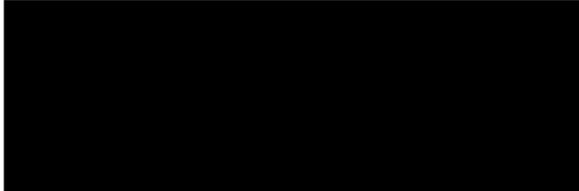


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**U.S. Citizenship  
and Immigration  
Services**

D2



Date: OCT 07 2011

Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, submitted December 21, 2009, the petitioner stated that it is a software consulting and development firm. To employ the beneficiary in what it designates as a programmer analyst position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to 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 director denied the petition, finding that the petitioner (1) failed to establish that it would employ the beneficiary in a specialty occupation position, (2) failed to establish that it has standing to file the visa petition as the beneficiary's prospective United States employer within the meaning of that term at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), (3) failed to establish that the Labor Condition Application (LCA) submitted to support the visa petition corresponds with the visa petition in that the beneficiary would be employed at a location for which the LCA is valid, and (4) failed to establish that it would comply with the terms and conditions of H-1B employment.

On appeal, the petitioner asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. The petitioner also submitted additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which requires [(1)] theoretical and practical application

of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers,

computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The visa petition indicates that the petitioner is located in [REDACTED]. The LCA provided to support the visa petition indicates that the beneficiary would work in [REDACTED].

With the visa petition, the petitioner submitted (1) a letter, dated December 17, 2009, from the petitioner's director; (2) a vacancy announcement, placed by the petitioner on its website; (3) a copy of an employment contract, dated December 1, 2009, between the petitioner and the beneficiary; (4) documents showing that the beneficiary has both a bachelor's degree and a master's degree in electrical engineering; and (5) an employment verification letter, dated December 4, 2009, from a senior manager of [REDACTED].

The December 17, 2009 letter from the petitioner's director provides the following description of the duties of the proffered position:

- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced.
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct.
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program.
- Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment.
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes.
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements.
- Write, analyze, review, and rewrite programs, using workflow chart and diagram, and applying knowledge of computer capabilities, subject matter, and symbolic logic.
- Write or contribute to instructions or manuals to guide end users.
- Investigate whether networks, workstations, the central processing unit of the system, or peripheral equipment are responding to a program's instructions.
- Prepare detailed workflow charts and diagrams that describe input, output, and logical operation, and convert them into a series of instructions coded in a computer language.

As to the educational requirements of the proffered position, the petitioner's director stated, "[T]he industry standard in the U.S. for computer professionals is that the candidate should possess at least a Bachelor's degree in Science or Computer Science or Computer Engineering or Electronics or

different disciplines of Engineering or a related area . . . .” He further stated that this is also the petitioner’s requirement for the proffered position. Yet further, the petitioner’s director stated, in a table provided in his December 17, 2009 letter, that the client for whom the beneficiary would work in [REDACTED]” and that the petitioner has sufficient specialty occupation work at which to employ the beneficiary throughout the period of requested employment.

A position qualifies in part as a specialty occupation position if it requires a minimum of a bachelor’s degree or the equivalent in a specific specialty. “Science or Computer Science or Computer Engineering or Electronics or different disciplines of Engineering or a related area” does not delineate a specific specialty. That the petitioner will accept any degree in that wide array of subjects as qualifying education for the proffered position makes clear that the proffered position is not a position in a specialty occupation. This is sufficient reason, in itself, to find that the proffered position does not qualify as a specialty occupation and sufficient reason to dismiss the instant appeal and to deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue in order to highlight other evidentiary deficiencies in the record of proceeding.

The vacancy announcement submitted is for a software engineer position. As such, its educational requirement is not necessarily the same as that for the proffered position and the vacancy announcement has no apparent relevance to the instant case. However, the AAO notes that the vacancy announcement states that the position requires a bachelor’s degree in science, rather than in any more specific field or any field more directly related to computers.

The employment contract provided is dated December 1, 2009. The position to which the petitioner appointed the beneficiary in that contract is Business Analyst, rather than programmer analyst. That contract states, “As an employee, [the petitioner] will be placed on projects at various client site [sic].”

The employment verification letter provided is dated December 4, 2009 and signed by a senior manager of [REDACTED]. It states that the beneficiary has been working, “through his employer,” at [REDACTED] Application Technical Analyst continuously since September 2009. It does not identify the beneficiary’s employer. It also states that [REDACTED] [has] a continued need for [the beneficiary’s] services now and into the foreseeable future for work on various projects,” but not how far into the future [REDACTED] is currently able to foresee.

On December 31, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence pertinent to the petitioner’s H-1B workers and the wages paid to them and evidence from [REDACTED] clarifying the nature of the work the beneficiary would perform for [REDACTED] and demonstrating that the petitioner would employ the beneficiary in a specialty occupation.

