

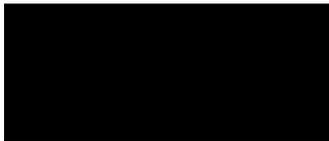
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



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



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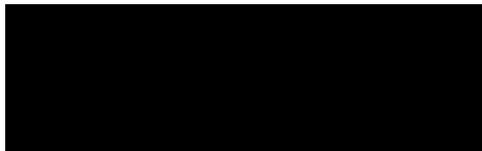
Petitioner:

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:



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,

Michael T. Perry
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 the petitioner stated that it is an "IT [information technology] Services and Solutions/Software Development" firm with "100+" employees. 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 failed to establish that it would employ the beneficiary in a specialty occupation position, and failed to demonstrate that it has standing to file the visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of that term at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and 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 counsel's brief and attached 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 be employing 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 [(1)] requires 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 [(2)] requires 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, 8 U.S.C. § 1184(i)(1), 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 (5th 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.

With the petition, counsel provided: (1) a letter, dated April 3, 2008, from the petitioner's CEO; (2) a document that purports to present the beneficiary's proposed itinerary; (3) a document entitled "Summary of Terms of Oral Agreement under Which Beneficiary will be Employed"; and (4) copies of two diplomas.

The petitioner's CEO's April 3, 2008 letter provides the following description of the duties of the proffered position:

Beneficiary will assist in designing, evaluating, programming, and implementing the applications. He will maintain computer systems, write program specifications and undertake technical documentation. He will design, write and develop custom-made software applications as per specific requirements.

Beneficiary will identify problems, study existing systems to evaluate effectiveness and develop new systems to improve production or workflow. He will write a detailed description of user needs, program functions, and steps required to develop or modify computer programs. Beneficiary will also review computer system capabilities, workflow and scheduling limitations to determine whether the program can be changed within the existing system.

Beneficiary will assist in developing application software based on specific needs. He will provide technical evaluation of new products, assess time estimation and provide technical support within the organization. Beneficiary will be responsible for trouble shooting, installation and design and development of software applications. He will maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

Beneficiary will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and to describe logical operations involved by making use of his knowledge of computer science. Beneficiary will also prepare manuals to describe installation and operating procedures.

Although the petitioner's CEO stated, "The duties [of the proffered position] are clearly those of a specialty occupation," she did not state the specific degree required by the proffered position. The itinerary document provided states that the beneficiary would work at the petitioner's offices throughout the period of requested employment. However, the summary of the terms of the beneficiary's employment states, *inter alia*:

The [beneficiary] shall work out of [the petitioner's] office located in Glendale, AZ. [The beneficiary] recognizes and accepts that he may be required to work anywhere in the United States for extended periods of time.

The diplomas provided show that the beneficiary has a bachelor's degree in mechanical engineering awarded by Jawaharlal Nehru Technological University in India, and a master's degree in electronic commerce awarded by the University of Sunderland, also in India.

On April 26, 2008, the service center issued an RFE in this matter. The service center requested additional evidence that the petitioner would employ the beneficiary in a specialty occupation, noting that, if the petitioner would provide the beneficiary to another company to work on that other company's projects, the petitioner must demonstrate that the end-user of the beneficiary's services would occupy the beneficiary with specialty occupation work.

The service center also requested that, if the beneficiary would work for an end-user other than the petitioner, the petitioner provide copies of the contracts and work orders pursuant to which the beneficiary would work. The service center noted that such documentation should specifically name the beneficiary as selected to perform the work and provide a detailed description of the duties the beneficiary would perform, the qualifications required to perform those duties, and the identity of the person who would supervise the beneficiary's performance of his duties. The service center also specifically requested that the petitioner provide copies of any contracts between the petitioner and the beneficiary.

In response, counsel submitted: (1) a letter, dated October 6, 2008, on the petitioner's letterhead, from a person who identified herself as a "Human Capital Management Group-Projects" employee; (2) a Software Development Agreement, ratified February 4, 2008 by the petitioner's director and the president of Positive Resource Group (PRG); (3) a Work Order, also dated February 4, 2008, ratified by the president of PRG and the petitioner's director; (4) a letter, dated June 2, 2008, from the president of PRG to the petitioner's director; (5) copies of contracts and documentation pertinent to clients and projects to which the beneficiary has no apparent connection; (6) an employment contract between the petitioner and the beneficiary; (7) lists of beneficiaries for whom the petitioner had filed H-1B visa petitions; and (8) counsel's own letter, dated July 15, 2008.

The October 6, 2008 letter from the petitioner's Human Capital Management Group-Projects employee states that the beneficiary is scheduled to work on the *iHireRight360* project and would work throughout the period of requested employment at the petitioner's own office in Glendale, Arizona. The petitioner provided various documents pertinent to that project.

