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U.S. Citizenship  
and Immigration  
Services

DATE: **JUN 29 2013** OFFICE: VERMONT SERVICE CENTER

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 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,

Ron Rosenberg  
Acting 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 describes itself as a construction and remodeling and export of heavy equipment machinery firm established in 2008. In order to employ the beneficiary in what it designates as a [REDACTED] position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner (1) failed to establish that it would employ the beneficiary in a specialty occupation position; and (2) failed to establish that it has standing to file the visa petition as the beneficiary's prospective U.S. employer. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

At various times during the pendency of the instant visa petition, the petitioner has submitted documents in Spanish without English translations, which are required. *See* 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether that evidence supports the petitioner's claims. Accordingly, the untranslated evidence is not probative and will not be accorded any weight in this proceeding.

As will be discussed below, the AAO has determined that the director did not err in his decision to deny the petition on each of the bases specified in his decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO basis 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; (5) the Form I-290B and counsel's submissions on appeal; (6) the AAO's request for additional and missing evidence; and (7) the response to the AAO's request for additional and missing evidence.

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*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, a proposed 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 particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). 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 directly related to the duties and responsibilities of the particular position, 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, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a [REDACTED] position, and that it corresponds to Standard Occupational Classification (SOC) code and title 41-9031.00 Sales Engineers. The LCA further states that the proffered position is a Level III position.

The record contains evidence that the beneficiary received a civil engineering degree from the [REDACTED]. An evaluation in the record states that the beneficiary's foreign degree is equivalent to a U.S. bachelor's degree in civil engineering.

Counsel also submitted a letter, dated January 3, 2011, from the petitioner's vice president for business development, which contains the following description of the duties of the proffered position:

[The beneficiary] will plan and formulate aspects of research, partnership, development and business proposals to meet both our company's and our clients' objectives. He will be required to advise companies, institutions or other perspective [sic] clients in Latin America to coordinate a unified development of our offers. He will determine the best equipment and machinery and the appropriate applications for each of our client's [sic] business needs, and will forecast their future

development needs. As part of his daily functions, [the beneficiary] will recruit, hire, and supervise training of Sales and Technical staff. He will both evaluate performance and develop objectives for personnel.

Additionally, [the beneficiary] will 1) offer engineering and technical support techniques by collaborating with major developers, architects, general contractors and subcontractors on new architectural and engineering developments; 2) will apply his educational knowledge to advise current and potential clients on their technical needs; 3) will abide by general procedures, codes and laws in the development of products and services; 4) work with production and engineering to determine best products to best suit the need of the client; 5) will apply theories and principles of engineering to solve client technical problems.<sup>1</sup>

The petitioner's vice president further stated: "The [proffered position] requires at a minimum, a Bachelor's Degree in International Management or on an [sic] engineering field."

On February 15, 2011, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel provided: (1) a statement, dated March 30, 2011, from the beneficiary; (2) counsel's own letter, dated March 31, 2011; and (3) four vacancy announcements. The vacancy announcements will be discussed below.

In his March 30, 2011 letter, the beneficiary stated, "A bachelor's degree in Engineering or a related field is the minimum academic requirement for [the proffered position]."

The beneficiary further stated:

Specifically, the [person in the proffered position] cannot advise on equipment, machinery, parts and accessories without the technical knowledge and understanding of civil engineering projects and what equipment is needed to perform specific aspects of a civil engineering project. Such knowledge clearly cannot be obtained without university level studies in the field of engineering or a closely related technical field.

In his own March 31, 2011 letter, counsel stated:

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<sup>1</sup> The AAO observes that although the petitioner claimed, on the Form I-129, to engage in construction and remodeling, in addition to exporting heavy equipment, the duties of the proffered position and its job title suggest that the beneficiary's position would not entail duties pertinent to construction or remodeling, but would be limited to duties pertinent to sales of heavy equipment.

[T]he petitioner is part of a significant civil engineering conglomerate, which is relying on the petitioner to advise on and provide a variety of American made heavy machinery, equipment and parts for several years to come for the [REDACTED] and several other projects in Venezuela. The petitioner is also planning on conducting marketing and technical sales in other Latin American countries in the construction arena. **It is unrealistic to expect the petitioner's [REDACTED] to be able to function in this heavily technical engineering environment and engage expertly and efficiently in these conversations without having a civil engineering or closely related background.**

Counsel also provided an amended, but substantially similar, description of the duties of the proffered position. As to the educational requirements of the proffered position, counsel stated:

It is clear from the duties described above – which were previously submitted but have been amplified upon USCIS request – that the [proffered position] requires at a minimum a BA in an engineering or engineering/managerial field.