In response, the petitioner provided no evidence pertinent to the asserted employment for [REDACTED]. Instead, the petitioner submitted a contract, dated October 27, 2005 and agreed to by the petitioner and [REDACTED], evincing terms pursuant to which the beneficiary was to provide workers to work on projects for customers of [REDACTED].

Appended to that contract is a Statement of Work (SOW), which states that the petitioner would provide the beneficiary to [REDACTED] to work on a project for [REDACTED] beginning on December 1, 2009. It indicates that the term of the assignment is one year with an option for an additional year. The signatures on that SOW are dated January 20, 2010. The AAO notes that the agreement postdates the date upon which the petitioner asserts that the beneficiary's work on the project began. It also postdates the submission of the instant visa petition. As such, it is not evidence that, when the petitioner submitted the visa petition, it had any non-speculative work for the beneficiary to perform.

The director denied the petition on February 11, 2010. As was noted above, one of the bases pursuant to which the director denied the visa petition is her finding that the petitioner had not demonstrated that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. The AAO will first address that basis for the decision.

On appeal, the petitioner asserted that the contract between the petitioner and [REDACTED] and the letter from Herbalife, taken together, demonstrate a contractual relationship between the petitioner and Herbalife and show that the work the beneficiary would perform demonstrates that the proffered position is a position in a specialty occupation. The AAO observes that those two documents contain no indication that [REDACTED] contracted directly with [REDACTED], rather than through an intermediary company.

The AAO will now address the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the proffered position is, for instance, a programmer analyst position and that a bachelor's or higher degree in a specific specialty or its equivalent is normally the minimum entry requirement for that particular position.

The record contains conflicting evidence pertinent to the job title of the proffered position. The visa petition states that the proffered position is a programmer analyst position. The letter from [REDACTED] states that it is an Oracle Application Technical Analyst position. The beneficiary's employment contract states that the proffered position is a business analyst position.

In any event, the AAO does not solely rely on the job title to determine whether a particular job qualifies as a specialty occupation position. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

The AAO recognizes 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>1</sup> In the chapter entitled Computer Systems Analysts, the *Handbook* describes the duties of computer systems analyst positions as follows:

To begin an assignment, systems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

More specifically, the same chapter of the *Handbook* describes the duties of programmer analysts as follows:

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas.

The duties described in the letter of December 17, 2009 from the petitioner's director are entirely consistent with the description of programmer analyst duties in the *Handbook*. If the description of the duties provided by the petitioner's director were definitive, it would clearly mark the proffered position as a programmer analyst position.

However, the record contains no indication that the petitioner would assign, direct, and supervise the beneficiary's work and, absent evidence to the contrary, that arrangement does not appear feasible, given that the petitioner's offices are in [REDACTED] and the petitioner has asserted that the

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<sup>1</sup> The Handbook, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the Handbook are to the 2010 – 2011 edition available online.

work for [REDACTED] would be performed in [REDACTED] more than 350 miles distant. Whether the petitioner's work would be assigned, directed, and supervised by [REDACTED], or an intermediary company is unclear.

As recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See id.* at 388. The court held that the legacy 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.* 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. *Id.*

The SOW issued by [REDACTED] indicates that the duties the beneficiary would perform consist of providing Oracle consulting services to [REDACTED]. The senior manager at [REDACTED] described the beneficiary's duties as being primarily responsible for the design and development of software systems using Oracle SQL, PL/SQL, Oracle Forms, and Reports 6i. Although those descriptions are very abstract, they are consistent with the duties of a programmer analyst.

The petitioner has not demonstrated which of those two companies, [REDACTED] if either, would assign the beneficiary's work and oversee his performance. Because the petitioner has not provided evidence of a direct contractual link between [REDACTED], the entity assigning duties and supervising the beneficiary's work might be a third, intermediary company. However, the AAO will assume, *arguendo*, that one or the other of those two companies would control the beneficiary's work. The duties described by those two companies suggest that the proffered position is a programmer analyst position. The *Handbook* describes the educational requirements of computer systems analyst positions, including programmer analyst positions, as follows:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos287.htm> (last accessed September 27, 2011).

A preference for applicants with a bachelor's degree is not a minimum requirement. Further, even for those positions requiring a bachelor's degree, a degree in computer science, information service, applied mathematics, engineering, or physical science appears to satisfy their educational requirement. As the phrase "computer science, information service, applied mathematics, engineering, or physical science" does not delineate a single specific specialty, the *Handbook* does not support the assertion that computer systems analyst positions in general, or, more specifically, positions for programmer analysts, categorically qualify as specialty occupation positions by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. Therefore, even if the AAO had found, rather than assumed, *arguendo*, that the proffered position is a programmer analyst position, the *Handbook* would not have supported the proposition that it is a specialty occupation position.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: 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 attest 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)).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner's industry, or any other, requires programmer analysts to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of programmer analysts that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the petitioner's industry. In short, the record contains no evidence that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO 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 demonstrates that, notwithstanding that other programmer analyst positions in the petitioner's industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

However, as was observed above, and consistent with *Defensor v. Meissner, supra*, where the work is to be performed for entities other than the petitioner, it is the duties assigned by the end user, and the end users educational requirements, that are the critical consideration.

