



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

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

MATTER OF M-, INC.

DATE: SEPT. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations.¹ *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: (1) does not qualify as a United States employer with an “employer-employee relationship” with the Beneficiary; and (2) did not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits a brief and asserts that the Director’s decision was erroneous.

Upon *de novo* review, we will dismiss the appeal.²

I. PROFFERED POSITION

The Petitioner stated that the Beneficiary will serve as a “programmer analyst.” The Form I-129, Petition for a Nonimmigrant Worker, indicated that the Beneficiary will work on a client site. In response to the Director’s request for evidence (RFE), the Petitioner provided the following description of the Beneficiary’s duties:

- Code different tasks assigned to be developed in each sprint. 55%
- Document all developed components, new design and review the design with the senior architect. 10%

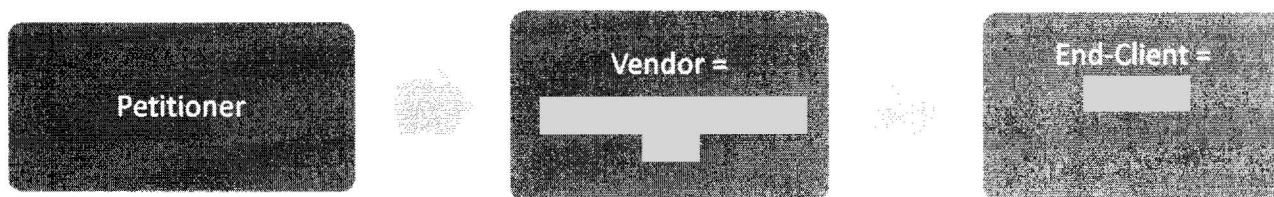
¹ The current Petitioner is an amended petition to a previously approved petition due to material change in the Beneficiary’s employment.

² We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

- Write unit and end to end test cases using Junit, mockito and Test ng frameworks, to make sure that the developed components work as per expectations. 15%
- She is also responsible to configure new rules and collect latest data for the new applications added for analysis. 5%
- Create Review request and review codes from peers, to make sure that the coding standards and [the end-client's] best coding practices are being followed. 15%

Regarding the educational requirements, the Petitioner stated that the position requires a bachelor's degree or equivalent in computer science or a related field.

The Petitioner also explained that the Beneficiary will be working for the Petitioner's end-client as follows:



II. EMPLOYMENT RELATIONSHIP

Upon review, we find that the Petitioner has not established that it meets the regulatory definition of a United States employer. *See* 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the Petitioner has not established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” *Id.*

A. Legal Framework

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

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . who meets the requirements for the occupation specified in section 214(i)(2) . . . and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term “United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), 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.³

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

³ 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).

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 318-19.⁴

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).⁵

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 petitions, we must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a “United States employer” as one who “has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee” (emphasis added)).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries’ services, are the “true employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The

⁴ 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))).

⁵ 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).

determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, we must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-24. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

B. Analysis

Applying the preponderance of the evidence standard, 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."

1. Offer of Employment Letter

For H-1B classification, the Petitioner is required to submit written contracts between the Petitioner and the Beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the Beneficiary will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(iv)(A) and (B). The Petitioner submitted a summary of the terms of agreement under which the Beneficiary will be employed, which stated the Beneficiary will work as a programmer analyst and will work onsite at the offices of its client in [REDACTED] California.

While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "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).

2. Vendor Agreement

The Petitioner explained that it has a contract with [REDACTED] (the vendor) who in turn contracts with [REDACTED] (the end-client). The Petitioner submitted the contractor agreement between the Petitioner and the vendor.

According to this agreement, the Petitioner agrees to “provide programming, systems analysis, engineering, or other specialized services as an independent contractor directly to the third party user client (“client”) who has requested [the vendor] to locate temporary staffing for the client’s project according to the training, skills, abilities and experience required by the client.” The agreement states that the Petitioner will provide qualified candidates to the vendor company to work for projects for an end-client; thus, the entire tenor of the agreement is a contract for staff augmentation. The Beneficiary will be assigned to the end-client to support its staff, a role which is indicative of day-to-day control by the end-client, whose staff is normally subject to the end-client’s direction.

Furthermore, the Petitioner did not submit the master service agreement or any other documentation evidencing a contractual obligation between the vendor and the end-client. Therefore, we cannot determine the full purpose and scope of duties required of the Beneficiary while working on the end-client’s project and work-site.

3. Supervision

A key element in this matter is who would have the ability to supervise or otherwise control the work of the Beneficiary for the duration of the H-1B petition. The Petitioner has not submitted a sufficient explanation, corroborated by credible evidence, detailing the manner in which the Beneficiary’s supervisor actually oversees, directs, and otherwise controls the off-site work of the Beneficiary. For example, the Petitioner stated the Beneficiary will report to her “supervisor at Petitioner on the progress of his [*sic*] work.” However, the Petitioner did not provide a name and job title for the Beneficiary’s supervisor, and did not provide concrete information on how that individual will supervise the work of the Beneficiary.

Moreover, the record indicates that the Beneficiary’s workplace would be located in a different state (California) from the Petitioner’s office in New Jersey, and the Petitioner did not clarify whether the Beneficiary’s supervisor will be stationed at the end-client site. If her supervisor is not working onsite at the end-client’s offices in California, it is unclear how the Petitioner will control the Beneficiary’s work and will administer the work assignments when she is working off-site at a location across the country. Absent evidence establishing the manner in which the Petitioner will supervise the Beneficiary’s work, we cannot determine if the Petitioner will assign and control the Beneficiary’s work at the client site.

