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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



D2

Date: **JUL 03 2012** 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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*for Michael T. Kelly*  
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 a computer consulting and training firm. To continue to employ the beneficiary in what it designates as a systems analyst position, the petitioner endeavors to classify her 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 it has an employer-employee relationship with the beneficiary. On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

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 submissions on appeal.

The AAO will first address the specialty occupation basis of denial.

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 AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

With the visa petition, counsel submitted evidence sufficient to show that the beneficiary has a bachelor's degree in mathematics, statistics, and computer science from Osmania University in India, and a master's degree in computer science awarded by Eastern Michigan University.

Counsel also provided a letter, dated November 3, 2010, from the petitioner's human resources manager. That letter provides the following description of the duties of the proffered position:

Specifically, as a Systems Analyst, the beneficiary will analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of the systems problems and then design a system of computer programs and procedures to resolve these problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already existing technological resources to additional operations that will streamline our clients' business processes. The process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques including, structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject-matter operations to be automated, specify the number and type of records, files and documents to be used as well as format the output to meet user's needs. As a Systems Analyst, the beneficiary is also required to develop complete specification and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems and recommend computer equipment changes to obtain more effective operations.

The petitioner's human resources manager also stated, "As with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field."

The concession that the proffered position may be filled by a person with an otherwise undifferentiated degree in engineering indicates that the proffered position does not require a minimum of a bachelor's degree or the equivalent in a specific specialty and is not a specialty occupation position.

This is because the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. A position that can be filled by a person with a degree in any of a wide array of subjects, such as the various fields that make up the general area of engineering, is not a specialty occupation position. The assertion that a degree in engineering, without further specification, is a sufficient qualification for the proffered position is tantamount to an admission that the proffered position is not a specialty occupation position. This is a sufficient reason, in itself, to dismiss the appeal and deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue, in order to identify other evidentiary deficiencies that preclude approval of this petition.

On February 18, 2011, the service center issued an RFE in this matter. The evidence requested by the service center is not directly relevant to the specialty occupation issue, but the evidence submitted in response has some relevance.

In response, counsel provided a letter, dated March 18, 2011, from the petitioner's administration manager. That letter states:

The petitioner has directly hired the Beneficiary, and as such, the Beneficiary will at all times be under the control and authority of the Petitioner during the requested validity period.

\* \* \* \*

[The petitioner] contracted with [redacted] who contracted with another vendor, [redacted] contracted with [redacted] who is the company through which [the beneficiary's]

services are provided to [REDACTED] is the end-client company through which [the beneficiary's] will be working on a project for [REDACTED] at its office in Detroit, Michigan.

Contracts between the petitioner and [REDACTED] partially confirm the petitioner's administration manager's assertions pertinent to the chain of contracts pursuant to which the beneficiary would work at [REDACTED] office. A letter from [REDACTED] business development director, dated March 18, 2011, however, confirms that the beneficiary was then working at [REDACTED] location, and was expected to continue through July 31, 2011, with extensions through 2012 possible.

The contract between [REDACTED] was not provided, nor was any other evidence of the asserted contractual relationship between them. As such, whether the chain of contracts described by the petitioner's administration manager is accurate is unknown to the AAO, as any number of intervening contracts could exist between [REDACTED] and [REDACTED]. However, as the relationship between the petitioner and the end-user of the beneficiary's services is already very attenuated, this difference would be of little importance.

The AAO observes the period of requested employment in this case is from November 27, 2010 to November 26, 2013, and that [REDACTED] business development director confirmed only that the beneficiary was expected to continue working at [REDACTED] location through July 31, 2011. Although he stated that further extension was possible, he did not even indicate that it was likely.

In his March 28, 2011 letter, the petitioner's administration manager stated that the beneficiary's assignment to [REDACTED] is expected to last throughout the requested validity period, and cited [REDACTED] business development director's letter as evidence of that duration. He explained that "Due to company policies, businesses that contract workers are often unable to issue work orders in increments greater than a fixed number of years; however, the work orders are routinely extended at the end of that term for as long as the project is ongoing."