Counsel also stated, "There are no other employees now, or in the past, employed in this position with the petitioner."

The director denied the petition on April 12, 2011, finding, 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 in a specific specialty or its equivalent.

In the appeal brief, counsel asserted: "As stated in the I-129 and subsequent [RFE], the [proffered position] requires a civil engineering or closely related academic background in order to undertake the job duties . . . ."

Counsel also asserted: "The job duties presented with the initial filing and amplified in the RFE response make clear that the majority of the responsibilities CANNOT be performed without a civil engineering background." In explaining that assertion, counsel stated:

For example, it would be impossible for a [person in the proffered position] with no academic background in civil engineering to sit down with [a] client and understand the ramifications of the client's construction project and then advise the client on the type of U.S. made heavy machinery and equipment and parts he or she would require. It is the core of the job of Sales Engineer, after all, to comprehend the nature of a technical and complex project in order to advise a client on its technical and machinery needs.

Counsel also cited the Specific Vocational Preparation (SVP) rating of sales engineer positions as reported in the Occupational Information Network (O\*NET) Internet site as support for the proposition that the proffered position requires a bachelor's degree.

As a preliminary matter, it is noted that the petitioner and counsel have made contradictory claims regarding the minimum requirements necessary to perform the duties of the proffered position. Specifically, the petitioner's vice president stated, in his January 3, 2011 letter, that the proffered position requires a minimum of a bachelor's degree in "International Management or on an [sic] engineering field." In the beneficiary's March 30, 2011 affidavit, he stated, "[The knowledge required by the proffered position] cannot be obtained without university level studies in the field of engineering or a closely related technical field." In counsel's March 31, 2011 letter, he stated that the proffered position requires a minimum of a bachelor's degree in any branch of engineering or in an "engineering/managerial field." Counsel's assertion on appeal that the proffered position requires a minimum of a bachelor's degree in civil engineering or a closely-related field is not a reiteration of the petitioner's previous position as counsel implies. It is a marked shift from the previous assertions that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent to the position that it does.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's educational requirements. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Furthermore, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

These discrepancies aside, the claims by counsel and the petitioner of the petitioner's requirement of a general bachelor's degree in engineering is inadequate to establish that a position qualifies as a specialty occupation. The assertion that the duties of the proffered position can be performed by a person with a degree in any engineering discipline implies that the proffered position is not, in fact, a specialty occupation. 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. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree *in a specific specialty*, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least

a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degree required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

By asserting that a bachelor's degree in any field of engineering would be a sufficient educational qualification for the proffered position, the petitioner has effectively admitted that the proffered position does not require a minimum of a bachelor's degree in a specific specialty, or its equivalent, which is tantamount to conceding that the proffered position is not a specialty occupation position. This is sufficient reason, in itself, to dismiss this 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.

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.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

Counsel's reliance on the SVP rating of sales engineer positions is misplaced. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position.<sup>2</sup> It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. The SVP rating of the proffered position, even if established, would provide no insight into whether it requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

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<sup>2</sup> For an explanation of SVP levels see <http://www.onetonline.org/help/online/svp>.

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup>

In the "Sales Engineer" chapter, the *Handbook* provides the following description of the duties of those positions:

Sales engineers sell complex scientific and technological products or services to businesses. They must have extensive knowledge of the products' parts and functions and must understand the scientific processes that make these products work.

### **Duties**

Sales engineers typically do the following:

- Prepare and deliver technical presentations that explain products or services to customers and prospective customers
- Confer with customers and engineers to assess equipment needs and to determine system requirements
- Collaborate with sales teams to understand customer requirements and provide sales support
- Secure and renew orders and arrange delivery
- Plan and modify products to meet customer needs
- Help clients solve problems with installed equipment
- Recommend improved materials or machinery to customers, showing how changes will lower costs or increase production
- Help in researching and developing new products

Sales engineers specialize in technologically and scientifically advanced products. They use their technical skills to explain the benefits of their products or services to potential customers and to show how their products or services are better than their competitors' products. Some sales engineers work for the companies that design and build technical products. Others work for independent sales firms.

