



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

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

MATTER OF [REDACTED]

DATE: MAR. 30, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software consulting company, seeks to temporarily employ the Beneficiary as a "programmer analyst" under the H-1B nonimmigrant classification. *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 evidence of record was insufficient to establish that the Petitioner will have an employer-employee relationship with the Beneficiary and that the proffered position is a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that it has met all evidentiary requirements.

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

**I. PROFFERED POSITION**

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a programmer analyst. The Petitioner submitted a letter of support listing the following job duties for the proffered position:

- Multiload, BTEQ, created & modified databases, performed capacity planning, allocated space, granted rights for all objects within databases, etc[.] (Approximately 20% of the work time)
- Installed patch sets and upgraded Teradata (Approximately 20% of the work time)
- Refreshed the data by using fastexport and fastload utilities. (Approximately 20% of the work time)
- Creating and modifying MULTI LOADS for Informatica using UNIX and Loading data into IDW. (Approximately 10% of the work time)
- Acted as a liaison between the offshore and onsite teams. (Approximately 10% of the work time)

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- Table loads, Updates, Inserts, DDL – Teradata DB2/Oracle. (Approximately 10% of the work time)

The Petitioner submitted an itinerary demonstrating that the Beneficiary would be employed onsite at the offices of an end client, [REDACTED] in [REDACTED] Washington.

The Petitioner also provided a vendor agreement, between it and [REDACTED] reflecting that the Petitioner would provide services to [REDACTED] who in turn would provide services to its third-party clients. According to Exhibit A of the agreement, the Beneficiary would serve as a “Teradata Developer” for [REDACTED] from November 23, 2015, to November 22, 2017.<sup>1</sup>

The Petitioner also submitted letters from [REDACTED] confirming that the Beneficiary would provide services to [REDACTED] through a contract between [REDACTED] and the Petitioner. A separate letter submitted from [REDACTED] confirmed this relationship.

## II. 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 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:

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<sup>1</sup> It is noted that on page one of the agreement, it states that “Inventit desires to engage in a partnership with [the Petitioner] to provide services to [REDACTED].” No further reference is made to [REDACTED] or any potential assignments for the Beneficiary, thereby raising questions regarding the validity of this agreement and the project assignment outlined in Exhibit A. Moreover, Exhibit A also states that the project assignment is “governed by the terms of a Sub-Vendor agreement” between the Petitioner and [REDACTED] yet no such agreement was submitted. “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

- (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 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.<sup>2</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do

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

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).

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.<sup>3</sup>

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

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

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. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact

<sup>3</sup> To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

<sup>4</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized individuals).

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, 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

Applying the *Darden* and *Clackamas* tests to this matter, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

In support of the petition, the Petitioner submitted its employment agreement with the Beneficiary, which stated the duties of the proffered position, identified his work location, outlined his salary and benefits, and noted that his performance would be reviewed after six months. The agreement also indicated that "[the Beneficiary] should provide reports concerning your work activities from time to time as requested." Notably, it did not state the name of his supervisor or the manner in which the Petitioner would supervise and control the Beneficiary's work while employed onsite at the client location in Washington.

The vendor agreement with [REDACTED] indicated that the Petitioner is responsible for compensating its employees and ensuring their compliance with mid-vendor and client requirements. The agreement also stated that the Petitioner is responsible for the payment of salaries, as well as hiring, firing, and all other employer responsibilities. This was confirmed in an updated letter provided by [REDACTED] in response to the request for evidence (RFE).

The Petitioner provides no documentation from [REDACTED] the ultimate end user of the Beneficiary's services. We note the submission of an email message to the Beneficiary from a [REDACTED] representative stating that [REDACTED] does not provide client letters. However, it appears that the Beneficiary's assignment is through multiple vendors (i.e., Petitioner > [REDACTED] > [REDACTED] > [REDACTED]),



yet no contractual documentation substantiating a relationship between [REDACTED] and [REDACTED] was submitted, such as copies of contracts, agreements, or statements of work.

