

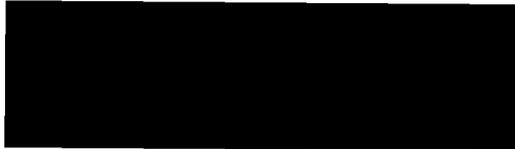
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: **MAR 06 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:

**INSTRUCTIONS:**

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition the petitioner stated that it is a software development and consulting firm with 40 employees. To continue to employ the beneficiary in a position 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). To support the visa petition, the petitioner provided a certified Labor Condition Application (LCA) that states that the beneficiary would work at the petitioner's offices in Fremont, California and in Dublin, California. The LCA is not approved for work at any other location.

The appeal is filed to contest each of the three independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the LCA in this case is valid for the location or locations where the beneficiary would work, and (3) that the petitioner has standing to file the visa petition as a United States employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent within the meaning of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

The AAO bases its decision upon its review of the entire record of proceedings, 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 in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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.

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.

The regulation at 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 (5<sup>th</sup> Cir. 2000) (hereinafter referred to as *Defensor*). 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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor’s *Occupational Outlook Handbook (the Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content.

A letter from the petitioner’s president, dated April 11, 2009, accompanied the visa petition. It includes the following list of the duties of the proffered position, as proposed by the petitioner:

- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced. (20%)
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct. (20%)
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program. (15%)
- Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment. (15%)
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes. (5%)
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements. (5%)
- Write, analyze, review, and rewrite programs, using workflow charts and diagrams, and applying knowledge of computer capabilities, subject matter, and symbolic logic. (5%)
- Write or contribute to instructions or manuals to guide end users. (5%)
- Investigate whether networks, workstations, the central processing unit of the system, or peripheral equipment are responding to a program’s instructions. (5%)

- Prepare detailed workflow charts and diagrams that describe input, output, and logical operation, and convert them into a series of instructions coded in a computer language. (5%)

A letter dated April 11, 2009, in which the petitioner offered employment to the beneficiary, was also provided with the visa petition. Neither letter identified the end-user of the beneficiary's services or where the work would be performed.

Because the evidence submitted did not demonstrate that the visa petition was approvable, the service center issued an RFE in this matter on April 21, 2009. The service center requested, *inter alia*, (1) a floor plan of the petitioner's offices; and (2) copies of signed and valid contracts and statements of work (SOWs) between the petitioner and end-users of the beneficiary's services specifically stating that the beneficiary would work pursuant to the SOWs and detailing his duties and the qualifications required to perform those duties. The service center noted that, if intermediary companies existed between the petitioner and the end-user of the beneficiary's services, the petitioner should provide contracts tracing the petitioner's relationship through those intermediaries to the end-users.

The RFE also requested the following information:

a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues or locations where the services will be performed for the period of time requested . . . .

In his response to the RFE, counsel stated:

[The] petitioner is not an agent for the Beneficiary, but is the actual employer. [The petitioner] is and will remain the actual employer of the Beneficiary as defined in 8 C.F.R. § 214.2(h)(4)(i). At all times, [the petitioner] will retain the ability to hire, fire, pay, and otherwise supervise the work of the Beneficiary.

Counsel also provided a letter, dated May 29, 2009, from the petitioner's president. That letter states, "The Beneficiary will be providing software development and implementation services to our client companies located here in Pleasanton, CA." The AAO notes that the petitioner was then located in Fremont, California, and that it continues to be.

The petitioner's president stated that the beneficiary was then providing his services to [REDACTED] through [REDACTED] and that the petitioner expected that contract to continue to May 2010, when it might be extended. The petitioner's president provided a description of the services the beneficiary was expected to perform at [REDACTED]. The petitioner's president also stated, "The Beneficiary will work under [my] direct supervision . . . upon the approval of the H1B petition at all times."

Counsel provided various documents to demonstrate that the petitioner and Serenity have agreed that the petitioner will provide business intelligence (BI); extract, transform, and load (ETL); and application development services to Serenity. An undated "Statement of Project" indicates that the petitioner began providing those services on April 5, 2009 and confirms that the expected project completion date is May 2010. The location where the work would be performed is stated as Pleasanton, California. Although that undated document indicates that the petitioner was then working on that project, it does not indicate that, prior to the submission of the visa petition on April 15, 2009, the petitioner and Serenity had agreed that the beneficiary would work regularly on that project through May 2010.

