



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

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

MATTER OF T-S-ITG- LLC

DATE: SEPT. 29, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an IT consulting services firm, seeks to employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 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 did not establish that the proffered position qualifies as a specialty occupation position, or that the Petitioner would have an employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred denying the petition.

Upon *de novo* review, we will dismiss the appeal.<sup>1</sup>

## I. SPECIALTY OCCUPATION

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record (1) does not describe the position’s duties with sufficient detail; and (2) does

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<sup>1</sup> We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). A petitioner must show that what it claims is “more likely than not” or “probably” true. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989).

not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</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
- (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 384, 387 (5th Cir. 2000).

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<sup>2</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.

**B. Proffered Position**

The Petitioner stated that the proffered position is a programmer analyst position. Although the Petitioner's address is in [REDACTED] New Hampshire, the Form I-129, Petition for a Nonimmigrant Worker, states that the Beneficiary would work at [REDACTED] in [REDACTED] Montana. Other evidence in the record indicates that this is a location of [REDACTED] (end-client), and that the Beneficiary would be working on a project identified as [REDACTED]

In a letter of support, the Petitioner identified the following as the requirements of the proffered position:

[The Beneficiary] as a Programmer Analyst will be responsible for developing and enhancing code, unit testing as well as generating test reports. He will be involved in creating high level and low level design as well as data-modeling for change request. He will be actively co-coordinating with the database and software configuration management team to ensure smooth execution of the project.

Below are a breakdown of [the Beneficiary's] specific job duties and the percentage of time spent on each of the activities totaling to 100%.

**The Beneficiary will spend 40% of his time on the below duties:**

Create, modify, test, and document PL/SQL code, tables, packages, procedures, functions, and database triggers for the [REDACTED]

Monitor and maintain applications, interfaces and processes to ensure maximum efficiency, performance and accuracy.

Provide technical support to users and functional subject matter experts that have system questions, issues, and defects.

Serve as point of contact for defects, upgrades and enhancements.

Gather and analyze user requirements, translate requirements into functional specifications.

Lead the design, development, and maintenance of new enterprise-wide business process models involving custom tools/applications.

Design and set up of [REDACTED] jobs in [REDACTED]

Prepare and maintain documentation, including requirements, specs, process flow documentation and procedures.

Participate and oversee custom code development and ensure adherence to coding standards.

**The Beneficiary will spend 35% of his time on the below duties:**

Manage storage of technical specifications and code in [REDACTED] application.

Provide expertise and assistance to ensure that all processes are designed to meet SOX, audit and role security requirements.

Validate or revise initial schema design holding approximately 100 fields of data in 10-15 normalized table structures for multiple records.

Design PL/SQL solutions to implement a data cleansing/reconciliation process, which will:

- Identify matches, prospective matches, etc.
- Remove duplicates,
- Report non-matched/problem cases for evaluation

Support re-incorporation of externally modified/marked up data.

Prepare solutions to load “final/cleansed” data into the primary set of tables.

**The Beneficiary will spend 25% of his time on the following Job Duties**

Implement PL/SQL solutions to support/replace/update processes on the enrollment tables.

Implement PL/SQL solutions to support efficient common queries of enrollment data.

Implement PL/SQL solutions to support regular exports of selected enrollment data for use in downstream systems (reporting, etc.).

Write PL/SQL code and documentation to support the “reconcile” functionality. Write PL/SQL code and documentation to support updated logic and related functionality; Document and unit test all code.

### C. Requirements for the Position

The Petitioner provided inconsistent statements regarding requirements for the proffered position and has not established that the duties of the proffered position require the attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Specifically, the Petitioner initially stated that the proffered position requires at least a bachelor's degree or equivalent in "Computer Science, Computer Information Systems, Computer Applications, Information Technology, Engineering (any), Math, Business, Commerce or any other related technical field." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).<sup>3</sup>

Here and as indicated above, the Petitioner, who bears the burden of proof in this proceeding, has not established either (1) that computer science, computer information systems, computer applications, information technology, any field of engineering, math, business, commerce, are closely related or (2) that all of these fields would be directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the Petitioner's own standards. As explained above, we interpret the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. *Royal Siam Corp.*, 484 F.3d at 147.

In response to the Director's request for evidence (RFE), the Petitioner submitted a position evaluation from [REDACTED] at [REDACTED], which stated that "the position of Programmer Analyst is clearly a specialty position, and requires the services of someone with advanced training through a Bachelor's program in Computer Science, Computer Information

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<sup>3</sup> In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Systems, or a closely related field.”<sup>4</sup> The statements of [REDACTED] identify a much narrower educational requirement than that originally stated by the Petitioner. The Petitioner has not resolved this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner has not demonstrated that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

#### D. Job Duties

Furthermore, the evidence of record is insufficient to demonstrate that the duties of the proffered position are in fact associated with a specialty occupation. The Petitioner asserts that the Beneficiary will be employed as a programmer analyst on the [REDACTED] project for the end-client, which it claims is specifically tailored to create a technology infrastructure, namely, a suite of web-based software programs for Native American communities. In support of this assertion, the Petitioner submitted a 51-page document entitled [REDACTED] (project document), which it claims is the overview of the intended project upon which the Beneficiary will work. The Petitioner also submitted a copy of its Independent Contractor Supplier Agreement (ICSA) with the end-client, along with a Statement of Work (SOW), indicating the Beneficiary would be responsible for “Implementation of Oracle, PL/SQL Packages and Performance Tuning” in accordance with the ICSA.

