



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

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

MATTER OF W-N-A-, INC

DATE: JUNE 29, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a business processing outsourcing 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 of the California Service Center denied the petition, concluding that the Petitioner had not established that the Beneficiary is qualified to perform the services of the proffered position.

On appeal, the Petitioner submits previously provided evidence and asserts that the Director erred when determining that the Beneficiary is not qualified to perform the services of the business analyst position.

We conduct *de novo* review on appeal, and note that a beneficiary’s credentials for the proffered position are relevant only when we find the position to be a specialty occupation. As we will discuss below, the record does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Additionally, the record does not establish that the Petitioner will have an employer-employee relationship with the Beneficiary. Accordingly, we will remand the matter to the Director for further review of the record and to issue a new decision.

## **I. SPECIALTY OCCUPATION**

We will first discuss whether 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 regulations largely restate this statutory definition, but add a non-exhaustive list of fields of endeavor. 8 C.F.R. § 214.2(h)(4)(ii). 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). We have consistently interpreted the term “degree” in these criteria 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 v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

#### B. Proffered Position

In response to the Director's request for evidence (RFE), the Petitioner listed the following duties for the proffered position:

- Analyzing the clients existing loyalty and marketing programs and operations and working with different client stakeholders to define business problems and help them prioritize the problems (10% of the time)
- Developing solution approaches and methodologies for each business problem; discussing the same with the client stakeholders and getting a sign-off on a specific solution approach for each problem. (15% of his time)

- Liaising with different stakeholders in the client's [REDACTED] and [REDACTED] to collect and get access to relevant data needed for developing the analytical solutions; Providing recommendations to the client on efficient and optimized analytical dataset creation to support various analytical initiatives. (5% of his time)
- Communicating the problem definition, available datasets, business objectives and solution plans to the operations team and helping them develop a project plan for executing projects. (10% of his time)
- Monitoring the progress of various projects with the operations manager and helping the operations team get regular clarifications and inputs needed from the client. (10% of his time)
- Helping the operations team develop the final solutions with appropriate story flow and actionable business insights relevant to the business problem. (10% of his time)
- Finalizing the solution with the client stakeholders, getting their feedback and sign-off. Communicating the feedback and next steps to the operations team. (10% of the time)
- Consulting with clients continuously to improve the effectiveness of their loyalty program & providing best practices. Leveraging the best practices in the industry across the globe and within other geographies of [REDACTED] to come up with ideas that can improve the effectiveness of the loyalty program. (10% of his time)
- Analyzing data to support key business decisions. (10% of his time)
- Participating in various client meetings as needed to stay updated with the business priorities and challenges of the client and educating the operations team about the changing business needs of the client. (5% of his time)
- Educating the client on the benefits of using advanced analytical solutions and supporting business decisions by analyzing available information and creating actionable business recommendations. (5% of his time)

According to the Petitioner, the proffered position requires a minimum of “a Bachelor’s degree or its equivalent in Marketing or Management or Economics or Engineering.” In response to the RFE, the Petitioner provided an expert opinion from [REDACTED] a professor of finance at the [REDACTED] indicating that the position requires “knowledge gained from a relevant quantitative or analytical field, such as Quantitative Business Analysis, a relevant field of Engineering, Economics, or other related field.” In addition, the Petitioner submitted a letter from [REDACTED] (end-client), to whom the Beneficiary will be assigned, stating that the position requires a bachelor’s degree or its equivalent “in management with strong quantitative and data analytics skills and experience.”

### C. Analysis

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation. Specifically, the record (1) does not demonstrate sufficient work available for

the Beneficiary for the entire validity period requested; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>1</sup>

The Petitioner initially indicated that the Beneficiary would be employed at the end-client's location in [REDACTED] Washington, for the entire validity period. On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2016, to August 31, 2019. However, the Petitioner has not submitted sufficient documentation to substantiate that the Beneficiary would be placed at the end-client location during the entire validity period requested.

In support of the petition, the Petitioner provided a Master Services Agreement (MSA) with the end-client. The MSA reflected that the parties would execute "Resource Activity Descriptions" (RAD), attached to the agreement as Exhibit A, to define the work to be performed and the resources and deliverables to be provided. Notably, the Petitioner did not submit all pages, but only pages 1-9 of the 13-page MSA. Further, Exhibit A or the accompanying RAD, was also not submitted.