Counsel also provided documents to demonstrate that [REDACTED] have agreed that [REDACTED] will provide BI, ETL, and application development services to [REDACTED]. Those documents state that the beneficiary and others are currently performing those services, but do not state what minimum qualifications Franklin requires of the person performing those services.

The AAO notes that the thrust of the service center's request for an itinerary was that it wanted a detailed explanation of where the beneficiary would work during what portions of the requested period of employment, what he would be doing, and for what end-user. Counsel's conclusory assertion that no employer/employee relationship would exist between the beneficiary and the end-user of his services did not satisfy that request. Further, although the period of requested employment continues through April 13, 2011, nothing in the record shows where the beneficiary would work after May 2010, what his duties would then consist of, or for whom he would perform them.

A floor plan of the petitioner's business office shows that it has seven work stations. As was noted above, the petitioner claims to have 40 employees.

The director denied the visa petition on June 10, 2009, finding, based on the three grounds described above, that the evidence did not demonstrate that the visa petition is approvable.

On appeal, as to the specialty occupation issue, counsel noted that the position is designated as a position for a programmer-analyst, and stated that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that such positions require bachelor's degrees.<sup>1</sup>

As to the issue of the location or locations where the beneficiary would work, counsel implied that the beneficiary would be employed only in the locations stated on the LCA throughout the period of intended employment.

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed July 15, 2001.

Counsel further stated, "The Itinerary contains a complete and detailed job description and explains that the Beneficiary will be posted at client site, [REDACTED] in Pleasanton, California . . . ."

As to the issue of whether the petitioner would be the beneficiary's employer, counsel asserted that the evidence demonstrates that the petitioner is qualified to be a U.S. employer, stating, "the Petitioner retains the ability to pay, hire, fire, supervise or otherwise control the work the [beneficiary]."

That the petitioner "retains the ability" to supervise or fire the beneficiary is insufficient. The petitioner must demonstrate not only that it has the contractual right and ability to maintain an employer/employee relationship with the beneficiary, but that such an employer/employee relationship is contemplated.

The petitioner claims to have 40 employees and has seven workstations at its offices. Clearly, the majority of its employees work elsewhere. Agreements provided confirm that the petitioner's employees routinely work at other companies' facilities, and that those other companies assign duties to them. Although the petitioner's president stated that he would personally supervise the beneficiary's performance of whatever duties were assigned to the beneficiary by whatever company, the record contains no explanation of how his personal supervision of numerous employees, at numerous locations, of duties assigned by various end-users is even possible, let alone likely.

Evidence in the instant case shows that the petitioner does not intend to assign the beneficiary to specific duties. Rather, it intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

Because the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that client of the petitioner who will be the end user of the beneficiary's services.

In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

In the instant case, the petitioner submitted its own description of the duties of the proffered position with the visa petition. Documents subsequently provided show that [REDACTED] have adopted that statement of the duties of the proffered position. [REDACTED], however, stated

that the duties of the proffered position require a minimum of a bachelor's degree or the equivalent in a specific specialty, or defined what specific specialty that requisite degree might be in.

The AAO will now apply to the evidence of record the specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As will now be discussed, the AAO finds that, because the evidence in the record of proceeding has not established that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The pertinent section of the 2010-2011 edition of the *Handbook*, its "Computer Systems Analysts" chapter, identifies programmer analysts as a subcategory of that occupation, which the *Handbook* generally describes as follows:

*Computer systems analysts* use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

The chapter briefly describes the Programmer Analysts subcategory 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 information on educational requirements in the *Handbook's* "Computer Systems Analysts" chapter indicates a bachelor's or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of computer systems analysts. That this occupational category accommodates a wide spectrum of educational credentials is reflected in the following paragraph that opens the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Computer Systems Analysts" chapter:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

The AAO notes that the paragraph's statement that "many employers prefer applicants who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. The *Handbook's* observation of a preference of "many employers" is not evidence that systems analysts positions normally require a bachelor's degree level of knowledge in a specific specialty. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter confirms this fact, as it states:

***Education and training.*** 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.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank may need some expertise in finance, and systems analysts who wish to work for a hospital may need some knowledge of health management. Furthermore, business enterprises generally prefer individuals with information technology, business, and accounting skills and frequently assist employees in obtaining these skills.