The petitioner asserted, on appeal, that the contract and purchase order between the petitioner and [REDACTED], and the letter from [REDACTED], taken together, establish that the proffered position qualifies as a specialty occupation.

The contract itself, of course, does not document any employment for the beneficiary, or specify any duties to be performed. It merely sets out the terms pursuant to which the petitioner might supply workers to [REDACTED]. Rather, it is the SOW appended to the contract that indicates that [REDACTED] agreed to assign the beneficiary to work on an [REDACTED] project. That SOW indicates that the beneficiary would perform "[REDACTED]"

The AAO observes, preliminarily, that USCIS regulations 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner must demonstrate that it had qualifying employment available for the beneficiary when it submitted the visa petition.

The [REDACTED] SOW, however, purports to have been signed on January 20, 2010. It is not evidence that the petitioner had qualifying employment for the beneficiary, or any employment at all, when the visa petition was submitted on December 21, 2009.

Further still, even if the SOW showed qualifying employment, and even if it had been signed prior to the submission of the visa petition, the term of that SOW is one year commencing on December 21, 2009, with an option for an additional year. The requested period of employment is December 11, 2009 to December 10, 2012. Although it contains an option for an additional year, it only evinces a contractual obligation through December 10, 2010. Even if it were evidence of qualifying employment it could not be taken as evidence that the petitioner had work for the beneficiary to perform after December 10, 2010.

Yet further, even if the option to retain the beneficiary's services for an additional year were exercised, which apparently had not occurred when the visa petition was submitted, even then, it would not provide employment for the beneficiary throughout the period of requested employment.

In any event, even if the proffered position was evidence of available employment throughout the entire period of requested employment, it would not demonstrate the available employment is so complex or unique that it can be performed only by an individual with such a degree, as the record contains no evidence and no indication that "Oracle consulting services" require a minimum of a bachelor's degree or the equivalent in a specific specialty. In summation, the SOW provides no support for the proposition that the proffered position satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The remaining evidence pertinent to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is the December 4, 2009 employment verification letter from [REDACTED] which states that the beneficiary had then been working, through his employer, at [REDACTED], since September 2009.<sup>2</sup> The employment verification letter states that the beneficiary had been "primarily responsible for the design and development of [REDACTED] Software systems using Oracle SQL, PL/SQL, Oracle Forms and Reports 6i." Again, that letter does not show that the petitioner has work for the beneficiary throughout the period of requested employment, and, again, that letter contains no indication of relative complexity or uniqueness that would require a minimum of a bachelor's degree or the equivalent in a specific specialty.

As the record contains no other pertinent evidence, the petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position meets the requirements of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The vacancy announcement provided is the only evidence in the record pertinent to the petitioner's previous recruiting and hiring practices. That vacancy announcement, however, is not for a programmer analyst position, but for a software engineer position.<sup>3</sup> The record contains no evidence

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<sup>2</sup> The identity of the company, or chain of companies, who provided the beneficiary to [REDACTED] beginning during September 2009 is unclear, as the petitioner's evidence indicates that it began to supply him to [REDACTED] on December 1, 2009.

<sup>3</sup> Further, although that software engineer position allegedly requires a "Bachelors or Masters [sic] in Science or equivalent," the entire field of "Science" is too broad to be considered a specific specialty. Therefore, even if it pertained to the proffered position, that vacancy announcement would not be evidence that the position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

Moreover, while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the

of a previous history of recruiting or hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position satisfies the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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, or its equivalent.

As was noted above, the salient descriptions of the duties of the proffered position are “**██████████**” and “primarily responsible for the design and development of **██████████** Software systems using Oracle SQL, PL/SQL, Oracle Forms and Reports 6i.” This vague description contains no indication of complexity or specialization that would demand a minimum of a bachelor’s degree or the equivalent in a specific specialty, especially relative to other programmer analyst positions that, according to the *Handbook*, normally do not have such a minimum entry requirement.

The petitioner has not demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position meets the requirements of the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Also, at a more basic level, as reflected in this decision’s discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition it had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this reason also, the appeal will be dismissed and the petition denied.