The project document, however, contains no references to the Beneficiary or to the proffered position. In fact, this 51-page document merely provides an overview of the research conducted regarding the digital divide, and the proposed solutions to be implemented by way of a technology infrastructure created by the end-client. The project document, which addresses [REDACTED] of the proposed project, contains no schedule for completion, no timeline for deliverables, and contains no list of the required positions and employees needed to complete the project.

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<sup>4</sup> We carefully evaluated [REDACTED] assertions but, for the following reasons, determined his opinions lent little probative value. 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, [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion without discussion. Third, 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 position for a beginning employee who has only a basic understanding of the occupation. In other words, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information to adequately assess the nature of the position. As such, we find that [REDACTED] opinion letter lends little probative value. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm’r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is “not in accord with other information or is in any way questionable.”). For efficiency’s sake, we hereby incorporate the above discussion regarding the letter into our analysis of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Moreover, even if it were established that the Beneficiary will be assigned to the [REDACTED] project, the evidence still does not sufficiently describe the duties to be performed by the Beneficiary. That is, while the Petitioner submitted a lengthy list of job duties in its initial support letter, the SOW submitted in support of the petition states simply that the Beneficiary will be responsible for “Implementation of Oracle, PL/SQL Packages and Performance Tuning” in accordance with the ICSA. This vague, abbreviated statement of duties is insufficient to establish that the proffered position qualifies as a specialty occupation.

As recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Here, the Petitioner asserts that the Beneficiary will be employed offsite at the end-client’s offices. The record of proceedings, however, is devoid of sufficient information from the end-client regarding the nature of the Beneficiary’s proposed position and the duties associated with it. While the record contains a list of duties provided by the Petitioner in its letter of support, as well as an identical list of the same duties in a letter from the end-client submitted in response to the RFE, the only formal statement of duties from the end-client pertaining to the [REDACTED] project is the brief statement in the SOW, which does little to shed light on the actual requirements of the proposed position. Simply stating that the Beneficiary will be responsible for “Implementation of Oracle, PL/SQL Packages and Performance Tuning,” which are generic IT duties that are not project specific, does little to support the Petitioner’s claim that the proffered position is a specialty occupation. The job duties, as presently stated, do not adequately convey the actual tasks the Beneficiary will perform within the context of the [REDACTED] project, the complexity of such tasks, and the knowledge necessary to perform them.

Consequently, we find that the evidence of record does not demonstrate the substantive nature of the proffered position and its constituent duties. The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore 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; (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.

Nevertheless, we will analyze the evidence of record to determine whether the proffered position as described qualifies as a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### E. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which 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. To inform this inquiry, we recognize 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>5</sup>

On the labor condition application (LCA)<sup>6</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Programmers," corresponding to the Standard Occupational Classification code 15-1131 at a Level I wage.<sup>7</sup> Thus, we reviewed the *Handbook's* subchapter entitled "How to Become a Computer Programmer," which states, in pertinent part: "Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers (2016-17 ed.).

On appeal, the Petitioner asserts that the *Handbook's* language supports an industry-wide standard for a degree in this occupation. However, the *Handbook* does not support the Petitioner's assertion that a bachelor's degree is required for entry into this occupation. Instead, the *Handbook* reports that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

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<sup>5</sup> All of our references are to the 2016-17 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. To satisfy the first criterion, however, 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>6</sup> The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services (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>7</sup> 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 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://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.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.*



The Petitioner also references the O\*NET OnLine Summary Report for “Computer Programmers.” The summary report provides general information regarding the occupation; however, it does not support the Petitioner’s assertion regarding the educational requirements for the occupation. For example, the Specialized Vocational Preparation (SVP) rating cited within O\*NET’s Job Zone designates this occupation as 7 < 8. That SVP rating indicates the occupation requires “over 2 years up to and including 4 years” of training. Further, while the SVP rating indicates the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.<sup>8</sup>

Further, the summary report provides the educational requirements of “respondents,” but does not account for 100% of the “respondents.” The respondents’ positions within the occupation are not distinguished by career level (e.g., entry-level, mid-level, senior-level). Additionally, the graph in the summary report does not indicate that the “education level” for the respondents must be in a specific specialty.