In response to the RFE, the Petitioner provided a RAD naming the Beneficiary and his assignment to support the "[REDACTED]". The RAD defined the service term as October 1, 2016, to September 30, 2017. However, this document is not dated. Therefore, we are unable to determine when this document was executed and if this was in place prior to filing.<sup>2</sup>

Even if we assume that the RAD was properly executed prior to filing, the record does not establish that the Petitioner had sufficient work for the Beneficiary for the duration of the requested H-1B validity period. The Petitioner stated "given our long term engagement with [the end-client] and the continuous support we have been providing them from offshore, we expect the onsite requirement to be extended further beyond September 30, 2017 . . . ." However, the record does not contain sufficient evidence of its long term engagement or other documents to support this expectation.

Therefore, we find 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. U.S. Citizenship and Immigration Services (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).<sup>3</sup>

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<sup>1</sup> The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

<sup>2</sup> Because the Petitioner did not submit the original RAD attached to the MSA, we are unable to compare this RAD to the original and determine its authenticity.

<sup>3</sup> 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:

However, even if we assume that the Petitioner has established non-speculative employment for the Beneficiary, we find that the record does not establish that the proffered position qualifies as a specialty occupation upon completing a specialty occupation analysis under each of the four, alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

### 1. First Criterion

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We often look to 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 that it addresses.<sup>4</sup>

On the labor condition application (LCA)<sup>5</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Management Analysts" corresponding to the Standard Occupational Classification code 13-1111.<sup>6</sup> The *Handbook* does not

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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).

<sup>4</sup> All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. To satisfy the first criterion, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

<sup>5</sup> The Petitioner is required to submit a certified LCA to USCIS to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<sup>6</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he

state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into the occupation.<sup>7</sup> The subchapter of the *Handbook* entitled "How to Become a Management Analyst" states, in relevant part, "[a] bachelor's degree is the typical entry-level requirement for management analysts." However, some employers prefer to hire candidates who have a master's degree in business administration (MBA)." The *Handbook* further states "many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Management Analysts, (2016-17 ed.).

The *Handbook* does not report that bachelor's degrees held by those entering the occupation must be in any specific specialty directly related to the occupation. Accordingly, the *Handbook* does not support the assertion that at least a bachelor's degree *in a specific specialty* is normally the minimum requirement for entry into this occupational category. We also note that a preference for a particular type of degree is not synonymous with a requirement for a degree in a specific discipline.

In this case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

## 2. Second Criterion

The second criterion presents two alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong concentrates on the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

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will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

<sup>7</sup> We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses.

a. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

We generally consider the following sources of evidence to determine if there is such a common degree requirement: 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 establish 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) (considering these “factors” to inform the commonality of a degree requirement)).

Here and as already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative sources) reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

The Petitioner submitted a letter from [REDACTED]. In his letter, [REDACTED] states that his assessment of the proffered position is based on the Petitioner’s support letter and the end-client letter. He describes the credentials that he asserts qualify him to opine about the nature of the proffered position and states that the proffered position requires at least a bachelor’s degree in a quantitative or analytical field such as quantitative business analysis, a relevant field of engineering, economics or other related field. We carefully evaluated [REDACTED] assertions in support of the petition but, for the following reasons, determined his opinions lent little probative value.

First, [REDACTED] does not provide sufficient information to establish his expertise on the practices of organizations seeking to hire “business analysts.” Without further clarification, it is unclear how his education, training, skills, or experience would translate to expertise regarding the current recruiting and hiring practices of an enterprise engaged in business processing outsourcing (as designated by the Petitioner in the petition) or similar organizations seeking to fill a business analyst position (or parallel positions). [REDACTED] does not sufficiently establish how his background in finance qualifies him to determine employers’ minimum entry requirements for jobs such as the proffered position.

Although [REDACTED] states that he based his assessment on the Petitioner’s support letter, his letter lacks sufficient information on the petitioning organization’s and the end-client’s business activities. That is, he does not demonstrate an in-depth knowledge of the Petitioner’s or the end-client’s operations, or how the Beneficiary would perform the position’s duties in the context of their business enterprise. Accordingly, we find that the record does not demonstrate that [REDACTED] is a qualified authority to opine on the current requirements for business analyst positions.



