioner is responsible for salary, benefits, training, and "any discretionary decision making, such as hiring, firing, performance evaluations and assignment of daily tasks." Vendor A's letter similarly states that the Beneficiary "will be operating at all times under the control of [the Petitioner's] management and all activities, including managerial supervision and hiring and firing decisions."

But the vendor letters provide no additional details as to who, when, where, and how the Petitioner will exercise such supervision and control, including the "assignment of daily tasks." Nor do the letters explain how the Petitioner could legally do so, in light of the above-referenced contractual provisions giving the end-client "sole and exclusive control" over the Beneficiary's daily job duties and prohibiting direct communication between the Petitioner and the end-client.

As evidence of its claimed control over the Beneficiary, the Petitioner submitted its performance review of the Beneficiary. However, the performance review was completed jointly by the Petitioner's human resources manager and the Beneficiary. The Petitioner has not explained such aspects as (1) why the Beneficiary's performance review was signed by the company's human resources manager rather than its chief technology officer, whom the Petitioner identified as the Beneficiary's direct supervisor; and (2) the basis of the human resources manager's knowledge to oversee the work of a digital analyst. In fact, we observe that the bulk of the evaluation consists of information provided *by the Beneficiary* about his work assignments and future objectives. That the Beneficiary is the one providing the Petitioner with such information, and not the other way around, raises additional questions as to how much knowledge and control the Petitioner has over the Beneficiary's daily assignments.

The Petitioner additionally submitted copies of the Beneficiary's identification badge⁵ and the end-client's weekly newsletter recognizing the Beneficiary as a new member of its "digital experience team." This evidence confirms only that the Beneficiary has been assigned to the end-client project team. This evidence does not contain any reference to the Petitioner, and thus, does not convey any type of employment relationship between the Petitioner and the Beneficiary.

Therefore, while payroll and other employment benefits are relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who has the right or ability to affect the projects to which the Beneficiary is assigned, and who will provide the instrumentalities and tools, have not been established in the Petitioner's favor. After considering the entire record, we find that the Petitioner has not demonstrated that it will have the requisite employer-employee relationship with the Beneficiary. The Petitioner has not established that it qualifies as a "United States employer," as defined at 8 C.F.R. § 214.2(h)(4)(ii).

II. SPECIALTY OCCUPATION

We also find the evidence of record insufficient to establish that the proffered position qualifies as a specialty occupation.

A. Legal Framework

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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

⁵ Even his identification badge recognizes him as a contractor of Vendor A, and contains no reference to the Petitioner.

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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”); *Defensor*, 201 F.3d at 387.

As recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. 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.* 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.

B. Analysis

As discussed above, the record lacks sufficient documentation from the end-client regarding the Beneficiary’s assignment. While we have considered the end-client’s purchase order, it is only valid until January 2017. The Petitioner has not sufficiently documented that this same end-client assignment will be extended until the end of the requested validity period in September 2019. Furthermore, the purchase order contains no information about the proffered position beyond the title of digital analyst. The Petitioner has not submitted evidence directly from the end-client confirming the Beneficiary’s specific job duties as well as the position’s minimum educational requirement. *See id.* (requiring evidence of the client company’s job requirements).

Moreover, upon review of the various job descriptions provided by the Petitioner and vendor companies, we find several ambiguities and inconsistencies that preclude us from understanding the true nature of the proffered position and its associated job duties.

For instance, the Petitioner classified the proffered position on the certified labor condition application (LCA) as a position under the “Computer Occupations, All Other” occupational

category, corresponding to the Standard Occupational Classification (SOC) code 15-1199, at a Level II wage level.⁶ The Petitioner later clarified that the proffered position falls under the sub-category of “Business Intelligence Analysts,” SOC code 15-1199.08, and submitted the Occupational Information Network (O*NET) Summary Report for this sub-category.

Yet the Petitioner also claimed that the proffered position is “a subset of a Computer Systems Analyst,” and submitted for the record the *Occupational Outlook Handbook’s* chapter and O*NET Summary Report for the “Computer Systems Analysts” occupational category. The problem is that O*NET recognizes “Computer Systems Analysts,” SOC code 15-1121, as an occupational category and code distinct from “Business Intelligence Analysts,” SOC code 15-1199.08. The Petitioner has not adequately explained the relationship between the “Business Intelligence Analysts” and “Computer Systems Analysts” occupational categories to the proffered position, and why it chose the former occupational category instead of the latter on the LCA.