The AAO finds that the director did not err in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

Another basis of the director’s decision of denial is the petitioner’s failure to establish that it has standing to file the visa petition as the beneficiary’s prospective United States employer within the meaning of that term at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). The AAO notes, initially, that the petitioner has never claimed to be an agent,

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occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

and the evidence does not support that the petitioner is an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). The remaining issue pertinent to standing is whether the petitioner qualifies as the beneficiary's United States employer such that it will have and maintain an employer-employee relationship with the beneficiary as required by 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA 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." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(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”). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms “employee,” “employed,” “employment,” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.”<sup>4</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States 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 Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

“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.”

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter “*Clackamas*”). 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 America*, 390 U.S. at 258 (1968)).<sup>5</sup>

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<sup>4</sup> Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an “agent” who will not be the actual “employer” of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien’s services is the “true employer” for H-1B visa purposes, since the end-user will “hire, pay, fire, supervise, or otherwise control the work” of the beneficiary “at the root level.” *Defensor v. Meissner*, 201 F.3d 384, 387-388. Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: “To interpret the regulations any other way would lead to an absurd result.” *Id.* at 388.

<sup>5</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

Therefore, in considering whether or not one is an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *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 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (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 actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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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), *aff’d*, 27 F.3d 800 (2<sup>nd</sup> Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). 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 Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to employ persons in 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, thus indicating that the regulations do not indicate an intent to extend the definition beyond “the traditional common law definition.” Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the “conventional master-servant relationship as understood by common-law agency doctrine,” and the *Darden* construction test, apply to the terms “employee,” “employer-employee relationship,” “employed,” and “employment” 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). That being 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 aliens).

It is important to note 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 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 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, 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, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director 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).

In the instant case, as was noted above, the petitioner has not demonstrated that it will assign, direct, or supervise the beneficiary’s work. Moreover, the evidence of record indicates that the beneficiary will not be employed at the petitioner’s premises or that he will use the tools and instrumentalities of the petitioner. As such, the petitioner has not established that it is or will be the beneficiary’s United States employer pursuant to the common law test and has not, therefore, established that it is or will be the beneficiary’s employer having and maintaining an employer-employee relationship with the beneficiary as required by 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner has not established that it has standing to file the instant visa petition as the petitioner’s intending United States employer within the meaning of that term at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). The appeal will be dismissed and the petition will be denied for this additional reason.

Another basis for the director’s decision of denial was the petitioner’s failure to establish that the LCA submitted to support the visa petition corresponds with the visa petition in that the beneficiary would be employed at a location for which the LCA is valid.

The AAO observes that the petitioner’s director initially stated, in his December 17, 2009 letter, that [REDACTED] was the client for whom the beneficiary would work during the entire period of requested employment, i.e., from December 11, 2009 to December 10, 2012. Subsequently, the petitioner submitted evidence that the beneficiary had been working and would continue to work on a project for [REDACTED] pursuant to an SOW between the petitioner and [REDACTED] although the term of that SOW is only from December 1, 2009 to December 1, 2010.

The petitioner has never explained that shift in the itinerary it provided for the beneficiary, which suggests that, when it submitted the visa petition, it did not know where it would send the beneficiary to work and even now does not know where the beneficiary would work after December

1, 2010. Further, the beneficiary's employment contract indicates that the beneficiary would work "on projects at various client site[s]." The AAO finds that the petitioner has not demonstrated that the LCA submitted to support the visa petition corresponds to it in that it is valid for all of the locations where the beneficiary would work. The appeal will be dismissed and the visa petition denied for this additional reason.<sup>6</sup>

The final basis for the decision of denial is the finding that the petitioner has not demonstrated that it would comply with the terms and conditions of H-1B employment. As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), failed to establish that it has standing to file the visa petition as the beneficiary's prospective United States employer within the meaning of that term at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), and failed to establish that the LCA submitted to support the visa petition corresponds with the visa petition in that the beneficiary would be employed at a location for which the LCA is valid, the director's decision shall not be disturbed. As the adverse determinations of those issues are dispositive of the

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<sup>6</sup> It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. 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 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).

appeal, the AAO will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish that it would comply with the terms and conditions of H-1B employment.

The record suggests another issue that was not addressed in the decision of denial. Specifically, the AAO observes that the petitioner is debarred from having any H-1B visa petitions approved from May 23, 2011 to May 22, 2013. Therefore, even if the instant visa petition were in all other respects approvable, it could not be approved for any period after May 22, 2011.

Finally, beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, the record indicates that the beneficiary would work at multiple locations at some point during the requested period of employment, and the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter. Although the petitioner's December 17, 2009 letter does include a section entitled "ITINERARY," it only lists one place of employment, i.e., [REDACTED] and fails to list any of the other employment locations, e.g., Herbalife. This single location itinerary therefore fails to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B), and the petition must also be denied on this additional basis

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.



**ORDER:** The appeal is dismissed. The petition is denied.