We again acknowledge the position evaluation from [REDACTED], who concluded that a bachelor’s degree in computer science, computer information systems, or a closely related field is required for the occupation of programmer analyst. As previously discussed, [REDACTED] does not reference sources of empirical information which he may have consulted to complete his evaluation, nor does he discuss the duties of the proffered position in any substantive detail. Moreover, there is no indication whether [REDACTED] was aware that the Petitioner considered the proffered position to be an entry-level position. As such, we find that [REDACTED] opinion letter lends little probative value.

In the instant matter, the Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

#### F. 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 casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

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<sup>8</sup> For additional information, see the O\*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

1. First Prong

To satisfy the 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)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter.

On appeal, the Petitioner submits copies of job announcements placed by the claimed end-client as well as other employers. However, upon review of the documents, we find that the Petitioner’s reliance on the job announcements is misplaced. First, we note that the Petitioner did not establish that the advertising organizations are similar to the Petitioner. For example, the advertisements provide little or no information regarding the hiring employers. The Petitioner did not supplement the record of proceedings to establish that these advertising organizations are similar to it.

When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Upon review, some of the employers for which the job postings are submitted include a university and a benefits management company, entities that cannot be considered to be within the same industry as the Petitioner. It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a basis for such an assertion.

Moreover, the advertisement by [REDACTED] does not appear to be for a parallel position. This posting requires a programmer analyst with five years of experience in addition to the stated educational requirements. However, the Petitioner indicated that the proffered position is an entry-level position on the LCA. Further, the Petitioner, has not sufficiently established that the primary duties and responsibilities of this advertised position is parallel to the proffered position.

Finally, not every posting requires a minimum of a bachelor’s degree in a specific specialty for entry into the occupation of programmer analyst. For example, the posting by [REDACTED] indicates

that it will accept an associate's degree and four years of related work experience, or a high school diploma with six years of related work experience.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.<sup>9</sup> That is, not every deficit of every job posting has been addressed.<sup>10</sup>

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

## 2. 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. In its letter of support, the Petitioner asserted that the "job duties for the proffered position are complex and unique" requiring a bachelor's degree. However, the Petitioner designated the proffered position as an entry-level position within the occupational category (by selecting a Level I wage).<sup>11</sup> This designation, when

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<sup>9</sup> The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

<sup>10</sup> Even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

<sup>11</sup> The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, unique, and specialized 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.

read in combination with the Petitioner and the end-client's job descriptions, further suggests that the particular position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of 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.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

#### G. 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 Petitioner claims that it routinely hires specialty-degreed individuals for the position of programmer analyst, and provides a list of names of the individuals it claimed held this position in the past. The Petitioner provided copies of their educational credentials and evaluations of these credentials, along with copies of paystubs or Forms W-2, Wage and Tax Statements. However, the Petitioner did not submit sufficient information regarding the duties and positions of these employees. For example, there is no evidence establishing the position titles they held or the duties they performed during their employment with the Petitioner. Absent additional evidence regarding these individuals, we cannot determine whether they held positions similar to that of the one proffered in the instant petition.

The record does not establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

#### H. 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.

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In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation. We again refer to our comments regarding the implications of the Petitioner's designation of the proffered position at a Level I wage level.

Upon review of the totality of the record, the Petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

Furthermore, the Petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). 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), the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. 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)).<sup>12</sup>

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<sup>12</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).

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. 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).

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, U.S. Citizenship and Immigration Services (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)).

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

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

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The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19. 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).

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.”

As previously noted, the Petitioner claims that the Beneficiary will work for the end-client, [REDACTED] and claims that the ICSA and the letter from the end-client support this contention.

Although the Petitioner submitted evidence such as the ICSA and the end-client letter, along with the 51-page project document, the Petitioner did not submit any document which outlined in detail the nature and scope of the Beneficiary’s employment from the end client. Although the submission of the SOW is noted, this document merely provides a one-sentence overview of the Beneficiary’s proposed duties, along with his hourly rate of compensation pursuant to the ICSA. It does not identify the Beneficiary’s supervisor or the manner in which his work will be monitored and supervised. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

On appeal and throughout these proceedings, the Petitioner contends that the Beneficiary is the Petitioner’s employee and that the Petitioner controls the Beneficiary’s salary and conditions of employment. We note, however, that the claimed work location of the Beneficiary is in Montana, but the Petitioner’s offices are located in New Hampshire. Given the significant distance between the end-client’s location and the Petitioner’s offices, it is unclear, absent additional evidence, how the Petitioner intends to supervise and control the Beneficiary’s work. Although the Petitioner’s submission of a sample performance review is noted, it contains no specific details pertinent to the Beneficiary’s assignment with the end-client, and further indicates that performance appraisals are conducted “every 6 months,” thereby suggesting that daily, onsite supervision is not exercised at the client location by the Petitioner or its employees.

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, 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 Petitioner exercises complete control over the Beneficiary, without evidence supporting 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. CONCLUSION

Here, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation or that it will have the requisite employer-employee relationship with the Beneficiary.

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-S-ITG- LLC*, ID# 592984 (AAO Sept. 29, 2017)