Technological advances come so rapidly in the computer field that continuous study is necessary to remain competitive. Employers, hardware and software vendors, colleges and universities, and private training institutions offer continuing education to help workers attain the latest skills. Additional training may come from professional development seminars offered by professional computing societies.

The *Handbook's* "Computer Systems Analysts" chapter's comments with regard to educational requirements - that employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field - is authoritative evidence that a bachelor's degree or higher in a specific specialty is not the normal minimum requirement for hiring systems analysts, or its subcategory of programmer analysts. In light of this occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers here would necessitate programmer analyst services at a level requiring the theoretical and

practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

That employers usually prefer applicants with at least a bachelor's degree does not suggest that a bachelor's degree is a minimum requirement for such positions. That chapter of the *Handbook* makes clear that some such positions do not require a bachelor's degree, but does not make clear that it is a minimum requirement for any positions. As it has not demonstrated that programmer-analyst positions typically require a bachelor's degree, the petitioner is obliged to demonstrate that the specific position proffered in the instant case, or its duties, are sufficiently complex that the position requires a bachelor's degree, notwithstanding that other programmer-analyst positions apparently do not.

Further, the petitioner is obliged to demonstrate not only that the proffered position requires a bachelor's degree, but that it requires a bachelor's degree *in a specific specialty*. A requirement of a degree in computer science, information science, applied mathematics, engineering, any of the physical sciences, or management information systems, or, in the alternative, an MBA, does not describe a requirement of a minimum of a bachelor's degree or the equivalent *in a specific specialty*. The petitioner is obliged, in order to prevail, to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. *Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988).

For the reasons discussed above, the petitioner has failed to satisfy the criterion at 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 observed above, the *Handbook* provides no support for the proposition that the petitioner's industry, or any other, requires programmer analysts to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of programmer analysts that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the software development and consulting industry.

The record contains no other evidence pertinent to recruitment and hiring practices to fill parallel positions in the petitioner's industry, and the petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other programmer analyst positions in the petitioner's industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The descriptions of the duties of the proffered position are the only evidence pertinent to its level of the complexity or uniqueness. Those duties, however, are the generic duties of a programmer analyst position. Consulting to determine the intended uses of programs, writing and rewriting programs, testing and repairing programs, and writing manuals and user guides, for instance, are manifestly within the duties of a typical programmer analyst position as described in the *Handbook*. The duties described contain no indication of complexity or uniqueness beyond the duties of typical programmer analyst positions, at least some of which the *Handbook* indicates do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

The AAO finds that the however, the duties described contain no indication of specialization or complexity beyond the duties of a typical programmer analyst position. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Because the petitioner has not satisfied any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), the proffered position cannot be classified as a position in a specialty occupation. The appeal will be dismissed and the petition will be denied on this basis.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. 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 petitioner and counsel imply that the beneficiary’s work would be performed exclusively in Fremont and Dublin, California, or, in the alternative, restricted to Alameda county. However, as previously noted, the evidence in the record projects the beneficiary’s proposed employment only through May of 2010, rather than to the end of the proposed period of employment on April 13, 2011. The evidence in the record does not establish where the beneficiary would work during the period from May 2010 through April 2011. Without specifically identifying the employers for whom the beneficiary would work throughout the employment period and when he would work for them, the petitioner cannot demonstrate that the beneficiary would be working within the area for which the LCA submitted to support the visa petition was approved. The appeal will be dismissed and the petition denied for this additional reason.

The remaining basis of the decision of denial is the director’s finding that the petitioner had not demonstrated that it has standing to file the visa petition as either the beneficiary’s prospective employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); or as an agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a “United States agent” to file a petition “in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.”