The immediate issue in this case is not the language of a work order, but the language of the March 16, 2011 letter from [REDACTED] business development director. That letter states that the beneficiary's tenure at [REDACTED] location was expected to continue through July 31, 2011. The record contains no indication, other than the petitioner's administration manager's uncorroborated assertion, that the beneficiary would likely continue to work for [REDACTED] after that, or that the petitioner has any projects upon which to employ the beneficiary after July 31, 2011. Further, even if the "possible" extensions were to occur, [REDACTED] business development manager indicated that they would only continue through 2012. Even those "possible" extensions would not cover the entire period of employment requested in this case.

Counsel also provided the employment agreement between the petitioner and the beneficiary. The agreement states, in part:

[The beneficiary] agrees that [her] duties shall be primarily rendered at [the petitioner's] business premise or at such other places as the [petitioner] shall in good faith require.

It further states:

If [the beneficiary] is directed to render services away from [the petitioner's] business premises, [the beneficiary] shall report back to [the petitioner] one time(s) per month for an evaluation of progress, performance, and goals.

Although that agreement does not state who would assign the beneficiary's duties and supervise her performance, that the beneficiary would meet with the petitioner one time per month during her assignment at [redacted] location strongly suggests that the petitioner would not exercise any such degree of supervision.

As was stated above, the court in *Defensor, supra*, recognized that where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The requirements of [redacted] therefore, are the critical requirements in this case, at least for so long as the beneficiary would work at [redacted] location on their project.

The March 18, 2011 letter from [redacted] business development director states the following duties of the proffered position:

- Be a part of the team to design and develop Java, J2EE based web application for the City of Detroit's Department of Buildings, Safety Engineering and Environmental Department Project and income tax.
- Use expertise in Struts 2, SQL, java, Javascript, we services, JBoss and related technologies to develop new robust applications for our client – City of Detroit.
- Maintain existing applications in production on need basis.

[redacted] business development director further stated that the beneficiary is working as a Software Programmer. The AAO observes that the duties described are, in essence, developing new applications and maintaining existing applications.

The AAO notes that the LCA submitted to support the instant visa petition states that the beneficiary would work as a computer systems analyst. The letter from [redacted], for whom the petitioner's administration manager states that the beneficiary would work throughout the period of requested employment, indicates that the beneficiary is not working for them as a systems analyst, but as a computer programmer. Those are two different positions. The significance of that difference will be further discussed below. For the moment, however, the AAO observes that, unless the beneficiary would be employed as a systems analyst, as stated on the visa petition and the LCA, the visa petition could not be approved. However, consistent with *Defensor, supra*, the AAO will analyze the specialty occupation issue pursuant to the duties described by the business development manager at [redacted] which is the proposed end-user of the beneficiary's services.

The director denied the petition on April 18, 2011, finding, *inter alia*, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty.

On appeal, counsel provided five vacancy announcements, and a brief. The vacancy announcements will be discussed below.

In his brief, counsel cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* and the Occupational Information Network (O\*NET) for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We 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 normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> In this instance, the petitioner may be able to meet this criterion by (1) establishing the occupational classification under which the proffered position should be classified and (2) providing evidence that an authoritative, objective, and reliable resource, such as the *Handbook*, supports the conclusion that this occupational classification normally requires a bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation in the United States.

In the chapter entitled "Computer Programmers," the *Handbook* provides the following descriptions of the duties of those positions:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

More specifically, the *Handbook* states:

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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 2012-2013 edition available online.

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

The quoted sections excerpts from the U.S. Dept. of Labor's Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., are available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm>. (Last accessed June 25, 2012).

The duties that [REDACTED] business development manager stated that the beneficiary would continue to perform during his work on [REDACTED] developing new applications and maintaining existing applications, are entirely consistent with the duties of computer programmers as described in the *Handbook*. The AAO finds that the duties described demonstrate that the beneficiary is working as a computer programmer on the [REDACTED]

The aforementioned chapter of the *Handbook* that discusses computer programmers includes this statement about the educational requirements for computer programmer positions:

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject.