Although not expressly asserted here, for positions involving duties of more than one occupational classification (which appears to be the Petitioner’s claim here), the LCA should reflect the O*NET/SOC category and code of the most relevant, i.e., highest-paying, occupation.⁷ According to the LCA, the prevailing wage for a Level II “Business Intelligence Analysts” position under the “Computer Occupations, All Other” occupational category in the area and time period of intended employment is \$71,594 per year. The Beneficiary is being offered \$72,000 per year. But the Level II prevailing wage for a “Computer Systems Analysts” position in the same area and time period of intended employment is higher, at \$78,250 per year.⁸ Thus, even if the Petitioner believed its position to be a combination of duties represented by both the “Computer Systems Analysts” and “Business Intelligence Analysts” occupational categories, it still should have chosen the higher-paying occupational category of “Computer Systems Analysts” on the LCA. That the Petitioner submitted an LCA for the lower-paying “Computer Occupations, All Other” position, without further explanation, precludes us from understanding the Petitioner’s intent in describing this position as a “subset” of “Computer Systems Analysts.”

Aside from the position’s occupational classification, we observe additional ambiguities and inconsistencies in the record. For example, the Petitioner’s response to the Director’s request for evidence identified the Beneficiary’s position’s title as “senior database developer.” This title is

⁶ The “Prevailing Wage Determination Policy Guidance” issued by the Department of Labor describes a Level II wage rate as generally appropriate for positions for which the Petitioner expects the Beneficiary to have a good understanding of the occupation, but will only perform moderately complex tasks that require limited judgment. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage (Level I) and progresses to a higher wage level (Levels II, III, and IV) after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

⁷ *Id.*

⁸ For more information regarding wages for “Computer Systems Analysts” in the [REDACTED] MI MSA for the period 7/2015 – 6/2016, see the Foreign Labor Certification Data Center at [http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=\[REDACTED\]&year=16&source=1](http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=[REDACTED]&year=16&source=1) (last visited Apr. 10, 2017).

neither consistent with the H-1B position title of “digital analyst” nor with the Level II wage level designation on the LCA.⁹ Then in its organizational chart, the Petitioner identified the Beneficiary as holding a “database management and analytics” position. Further, the end-client’s weekly newsletter recognizes the Beneficiary as a new member of its “digital experience team,” specifically, its “mobile app team.” None of the proffered duties contains any duties specific to database management or mobile applications.

We also observe that the Petitioner, Vendor E, and Vendor A, all listed the proffered job duties in the same vague language. To illustrate, they identically state that the Beneficiary will “[c]ollaborate with project team, business SME’s and vendors to identify changes to business processes, people or systems based on implementation of a large scale project.” They do not further explain such aspects as (1) what is meant by the word “collaborate,” i.e., what specific duties and tasks are involved; (2) the nature of these “business processes, people, or systems”; and (3) what “project” is involved. Several other job duties refer to the “project” as well, but do not identify and further define the “project.”

Beyond the listed job duties, the Petitioner added that the Beneficiary “will be responsible for working collaboratively with Business and IT SMEs to document the requirements in an agile format. The requirements capture the wants of the business and presents them in a format for the development team. Serves as consultant for other digital analysts.” This additional description does not provide substantial insight into the nature of this position’s duties and their level of difficulty, complexity, uniqueness, and/or specialization. Given this lack of evidence, we cannot determine the substantive nature of the work the Beneficiary will perform.

We are therefore precluded from 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 entry into 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 for classification as a specialty occupation.

⁹ Again, the Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a good understanding of the occupation, but will only perform moderately complex tasks that require limited judgment. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. The Level II wage level is the second lowest of four wage levels.

C. Position Evaluation

Finally, we will briefly address the position evaluation from [REDACTED] associate dean of academic affairs at [REDACTED] provides a brief description of the Petitioner's operations, reproduces the list of job duties provided by the Petitioner and both vendors, and concludes that the proffered position requires an individual with at least a bachelor's degree in business analytics, information systems, or a related field.

[REDACTED] letter does not appear to be based upon sufficient information about the position proposed here. While his letter references the Petitioner's operations, it does not reference the particular end-client, project, or project team to which the Beneficiary will be assigned. Accordingly, [REDACTED] does not demonstrate in-depth knowledge of how the proffered duties will actually be performed within the context of the end-client's particular business operations. We consider these to be significant omissions which suggest an incomplete review of the position in question.

[REDACTED] also states that the proffered duties "are not those of a lower level employee performing tasks such as those duties performed by an Administrative Assistant or Office Worker." He further characterizes the position as serving "a great level of responsibility within the company" and a "highly skilled leadership role." We question how these statements relate to the proffered position. The Director did not compare the proffered position to an administrative assistant or office worker. Moreover, [REDACTED] statements belie the Petitioner's submission of an LCA for a Level II position. Through this designation, the Petitioner indicated that the position is a comparatively lower level position relative to others within its occupation, and is unlikely one with leadership-level responsibilities.¹⁰

As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are not required to accept an opinion or give it full weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* For all of the above reasons, we conclude that Dr. McAdams' opinion letter is not sufficient to establish the proffered position as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

III. CONCLUSION

The Petitioner has not sufficiently established that (1) it will have a valid employer-employee relationship with the Beneficiary, and (2) the proffered position qualifies as a specialty occupation.

¹⁰ See *id.*

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ORDER: The appeal is dismissed.

Cite as *Matter of JVRS-, Inc.*, ID# 298764 (AAO Apr. 10, 2017)