The Software Development Agreement provides the terms pursuant to which the petitioner would provide services to PRG. In the section entitled "Work Orders," it states, "Each work order shall contain . . . [the] [n]ames of [petitioner's] personnel delivering Services [under that work order]." The Work Order states that the commencement and termination dates of the project, and the timetable pursuant to which each phase of the project is to be completed are "As per the Project Plan." No project plan was provided. The beneficiary is not named in that work order.

The June 2, 2008 letter from PRG's president states, "[The beneficiary] is a short[-]listed candidate to work on the [*iHire360Control software*] project as programmer analyst." It states that the work would be performed at the petitioner's Glendale location and co-managed by the petitioner and PRG. The AAO notes that neither the contract, nor the work order, nor the letter from PRG's president, nor any other evidence in the record indicates that the beneficiary has been selected to work on the PRG project.

The beneficiary's employment contract reiterates that, "[The beneficiary] may be required to work at clients' locations anywhere in the United States for extended periods." It further states, "[The petitioner], in its discretion, shall have the right, at any time during the term of this assignment, to assign the [beneficiary] to perform duties different in any manner whatsoever from the duties originally assigned and specified."

Although the petitioner's Human Capital Management Group-Projects employee stated that the beneficiary would work on the PRG project throughout the period of requested employment, no evidence corroborates that the project will last throughout the period of requested employment, no evidence corroborates that the beneficiary has been selected to work on it, and the petitioner reserved the right, in the agreement between the petitioner and the beneficiary, to reassign the beneficiary to other duties in other locations.

One of the lists of H-1B beneficiaries the petitioner provided indicates that the petitioner currently has 49 H-1B workers. Another list identifies 66 H-1B workers whom the petitioner transferred to SQA Labs on December 31, 2005.

In his own letter of July 15, 2008, counsel stated that the petitioner has been operating in multiple states including Indiana, Kentucky, California, Florida, New York, Arkansas, Minnesota, North Carolina, Georgia, Colorado, Texas, New Jersey, Connecticut, Illinois, and Washington. Counsel also stated that the petitioner "exercises day-to-day control over the work of its employees and retains total control over the ability to hire or terminate the services of [the] Beneficiary." Finally, counsel stated, "[The] Beneficiary will report to the Director of Business Operations and Management, [REDACTED]"

The director denied the petition on September 9, 2008, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A); had not, therefore, established that the proposed position qualifies for classification as a specialty occupation; and had not demonstrated that it has standing to file a visa petition as the beneficiary's agent or his prospective employer.

On appeal, counsel reiterated the position that the petitioner would be the beneficiary's actual employer. Counsel asserted that position had been established by a preponderance of the evidence, given that the record contains no evidence to the contrary. Counsel also reiterated that the petitioner would employ the beneficiary in a specialty occupation, citing the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and DOL's *O*Net Online* Internet site as

support for the proposition that programmer analyst is a position in a specialty occupation. Neither of those two DOL information sources, however, supports the petitioner's position.

The AAO will now address the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner establishes that the proffered position is one for which the normal minimum requirement for entry is a baccalaureate degree, or its equivalent, in a specific specialty.

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.¹ The *Handbook* discusses programmer analyst positions in the section entitled Computer Systems Analysts. It describes programmer analyst positions 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. (A separate section on computer software engineers and computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

The referenced section of the 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 January 4, 2012).

Programmer analyst positions, then, combine the duties of computer systems analysts and computer programmer. The *Handbook* describes the duties of computer systems analysts 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.

¹ 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.

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.

The *Handbook* discusses computer programmer duties in the section entitled Computer Software Engineers and Computer programmers, where it describes the duties of computer programmer positions as follows:

Computer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the *Handbook*). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos303.htm> (last accessed January 4, 2012).

The duties attributed to the proffered position in the petitioner's CEO's letter of April 3, 2008 are generally consistent with such a blend of the duties of a computer systems analyst and those of a computer programmer. The AAO finds, therefore, that if that duty description is reliable, the proffered position is, in fact, a programmer analyst position. The *Handbook* describes the educational requirements of 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.

A preference for a bachelor's degree is not a minimum requirement. Further, a preference for a bachelor's degree in computer science, information science, applied mathematics, engineering, or the physical sciences is yet more clearly not a requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty. That section of the *Handbook* does not suggest that programmer analyst positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Contrary to counsel's assertions, *O*Net Online* does not indicate that the proffered position is a specialty occupation position. *O*Net Online* does not state a requirement of a bachelor's degree for programmer analysts. Rather, it discusses programmer analyst positions in the section entitled Computer Systems Analysts (15-1051.00), and assigns those positions a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the *O*Net Online* does not indicate that, where required, by Job Zone Four occupations, four-year bachelor's degrees must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position's being a specialty occupation by virtue of requiring a minimum of a bachelor's degree, or the equivalent, in a specific specialty.