Many of the duties of sales engineers are similar to those of other salespersons. They must interest the client in buying their products or services, negotiate a price, and complete the sale. To do this, sales engineers give technical presentations during

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

which they explain the technical aspects of the product and how it will solve a specific customer problem.

Some sales engineers, however, team with salespersons who concentrate on marketing and selling the product, which lets the sales engineer concentrate on the technical aspects of the job. By working as part of a sales team, each member is able to focus on his or her strengths and expertise. For more information on other sales occupations, see the profile on wholesale and manufacturing sales representatives.

In addition to giving technical presentations, sales engineers are increasingly doing other tasks related to sales, such as market research. They also may ask for technical requirements from customers and modify and adjust products to meet customers' specific needs. Some sales engineers work with research and development (R&D) departments to help identify and develop new products.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Sales Engineers," <http://www.bls.gov/ooh/sales/sales-engineers.htm#tab-2> (last visited June 27, 2013).

The petitioner and counsel have asserted that the proffered position will require complex knowledge of the requirements of civil engineering projects and a comparison of those requirements to the capabilities of heavy machinery. That truth of that abstract assertion, however, has not been sufficiently demonstrated, nor have the petitioner and counsel provided any concrete examples of the knowledge necessary in order to sell heavy equipment. There is no evidence, nor even an assertion, that, for instance, in order to sell earth-moving equipment, one must know how many cubic yards of earth a particular model is capable of moving to what distance in the course of an hour, or that such knowledge is possessed solely by engineers, rather than being available to, for instance, heavy equipment operators, or readily available in, for instance, information manufacturers provide about their products. Without any concrete examples and corroborating evidence, the mere assertion by counsel and the petitioner that selling heavy equipment requires some esoteric, but unspecified, body of knowledge is insufficient, however often it is rephrased and repeated.

Counsel and the petitioner have implied, but not demonstrated, that the beneficiary would prepare and deliver technical presentations pertinent to the machinery the petitioner sells. Counsel and the petitioner have asserted, but provided no evidence to corroborate, that the proffered position would entail assessing equipment needs and determining requirements. The record does not contain even an assertion that the petitioner would modify the heavy equipment it sells to conform it to the needs of its customers or that, if it did, the beneficiary's knowledge of civil engineering would be important to those modifications. In short, although counsel and the petitioner have abstractly asserted that the proffered position is similar to a sales engineer position, counsel has provided insufficient evidence to support that assertion. The proffered position has not been shown to be a sales engineer position.

Nevertheless, the AAO will assume, *arguendo*, that the proffered position is a sales engineer position, in order to reach counsel's arguments pertinent to those positions.

As to the educational requirements of a sales engineer position, the *Handbook* states:

Sales engineers typically need a bachelor's degree in engineering or a related field. However, workers without a degree but with previous sales experience as well as technical experience or training sometimes hold the title of sales engineer. Also, workers who have a degree in a science, such as chemistry, or in business with little or no previous sales experience may be called sales engineers.

*Handbook*, 2012-13 ed., "Sales Engineers," <http://www.bls.gov/ooh/sales/sales-engineers.htm#tab-4> (last visited June 27, 2013).

That the *Handbook* indicates that sales engineers typically require a bachelor's degree in engineering or a related field does not suggest that the degree must be in any specific branch of engineering, such as civil engineering. As was explained above, an educational requirement that may be satisfied by a degree in any branch of engineering, rather than requiring a minimum of a bachelor's degree in a specific branch of engineering, is not a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent.

Thus, even if the counsel had demonstrated that the proffered position is a sales engineer position, that would not have been sufficient, in itself, to demonstrate that the proffered position is a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty, or its equivalent.

Further, to the extent that they are described in the record of proceeding, the duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of heavy equipment and sales. However, other than the unsupported assertion that selling heavy equipment inherently entails providing engineering expertise, those duties contain no indication that they would require any detailed technical knowledge, or that any particular level of formal, post-secondary education leading to a bachelor's or higher degree in a specific specialty is minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, in a specific specialty, or its equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

Counsel did, as was noted above, provide four vacancy announcements. They are for positions entitled Construction Materials OEM Sales Manager, Account Manager Engineering Sales, Sales Engineer, and Engineering/Professionals/Managers. One was placed by a company that identifies itself, not by name, but as a [REDACTED] Georgia." One was placed by [REDACTED] an engineering resource company. Another was placed by a concrete tank design and construction firm. The final announcement was placed by [REDACTED] an engineering staffing service. None were placed by companies that sell heavy construction equipment in either the domestic market or in foreign markets.