That most computer programmers have a bachelor's degree in computer science or a related subject does not indicate that it is a minimum requirement. Rather, it implies that some computer programmer have a degree in some other subject, or have no degree at all. Further, the *Handbook* makes explicit that an associate's degree is a sufficient qualification for some computer programmer positions. Inclusion in that job category is not indicative of a particular position being a specialty occupation position.

Further, the AAO finds that, to the extent that they are described by [REDACTED]'s business development manager, the duties that the beneficiary is performing and will continue to perform while working on [REDACTED] developing new programs and modifying existing programs, are the generic duties of any software development position. They indicate a need for knowledge of programming, but do not establish any particular level of formal education as minimally necessary to attain such knowledge.

As the evidence in the record of proceeding has not established that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the

particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 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* does not report that the petitioner's industry normally requires computer programmers 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 computer programmers 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.

The five vacancy announcements provided are for positions designated as Systems Analyst, Information Systems Analyst, IT Healthcare Business Systems Analyst, SAP Systems Analyst, and Operations Systems Analyst I. Whether those positions are parallel to the proffered position is not clear from the job titles or from the descriptions provided of the positions' duties. The AAO observes, initially, that those vacancy announcements are only relevant if the beneficiary would perform systems analyst duties, and the letter from [REDACTED] business development manager indicates that he would not, at least while working on [REDACTED] project.

Additionally, the employers who posted those vacancies are Fidelity, an investment broker/counselor; [REDACTED], a manufacturer of various communications systems; Optimize, a management consulting service; an unidentified manufacturer of optical devices in Sugar Land, Texas; and [REDACTED] another management consulting service. None of those employers appear to be in the petitioner's industry.

Three of the vacancy announcements provided state that the positions announced require a bachelor's degree, but not that the requisite degrees must be in any specific specialty. The petitioner cannot, therefore, demonstrate that the proffered position in the instant case requires a minimum of a bachelor's degree or the equivalent in a specific specialty by virtue of some perceived similarity to them.

One announcement states that the position announced requires a bachelor's degree in computer science. One vacancy announcement states that the position requires a bachelor's degree in computer science or management information systems. Although those are somewhat different subjects, the AAO finds that those two subjects might be considered to be within a specific specialty.

Those five vacancy announcements, considered together, demonstrate only that some positions in the computer systems analyst field require a minimum of a bachelor's degree or the equivalent in a specific specialty. They do not demonstrate that any other particular position requires a minimum of a bachelor's degree or the equivalent in a specific specialty by virtue of being designated a systems analyst position, and have no relevance to whether the work the beneficiary would perform, at least while working on projects of [REDACTED], qualifies as specialty occupation work.

Further, even if all five positions were demonstrated to be for parallel positions in the petitioner's industry with organizations similar to the petitioner and unequivocally required a minimum of a bachelor's degree or the equivalent in a specific specialty, the submission of the five announcements is statistically insufficient to demonstrate an industry-wide requirement.<sup>2</sup> The record contains no independent evidence that the announcements are representative of common recruiting and hiring practices for the proffered position in the petitioner's industry.

The petitioner has not demonstrated 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 establishes that, notwithstanding that other computer programmer positions in the petitioner's industry may not require a minimum of a bachelor's degree, or the

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<sup>2</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from five job postings with regard to determining the common educational requirements for entry into parallel positions in similar computer consulting organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of computer programmer, or systems analyst, for a small computer consulting company required a bachelor's or higher degree in a specific specialty or its equivalent, it could not be found that such a limited number of postings that may have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position may not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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 credentials.

The description of the duties the beneficiary is performing and would perform for [REDACTED] however, developing new programs and maintaining existing applications, contain no indication of complexity or uniqueness beyond the ken of a computer programmer without a specialized degree or the equivalent. Instead, they are an abstract description of the generic duties of computer programmers in general. As such, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to others the petitioner may previously have recruited or hired to fill the proffered position. 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).<sup>3</sup>

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree, or the equivalent, in a specific specialty.

