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

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

MATTER OF S-, INC.

DATE: JAN. 23, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a 13-employee information technology and outsourcing services company, seeks to temporarily employ the Beneficiary as a business 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, California Service Center, denied the petition. The Director concluded the Petitioner did not establish that it will have an employer-employee relationship with the Beneficiary. Further, the Director found that the Petitioner did not demonstrate that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in denying the petition.

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

I. PROFFERED POSITION

The Petitioner, located in [REDACTED] Nebraska, indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the Beneficiary would work off-site as a business analyst in [REDACTED] Nebraska, and supporting evidence reflected that this work would be for a mid-vendor [REDACTED]. In a support letter, [REDACTED] indicated that the Beneficiary would work at its location in [REDACTED] providing professional IT services to its clients.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the evidence of record establishes that the Petitioner will be a "United States employer" having "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).

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 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 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), 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 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, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). 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 (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 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

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’

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 318-19.²

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, 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)).

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).

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).

(b)(6)

Matter of S-, Inc.

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 relevant to control may affect the determination of whether an employer-employee relationship exists. 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).

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 323-24. 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

As a preliminary matter, the Petitioner has not established the duration of the Beneficiary’s employment for the entire requested period. On the Form I-129, the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2016, to September 30, 2019. However, the Petitioner has not submitted supporting documentation to substantiate that the Beneficiary will be engaged at [REDACTED] location during the entire period of the requested visa. For instance, the Petitioner submits a letter from [REDACTED] an affidavit from the Beneficiary’s asserted supervisor, an

employment letter, and agreement between it and the Beneficiary, amongst other documentary evidence, none of which details the period of the Beneficiary's engagement for [REDACTED]. In fact, two letters provided from [REDACTED] both vaguely state that the "project end dates vary for projects that [the Beneficiary] will be assigned to" and that "we expect to have ongoing projects for [the Beneficiary]." A supplier agreement between the Petitioner and [REDACTED] reflects that the assignment of each Petitioner employee is dictated by a purchase order. However, the Petitioner's vice president states in a submitted letter that the purchase order will "not [be] established until [the Beneficiary] has been granted work authorization by USCIS."

The evidence reflects that the Petitioner has not established non-speculative work for the Beneficiary at the time of the petition's filing for the entire period requested. 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'l Comm'r 1978). Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁴ Although the Petitioner attests that work will be available for the Beneficiary throughout the requested period, this is not supported by documentary evidence. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); see also *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. at 376.

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Furthermore, applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not sufficiently establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, we find that the record of proceedings does not contain sufficient, consistent, and credible documentation confirming and describing who exercises control over the Beneficiary.

The Petitioner states that the Beneficiary will work for the vendor [REDACTED] at its work-site in [REDACTED] Nebraska providing services for its unidentified [REDACTED] clients. The Petitioner asserts that it has submitted sufficient evidence to demonstrate by a preponderance of the evidence that it will control the Beneficiary while he is assigned to [REDACTED] location, including letters from [REDACTED] indicating that it will not employ the Beneficiary, control her, have the ability to hire or fire her, or administer her payroll or benefits. The Petitioner further references a submitted employment letter and agreement indicating that it will handle the Beneficiary's payroll and benefits and an agreement between the Petitioner and [REDACTED] stating that the Petitioner will "at all times retain the primary control over its personnel."

However, the Petitioner has submitted little supporting documentation to corroborate that it will exact daily control over the Beneficiary while she is assigned to [REDACTED] location. Submitted letters from [REDACTED] state that the Beneficiary will be supervised by [REDACTED] a manager for the Petitioner and further indicate that this manager will regularly supervise and control the Beneficiary's work, the terms and details of her employment, and her salary, benefits, and expenses. The Petitioner also provided an affidavit of [REDACTED] listed as vice president, stating that the Petitioner retains the right to control of the work "of the Business Analyst." First, it is noteworthy that the affidavit of [REDACTED] makes no direct reference to the Beneficiary, and only vaguely references business analysts, in general. Further, the Petitioner has provided no direct evidence to substantiate that the Beneficiary will be under the supervision and control of the Petitioner or [REDACTED]. The Petitioner does not explain how, how often, and in what form [REDACTED] will supervise the Beneficiary at [REDACTED] location. The Petitioner did not submit an organizational chart or a description of its performance review process, as requested by the Director, to substantiate that [REDACTED] will have primary supervisory control over the Beneficiary. Indeed, a submitted employment agreement between the Petitioner and the Beneficiary indicates that she agreed to "follow the instruction from [a Petitioner] project manager under whom you are working," an employee not referenced or documented on the record.

The Petitioner did not submit a purchase order covering the Beneficiary's engagement, a document required pursuant to its contract with [REDACTED] and the Petitioner admits that this will not be issued until an approval of the Beneficiary's petition. In sum, the evidence does not support a conclusion that the Beneficiary will be primarily controlled and supervised by the Petitioner performing work at [REDACTED] location for its unidentified end-clients. Again, a petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. See *Matter of Soffici*, 22 I&N at Dec. 158, 165 (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. at 190 see also *Matter of*

Chawathe, 25 I&N Dec. at 369, 376. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Id.*

Further, the Petitioner provides other conflicting evidence leaving question as to whether it will actually control the Beneficiary's work on a daily basis. For instance, a provided employment agreement between the Beneficiary and the Petitioner indicates that work will be assigned by the Petitioner "or its clients" and an agreement between the Petitioner and [REDACTED] reflects that assigned Petitioner employees submit weekly timesheets to [REDACTED] clients for approval. The agreement further indicates that [REDACTED] is engaged in "locating technical services personnel" for its clients, suggesting that the Beneficiary will be further contracted out to provide labor under the direct supervision of [REDACTED] clients on a daily basis. The Petitioner does not otherwise submit any evidence reflecting its oversight of the Beneficiary or the provision of materials and instrumentalities necessary for the completion of work by the Beneficiary. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The evidence indicates that the Beneficiary acts largely autonomous from the Petitioner, reacting to client requests as they arise, and that she is in essence, under the direction of [REDACTED] clients.