At the outset, the AAO notes that counsel asserted, at page nine of the response to the RFE, that the petitioner is the beneficiary’s prospective employer, rather than an agent, and the AAO agrees that the petitioner does not qualify as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). Thus, the remaining issue pertinent to standing is whether the director was correct in denying the petition on the basis that the evidence of record did not establish the petitioner as a United States employer.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a “United States employer” as authorized to file an H-1B petition. “United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

- (3) Has an Internal Revenue Service Tax identification number.

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. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that “United States employers” must file Form I-129 in order to classify aliens as H-1B temporary “employees.” 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms “employee,” “employed,” “employment,” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.”<sup>2</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

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<sup>2</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, 387-8 (5th Cir. 2000). 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.

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>3</sup>

Therefore, in considering whether or not one is an "employee" in an "employer-employee

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<sup>3</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 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).

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 (5<sup>th</sup> Cir. 2000) (determining that hospitals, as the recipients of beneficiaries’ services, are the true “employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the 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).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it or any of its clients will be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.”

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met.

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 directly 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 the

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 has already determined that the petitioner failed to demonstrate that it would employ the beneficiary in a specialty occupation, and failed to demonstrate that the LCA submitted is valid for employment in the locations where the beneficiary would work. Those findings are determinative of the appeal. The AAO is not obliged, therefore, to perform a detailed analysis of the issue pertinent to standing.

The AAO notes, however, that the salient statutes and 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). Therefore, the evidence submitted is salient to the employer/employee issue only if it relates to work existing for the beneficiary at the time the petition was filed. Although the evidence shows that the petitioner secured an engagement to which it could assign the beneficiary to work until May 2010, none of the evidence demonstrates that arrangement was in place on April 15, 2009, when the petitioner submitted the visa petition. Further, the record contains no evidence pertinent to any employment to which the petitioner could assign the beneficiary from May 2010 through the end of the period of requested employment on April 13, 2011.

Notwithstanding the statement that the petitioner would be the beneficiary's employer, the record contains insufficient evidence to demonstrate that assertion. The record does not establish where the beneficiary would work, who would assign his duties, or who would supervise his performance. Without evidence establishing the nature of the beneficiary's prospective employment during the requested period, the AAO is unable to find that the petitioner has demonstrated that it would have an employer/employee relationship with the beneficiary within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A)(2). The appeal will be dismissed and the petition will be denied on this additional basis.

The record suggests additional issues that were not raised in the decision of denial.

The petitioner is obliged, by 8 C.F.R. § 214.2(h)(2)(i)(B), to provide an itinerary as initial evidence submitted with the visa petition, unless the employment would be at one single location throughout the period of requested employment. The evidence submitted does not demonstrate that the beneficiary would work for Serenity at Franklin's location throughout the period of requested employment. The petitioner was obliged either to demonstrate that fact or to provide the requested itinerary. The petitioner provided an itinerary, but it is incomplete, in that it does not state where the beneficiary would work, or for whom, or what his duties would be from May 2010 through the end of the period of requested employment. The petitioner has not complied with the requirement of C.F.R. § 214.2(h)(2)(i)(B). The appeal will be dismissed and the petition denied for this additional reason.

The petitioner's failure to provide a complete itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B). Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the April 21, 2009 request for evidence, that the petitioner submit:

. . . a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names of the addresses of the establishment, venues, or locations where the services will be performed for the period of time requested . . . .

Because the itinerary submitted in response was incomplete, the AAO finds that the petitioner did not comply with that request.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, in addition to being required initial evidence,

as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. The appeal will be dismissed and the petition denied for this additional reason.

Further, none of the evidence submitted shows that Franklin had agreed that the beneficiary would regularly work at its location on its projects when the visa petition was filed on April 15, 2009. That is, none of the documents executed by Serenity and Franklin prior to April 15, 2009, when the visa petition was filed, mentions the beneficiary by name. The undated Statement of Project mentions the beneficiary by name, and indicates that he would continue working at Franklin's location through May of 2010, but the date that Statement of Project was executed is unclear. Further, as was noted above, the record contains no evidence that the petitioner has any work for the beneficiary to perform from the projected end of that project through April 13, 2011, the end of the period of requested employment.

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 during the requested period of employment, and especially during the latter portion of that period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The appeal will be dismissed and the petition denied on this additional basis.

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

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. The appeal will be dismissed and the petition denied.

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