However, developing new programs and maintaining existing programs are the routine duties associated with computer programmer positions in general. This generalized description of generic duties contains no indication of complexity and specialization that would require knowledge usually associated with at least a bachelor's degree or the equivalent in a specific specialty, especially relative to other computer programmer positions that, according to the *Handbook*, normally do not have such a minimum entry requirement. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO reiterates that, as recognized by the court in *Defensor v. Meissner, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The record contains insufficient evidence to demonstrate who would be the end-user of the beneficiary's services from July 31, 2011 through November 26, 2013, which is the end of the requested period of employment. The record contains, therefore, no description of the work the beneficiary would identify for that unidentified entity.

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<sup>3</sup> 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 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").

Even if the beneficiary's proposed employment prior to July 31, 2011 had been demonstrated to be specialty occupation work, which it has not, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary after July 31, 2011 would preclude a finding that, from that date through the end of the period of requested employment, the beneficiary's work would qualify as specialty occupation employment 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 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.

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, the petitioner had secured work of any type for the beneficiary to perform from July 31, 2011 through the end of 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 petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The other independent ground upon which the decision of denial was based is the director's finding that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective United States employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and as that term is defined at 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).

As set out above, 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."<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 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

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).

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

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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).

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, the answer 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).

The evidence pertinent to the employer-employee issue has already been described.

In his March 18, 2011 letter, the petitioner's administration manager stated that, as the petitioner directly hired the beneficiary, the beneficiary would "at all times be under the control and authority of the Petitioner during the requested validity period." The AAO observes that, as no one factor is decisive, the administration manager's conclusion does not follow. As is clear from the discussion, above, pertinent to the law governing this issue, that the petitioner has executed an employment contract with the beneficiary is not controlling.

In that same letter, the petitioner's administration manager described a chain of companies through which it would provide the beneficiary to work for [REDACTED] location. The record contains no indication that the petitioner would provide a supervisor to assign duties to the beneficiary and to supervise her performance. The only evidence pertinent to contact the beneficiary would have with the petitioner during her assignment to [REDACTED] is the employment contract between the petitioner and the beneficiary, which indicates that the beneficiary would report to the petitioner once per month for an evaluation of progress, performance, and goals.

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 would 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.

As reflected in this decision's earlier comments with regard to the evidentiary deficiencies of this petition, the record of proceeding contains no evidence that the petitioner would assign the beneficiary's duties or directly supervise her day-to-day performance during her assignment to [REDACTED] and her subsequent assignment, if any, after the termination of the [REDACTED] assignment. The AAO finds, therefore, that the petitioner has not demonstrated that it would have an employer-employee relationship with the beneficiary. 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 LCA submitted to support the visa petition was certified for a systems analyst position. The March 18, 2011 letter from [REDACTED] business development director, however, states that the beneficiary "consults as a Software Programmer." Further, as was observed above, the duties described in that letter are, in essence, developing new programs and modifying existing programs. Those duties, and that job title, are entirely consistent with a computer programmer position as described in the *Handbook*. They are inconsistent with a systems analyst position.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

[Italics added]

In this case, the March 18, 2011 letter from [REDACTED] business development director indicates that the beneficiary would work as a computer programmer, rather than as a systems analyst. The AAO finds that the LCA submitted in support of the visa petition does not correspond with the visa petition.<sup>6</sup> The visa petition must be denied on this additional basis.

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approval of the previous nonimmigrant petition filed on behalf of the beneficiary. If the previous nonimmigrant petition was approved based on the same evidence

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<sup>6</sup> The AAO notes that the "visa petition," in this context, does not mean only the Form I-129 Petition for a Nonimmigrant worker. It includes "[a]ny evidence submitted in connection with the application or petition," including, in this case, the March 18, 2011 letter from [REDACTED] business development director. *See* 8 C.F.R. § 103.2(b)(1).

contained in the current record, that approval would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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