Further, [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the Petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. His opinion letter does not reflect that he has published any works on the academic or experience requirements for business analysts (or related issues).

Even assuming [REDACTED] was an expert on degree requirements for a business analyst, his letter does not substantiate his conclusions, such that we can conclude that the Petitioner has shouldered its burden of proof. First, [REDACTED] does not reference, cite, or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete his evaluation. Second, the record does not indicate whether [REDACTED] was aware that, as indicated by the Level I wage on the LCA, the Petitioner considered the proffered position to be an entry-level business analyst position for a beginning employee who has only a basic understanding of the occupation. In the letter, [REDACTED] describes the position as "advanced, complex" that requires "significant mathematical and statistical skills." In other words, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information to adequately assess the nature of the position and appropriately determine parallel positions based upon the job duties and level of responsibilities. We may, in our discretion, 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, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

As such, we find that [REDACTED] opinion letter lends little probative value, and thus the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

b. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it 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 explained, or offered sufficient evidence that the duties of the position proffered here are so complex and unique that a bachelor's degree in a specific specialty is required.

Moreover, the Petitioner does not articulate or document what detailed course of study leading to a specialty degree would be required to perform these or any of the duties described, nor how such a curriculum is necessary to perform the duties it provided for the position. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.



Although we note the Petitioner's assertion that the Beneficiary's duties are "highly complex," this statement is at odds with the Petitioner's designation of the proffered position as that of a Level I, entry-level position.<sup>8</sup> Again, the LCA indicates that, relative to other positions located within the "management analysts" occupational category, the Beneficiary would perform routine tasks that require only a basic understanding and require limited, if any, exercise of judgment. Without further evidence, the record does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.

The evidence of record does not establish that this position is significantly different from other business/management analyst positions such that it refutes the *Handbook's* information to the effect that a general bachelor's degree is acceptable for this position. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

### 3. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor*, 201 F.3d at 387-88. Were USCIS limited solely to reviewing the 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 Petitioner created a token degree requirement. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

We reviewed the Petitioner's statements regarding the proffered position. However, it does not assert, and has not provided evidence in support of this criterion. Therefore, it has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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<sup>8</sup> The issue here is that the Petitioner's designation of this position as a Level I position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage-level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

#### 4. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific 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 a specific specialty, or its equivalent.

The Petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position. The Petitioner has not distinguished the duties of the proffered position as more specialized and complex than the duties of a business/management analyst position that does not require a bachelor's degree in a specific specialty.

We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the same occupational category.

The record does not include sufficient evidence establishing that the duties of the proffered position require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, the petition cannot be approved because the Petitioner has not demonstrated that it qualifies as a United States employer. As detailed above, the record of proceedings lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of employment requested or where exactly and for whom the Beneficiary would be providing services. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

Even if we assume that the Beneficiary will work for the end-client as claimed, it is noteworthy that the Petitioner has not provided sufficient evidence to substantiate that the Beneficiary would be under the Petitioner's supervision and control. For instance, although the Petitioner identifies the Beneficiary's supervisor, it does not indicate how this manager will oversee him, whether the manager will be located at the client location, and if not, how the manager will supervise him on a day-to-day basis. In contrast, the Petitioner's duties discuss regular and constant contact with the

client, including getting the client's "feedback" and "sign-off," mentioning his "continuous" provision of consulting, and his attendance at "various client meetings." Indeed, the Petitioner references its "right" to control the Beneficiary, but does not indicate with its statements or the evidence that it will be actually controlling his work on a daily basis. The Petitioner states that it is responsible for supervising the Beneficiary at the client location and that it will provide all the tools and instrumentalities necessary for the work. However, the Petitioner does not indicate how, when, and in what form this supervision will take place nor the tools or instrumentalities it will provide. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Although the Petitioner may pay the Beneficiary's wages and administer his benefits, the evidence currently indicates that the Beneficiary will primarily be under the direction of the end-clients and that he will only occasionally check in with the Petitioner as to his progress. While payroll, tax withholdings, and other employment benefits are relevant factors in determining who will control the Beneficiary, other aspects 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.

Therefore, the petition cannot be approved for this additional reason.

### III. CONCLUSION

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision

Cite as *Matter of W-N-A-, Inc*, ID# 406064 (AAO June 29, 2017)