Although we do not doubt that the Beneficiary is likely being paid and that her benefits are being administered by the Petitioner, the preponderance of the evidence appears to indicate that the Beneficiary is primarily under the direction of [REDACTED] or its end-clients. While payroll, tax withholdings, 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 will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Here, we find that the preponderance of the evidence demonstrates that the Beneficiary will be primarily under the control of its client.

Based on the above, 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). The Director's decision must be affirmed and the petition denied on this basis.

III. SPECIALTY OCCUPATION

The second issue before us is whether the evidence of record demonstrates by a preponderance of the evidence that the Petitioner will employ the Beneficiary in a specialty occupation position.

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:

(b)(6)

Matter of S-, Inc.

- (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 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). USCIS has consistently interpreted 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 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.

B. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the evidence is insufficient to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceedings is absent sufficient information from [REDACTED] end-clients regarding the specific job duties to be performed by the Beneficiary for these companies. In fact, the Petitioner does not specifically identify the identity of [REDACTED] clients or the specific projects on which the Beneficiary will be working. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s), as well as any hiring requirements that it may have specified, in order to properly

ascertain the minimum educational requirements necessary to perform those duties. *See Defensor*, 201 F.3d at 387-88. Here, the record is insufficient to establish that, in fact, the Beneficiary would be performing services for the type of position for which the petition was filed, in this matter, a business analyst position. Indeed, as we stated previously, the Petitioner has not submitted the purchase order required to establish the Beneficiary's position pursuant to its agreement with [REDACTED]. Accordingly, we concur with the Director's determination that the record is insufficient to establish that the duties of the proffered position comprise the duties of a specialty occupation.

As noted, the Petitioner did submit letters from [REDACTED] explaining the Beneficiary's duties, but these duties are vague and convey only general tasks and not the specific work and assignments to be completed by the Beneficiary. For example, the largely identical letters from [REDACTED] list duties such as "identifies, develops, and evaluates alternatives to meet business requirements," "coordinates with internal and external business partners in designing and developing new systems," "coordinates, plans, and performs enhancements, upgrades, and on-going maintenance," "reviews, analyzes, test[s], and recommends new software applications and equipment," "develops and maintains current knowledge of assigned business areas," completes "UI mockups, test cases, functional specifications, workflow process diagrams, data flow/data model diagrams," and "perform[s] testing in Development and UAT environment." However, these letters, nor other evidence, explain the nature of these applications or the specific work to be performed by the Beneficiary. The record of proceeding does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis, nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., the nature of the "UI mockups," "business requirements," "business partners," "enhancements," "software applications and equipment," "UAT environment," etc., and what body of knowledge is required to perform the duties).

In fact, the evidence of record does not specifically identify the particular project to which the Beneficiary will be assigned at [REDACTED] premises. Further, the Petitioner and [REDACTED] make no reference to the specifics of the project on which the Beneficiary will be working. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

The evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary. 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

(b)(6)

Matter of S-, Inc.

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.

Furthermore, even if the Petitioner had established the substantive nature of the Beneficiary's position, it has not, at minimum, articulated what bachelor's degree in a specific specialty is required for the proffered position. In fact, the Petitioner has made conflicting statements regarding the specific bachelor's degree required for the position leaving question as to whether any specific degree is required. For instance, in a petition support letter, the Petitioner states that "the minimum requirement of this position [is] a Bachelor's degree in Business or a related field," while in response to the Director's RFE the Petitioner stated that the position "required a bachelor's degree in a computer-related field." Further still, the Beneficiary's asserted supervisor with the Petitioner, [REDACTED] indicated in response to the RFE that the position "required a minimum of a bachelor's degree in Business or related [field]" and that the Petitioner "has never hired a Business Analyst who did not have a bachelor's degree," without mentioning a specific type of bachelor's degree. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner's statements and the evidence submitted directly indicate that the position does not require a bachelor's degree in a *specific specialty* for minimum entry. The Petitioner has made conflicting statements as to the type of specific bachelor's degree required, also indicated that only a general degree would suffice, such as that in business, or even any bachelor's degree. As stated previously, 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. It is important to note that a position may not qualify as a specialty occupation based solely on either a preference for certain qualifications for the position or the claimed requirements of a petitioner. *See Defensor*, 201 F.3d at 384, 387. Instead, the record must establish that the performance of the duties of the proffered position requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum for entry into the occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "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 Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

We further acknowledge the Petitioner's submittal of business analyst job postings with other companies in the [REDACTED] Nebraska area. The Petitioner asserts on appeal that these job postings were not properly considered by the Director. However, consistent with our conclusion, the Director found that the Petitioner had not, at minimum, established the substantive nature of the proffered position. We, as discussed above, find the same, and further that the Petitioner has not articulated a

specific bachelor's degree requirement for the position. As such, an analysis of the specific criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is not required. Regardless, upon review, the submitted postings only reinforce the Petitioner's ambiguous assertions regarding a specific degree requirement, as they reflect various bachelor's degree requirements. For instance, one indicates that a bachelor's degree in "Business Administration, Computer Science or an equivalent combination of education/experience" would suffice, while two others reflect that a bachelor's degree in "Computer science or equivalent" would meet the educational requirement. Further, a fourth posting reflects a bachelor's degree requirement with coursework in "Business Management, Computer Science, MIS or Marketing."

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. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-, Inc.*, ID# 270736 (AAO Jan. 23, 2017)