The Petitioner submitted a sample performance appraisal form; a project status report (for an individual other than the Beneficiary); and timesheets. However, it is not clear who is assigning the work and whether the Beneficiary is only providing progress reports. If the Beneficiary is reporting work completed to the Petitioner, it appears that the Petitioner will have general contact but will not be managing the Beneficiary’s day-to-day duties at the client site.

4. Purchase Order

The Petitioner submitted a purchase order (PO) between the Petitioner and the vendor. The PO stated that the Beneficiary will perform work for the vendor by working at the end-client site. The PO indicates that the project will commence in July 2015, and will terminate “on the ‘end date’ or an estimated duration of 12+ months.” The PO did not provide an “end date,” thereby indicating that the project is subject to termination after July 2016. In addition, the PO did not provide any detail, aside from identifying the Beneficiary and the end-client, regarding the job title and the type of work the Beneficiary will perform, and lacked a detailed explanation of how the Petitioner will control the work performed by the Beneficiary.

5. Vendor Letter

The letter from the vendor confirms that it has contracted services with the Beneficiary to work at the end-client site on a project named “Consumer Operability’s Server Side Monitoring.” This letter is the first time that this specific project is mentioned. The letter does not state that the Beneficiary will work as a programmer analyst, and provides a job description that differs from the job description provided by the Petitioner. The vendor letter stated that the Beneficiary will utilize several systems that were not mentioned in the Petitioner’s job description, such as Json, Rest ful Webservices, MySql server, Maven, Jenkind and Tomcat. The Petitioner did not explain these variances in the job duties.

6. End-Client Letter

The end-client letter also confirms that the Beneficiary will work at the end-client’s site through May 2016, “with possible extension up to 12 months.” The letter further states that the Beneficiary will be managed by the Petitioner even while at the client site, but did not indicate how the Beneficiary will be supervised/managed by the Petitioner.

7. Speculative Employment

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor’s degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

The Form I-129 requested employment dates from December 28, 2015, through January 26, 2018. However, the record of proceedings provided several different periods of employment as evidenced below:

Document	Period of Employment
Offer Letter	12/28/2015 to 01/26/2018
Itinerary	Work at client site from 12/28/2015 to 01/26/2018
Purchase Order between the Petitioner and Vendor	Beneficiary will begin on July 29 2015 and the work will be terminated on the "end date" or an estimated duration of 12+ months." The documentation does not indicate an "end date."
Vendor Letter	"We anticipate that [the Beneficiary's] services will be needed on an ongoing basis, with possible extension beyond that time."
End-Client Letter	"We anticipate the need for [the Beneficiary's] services from 07/29/2015 through 05/31/2016, with possible extension up to 12 months."

In this matter, the documentation provided several different periods of employment for the Beneficiary. The Petitioner does not explain these variances on project dates. Although the Petitioner's itinerary indicates that the Beneficiary will be employed as a programmer analyst for the end-client through January 2018, no formal documentation in the form of purchase orders or statements of work corroborates this assertion. At best, the documentation submitted from the vendor and end-client establishes that work may be available for the Beneficiary until mid-2016. Thus, the Petitioner does not establish that the petition was filed for non-speculative work for the Beneficiary that existed as of 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. Comm'r 1978). Thus, even if the Petitioner established that it would be the Beneficiary's employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁶

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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

7. Conclusion

The evidence, therefore, 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 Beneficiary is the Petitioner's employee and that the Petitioner exercises control over the Beneficiary, without sufficient, corroborating evidence to support the claim, does not establish eligibility in this matter.

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

We will now address the Director's finding that the Petitioner did not establish that it would employ the Beneficiary in a specialty occupation position.

As recognized in *Defensor*, 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. *Defensor*, 201 F.3d at 387-88. In other words, as the employees in that case would provide services to the end-client 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.*

In the instant matter, the record of proceedings does not provide sufficient information from the end-client regarding the specific job duties to be performed by the Beneficiary. The Petitioner submitted a letter from the end-client confirming that the Beneficiary will be working on a project at its office. The letter describes the Beneficiary's job duties in brief, generalized terms that do not convey the substantive nature of the proffered position and its constituent duties. The record of proceedings does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis for the end-client. Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., an explanation of what specific systems and applications are involved, and what body of knowledge is required to perform the duties). In fact, the duties described by the end-client differ from those identified by both the Petitioner and the vendor in their

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.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). 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).

respective letters, thus rendering it difficult for us to ascertain the true nature and responsibilities of the Beneficiary's proposed position.

Accordingly, upon review of the totality of the record, the Petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the Beneficiary would be performing services primarily as a programmer analyst for the duration of the requested employment period. As the Petitioner has not established the substantive nature of the work⁷ to be performed by the Beneficiary, it precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1;⁸ (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.

IV. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of M-, Inc.*, ID# 879456 (AAO Sept. 28, 2017)

⁷ Even if the proffered position had been established as one located within the "Computer Systems Analysts" occupational category (the occupational category selected by the Petitioner on the labor condition application), we note that DOL's *Occupational Outlook Handbook (Handbook)* specifically states that "a bachelor's degree in a computer or information science field is common, although not always a requirement." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (2016-17 ed.). The *Handbook* therefore would not support the proposition that the position is a specialty occupation.

⁸ We further note that the end-client letter states that a bachelor's degree in business is acceptable for the position. However, the requirement of a bachelor's degree in business is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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, 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 have consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.