Although the Petitioner provided letters from the mid-vendors, the Petitioner did not submit documentation outlining in detail its agreements with these entities, or the nature and scope of the Beneficiary's employment, including the details of his direct supervision and the review and approval of his work while assigned to the end-client, [REDACTED]. The Petitioner did not provide an organizational chart or other documentation to identify the Beneficiary's supervision and whether his work would be controlled directly by an employee of the end-client, one of the mid-vendors, or the Petitioner.<sup>5</sup> We note that the vendor agreement provides time cards for the Beneficiary to document hours worked, but it does not give specific details regarding the completion of these cards, who signs them, and how they would be submitted and approved.

Further, given that the claimed end-client is located in [REDACTED] Washington, across the country from the Petitioner's offices in [REDACTED] Virginia, it is questionable that the Petitioner would exercise actual control over the Beneficiary's day-to-day work. The absence of evidence demonstrating that an employee of the Petitioner would be stationed at the end-client's location to supervise the Beneficiary leaves doubt that the Petitioner would retain exclusive control over the Beneficiary. Absent evidence identifying the Beneficiary's supervisor and the manner in which he or she would oversee the Beneficiary's work, we cannot determine who would directly supervise his work and what level of control they would exercise. Therefore, the Petitioner has not substantiated who would exercise actual control over the Beneficiary while assigned to the end client location.

On appeal, the Petitioner contends that the Beneficiary is employed by the Petitioner and that the Petitioner controls the Beneficiary's salary and conditions of employment. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control 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. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

The evidence is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish

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<sup>5</sup> We note the Petitioner's submission of a generic organizational chart in response to the RFE; however, this chart merely identifies various position titles within the Petitioner's organization and is little probative value in terms of identifying the supervision of the Beneficiary.

eligibility in this matter. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Based on the tests outlined above, the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the Beneficiary as an H-1B temporary “employee.” 8 C.F.R. § 214.2(h)(4)(ii).

### III. SPECIALTY OCCUPATION

In addition, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>6</sup>

#### 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 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

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<sup>6</sup> The Petitioner submitted documentation to support 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.



- (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 v. Meissner*, 201 F.3d at 387.

#### B. Analysis

As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. See *id.*

Specifically, where the work is to be performed for entities other than the Petitioner, evidence of the end-client’s job requirements is critical. In *Defensor*, 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 a beneficiary’s services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The Petitioner did not submit supporting documentation from the end-client, [REDACTED] regarding the job duties to be performed by the Beneficiary and the requirements for the position. While the letters from the Petitioner, [REDACTED] and [REDACTED] are acknowledged, without a contractual documentation that outlines the substantive nature of the Beneficiary’s work for the end-client, we are unable to determine that the Beneficiary will be employed in the proffered position for the duration of the requested employment period. The letters from the mid-vendors contain identical statements of duties to be performed by the Beneficiary. However, the letters do not provide any sufficient detail regarding the demands, level of responsibilities, and requirements necessary for the performance of these duties. The mid-vendor letters only provide a broadly-stated description of the duties. None of the letters specifically identify the nature of the project to which the Beneficiary will be assigned. As previously noted, the Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. at 376.

There is insufficient evidence in the record from the end-client to corroborate the Beneficiary’s proposed duties and scope of his assignment. The Petitioner’s letters, as well as the letters provided by [REDACTED] and [REDACTED] describe the Beneficiary’s job duties in brief, generalized terms and they fall

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short of conveying the substantive nature of the proffered position and its constituent duties. The Petitioner did not provide a detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis for [REDACTED]. Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of duties for [REDACTED].

Finally, the project assignment document, Exhibit A of the [REDACTED] agreement, appears to be governed by a sub-vendor agreement not included in the record. Further, Exhibit A references assignment to another third-party client, [REDACTED] which is not referred to elsewhere. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582, 591-92.

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

#### IV. CONCLUSION

The record does not establish that, more likely than not, the Petitioner will have an employer-employee relationship with the Beneficiary, and the proffered position is a specialty occupation.

**ORDER:** The appeal is dismissed.

Cite as *Matter of* [REDACTED] ID# 205562 (AAO Mar. 30, 2017)