The AAO finds not only that the proffered position's inclusion within the computer programmer analyst occupation would not in itself qualify the position as a specialty occupation, but also that the record of proceeding contains no evidence that otherwise qualifies the position as one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

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

Next, the AAO will consider 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 noted above, the *Handbook* provides no support for the position that the petitioner's industry, or any other, requires programmer analysts to have a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence of the existence of a professional association of programmer analysts that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a prerequisite for entry. Counsel provided no letters or affidavits from others in the petitioner's industry attesting to such a requirement.

In short, counsel provided no evidence that a requirement that programmer analysts possess a minimum of a bachelor's degree or the equivalent in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to 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 criterion 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 may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered is so complex or unique that it can be performed only by an individual with a degree.

The duties attributed to the proffered position, however, appear to be the duties typical to programmer analyst positions in general. Nothing in the record suggests that the proffered position is more unique or more complex than programmer analyst positions performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

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 qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider 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.

Again, however, the duties of the proffered position appear to be the generic duties of a programmer analyst position. The record contains no indication that the nature of those duties is sufficiently specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

Yet further, the employment contract executed by the beneficiary and the petitioner's CEO indicates that the petitioner reserves the right, at its convenience, to assign the beneficiary to "perform duties different in any manner whatsoever from the duties originally assigned and specified." Even if the duties described in the petitioner's CEO's April 3, 2008 letter were clearly specialty occupation duties, that clause in the beneficiary's employment contract would prevent the AAO from finding that the petitioner would employ the beneficiary in a specialty occupation.

For all of the reasons above, the petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Furthermore, the petitioner's admission that, rather than working at the duties described, the beneficiary may be assigned to other duties, precludes a finding that the proffered position is a specialty occupation under 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 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's 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.

In summary, the AAO finds that the director was correct 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.

The remaining basis pursuant to which the director denied the visa petition was her finding that the petitioner has not demonstrated that it has standing to file the instant visa petition either as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii) or as an agent within the meaning of that term at 8 C.F.R. § 214.2(h)(2)(i)(F).

The AAO observes that the petitioner has never claimed an agency relationship with the beneficiary. The remaining issue before the AAO is whether the petitioner has established that it meets the regulatory definition of an intending United States employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has 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." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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 regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

"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.

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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 a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 182(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 U.S. Citizenship and Immigration Services (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."² 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)).³

² 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.

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of

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

"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), *aff'd*, 27 F.3d 800 (2nd 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).

service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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 "Summary of Terms of Oral Agreement under Which Beneficiary will be Employed," the petitioner made explicit that the beneficiary may be required to work anywhere in the United States for extended periods of time. The service center requested, *inter alia*, that the petitioner identify the people who would assign the beneficiary's duties and supervise his performance at those alternative locations.

In response, counsel confirmed that the petitioner has employees in at least 15 of the United States, and asserted that the beneficiary would be supervised by [REDACTED], the petitioner's Director of Business Operations and Management. Counsel did not state his basis or provide any corroborating evidence for his assertion that [REDACTED] would supervise the beneficiary's work at whatever location to which the petitioner might assign him.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Notwithstanding that the service center explicitly requested the identity of the people who would supervise the beneficiary's performance at the locations to which he would be assigned, the petitioner provided no evidence on that point.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien 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

alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Absent full disclosure of all of those relevant factors, the AAO is unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The AAO finds that the petitioner has not demonstrated that it is the beneficiary's prospective employer and has not, therefore, demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the visa petition will be denied on this additional basis.

The record suggests an additional issue that was not addressed in the decision of denial.

The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition" In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The visa petition states that the beneficiary would work in the petitioner's Glendale, Arizona location. The LCA is certified for employment in Glendale, Arizona, and is valid for employment only in that immediate area.

On the itinerary and in various other submissions, the petitioner and counsel have asserted that the beneficiary would work in Glendale. However, the summary of the terms of the oral agreement pursuant to which the petitioner would employ the beneficiary makes clear that the petitioner reserves the right to assign the beneficiary to any other location in the United States at its convenience. The written employment contract subsequently submitted reiterates that the petitioner retains that right. That the petitioner has explicitly reserved the right to assign the beneficiary wherever in the United States its needs might dictate precludes the AAO from finding that the petitioner has demonstrated that the beneficiary would work in or near Glendale, Arizona.

Thus, the petitioner has not demonstrated that the LCA submitted corresponds to the visa petition, as it has not demonstrated that the beneficiary would work in the location for which that LCA is approved. The appeal will be dismissed and the visa petition will be denied for this additional reason.

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 (9th 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).

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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.