One of those announcements states that the position requires a minimum of a bachelor's degree in an engineering discipline or equivalent experience. As it does not state what experience the hiring authority would consider equivalent to a bachelor's degree in engineering, the AAO is unable to make an independent determination that it actually requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, within the meaning of the salient regulations. Further, as was explained above, an educational requirement that may be satisfied by a degree in any branch of engineering is not a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent. For both reasons, that announcement does not state a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent.

Another announcement states that the position it announces requires a bachelor's degree, and that: "[An] engineering degree is preferred though candidates with other technical or business degrees will be considered." That announcement does not contain a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent for various reasons. First, a preference for a degree in a specific specialty is not a minimum requirement. Second, as was noted above, a requirement that may be satisfied by a degree in any of the various engineering disciplines is not a

(b)(6)

requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent. Further, the announcement indicates that degrees in other technical subjects or in business may satisfy the educational requirements of the position announced.

The third vacancy announcement states that the position announced requires a bachelor's degree in civil or environmental engineering. That position does appear to require a minimum of a bachelor's degree in a specific specialty, or its equivalent.

The final vacancy announcement states a requirement of a four-year degree, but not that the degree must be in any specific specialty. The position thus announced does not appear to require a minimum of a bachelor's degree in a specific specialty, or its equivalent.

Each of those vacancy announcements contains at least some description of the duties of the position announced. There is insufficient evidence that those positions are for positions selling heavy construction machinery. Furthermore, there is insufficient evidence that those position descriptions shows that the positions announced could be considered parallel to the proffered position.

None of those vacancy announcements appears to be for a position parallel to the proffered position in an organization in the petitioner's industry and otherwise similar to the petitioner and requires a minimum of a bachelor's degree in a specific specialty or its equivalent. Further, even if all of the vacancy announcements were for positions parallel to the proffered position with an organization in the petitioner's industry and otherwise similar to the petitioner and unequivocally indicated a bachelor's degree in a specific specialty, or its equivalent, to be a prerequisite for the vacancies they announce, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from four announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>4</sup>

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<sup>4</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 four job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding the proffered position for organizations similar to the petitioner required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that may have been consciously selected could credibly refute the 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.

As the vacancy announcements provided do not establish that the petitioner has satisfied the requirement of the first alternative prong of 8 C.F.R. 214.2(h)(4)(iii)(A)(2), further analysis of the specific information contained in each of the vacancy announcements is unnecessary. That is, not every deficiency of every vacancy announcement has been addressed.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied 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 the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree in a specific specialty, or its equivalent.

The record contains no evidence that would differentiate the work of the proffered position from the work of other positions in heavy equipment sales. The petitioner sells heavy equipment. The beneficiary would sell heavy equipment and allegedly, in addition, recruit, train, and supervise a staff to sell heavy equipment. Counsel, the petitioner's vice president, and the beneficiary have all asserted that such duties inherently require a college education, although they have differed in their description of the requisite education. In any event, they have provided insufficient explanation and no corroborating evidence to support the conclusion that the proffered position is so complex or unique that it requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, which conclusion is especially questionable given that the *Handbook* indicates that, even if the proffered position were demonstrably a sales engineer positions, which it is not, it still might not require a minimum of a bachelor's degree in a specific specialty or its equivalent. Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will now consider the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the proffered position.<sup>5</sup> In his March 31, 2011 letter, counsel stated, "There are no other employees

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<sup>5</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").

now, or in the past, employed in [the proffered] position with the petitioner." The record contains no evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 in a specific specialty, or its equivalent.

Specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Notwithstanding that counsel and the beneficiary have asserted that the proffered position requires a civil engineering background, the evidence does not demonstrate that the beneficiary's duties would actually involve dispensing civil engineering advice, as claimed. The record establishes that the petitioner sells heavy equipment and that the beneficiary would represent the petitioner in the sale of heavy equipment. It is further alleged that the beneficiary would hire and supervise a team of sales people to sell heavy equipment, although the record does not establish that the petitioner presently has such a sales team for the beneficiary to supervise.

In any event, the proposed duties have not been described with sufficient specificity to show that they are so specialized and complex that they are usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 remaining basis cited in the director's decision to deny the visa petition is his finding that the petitioner has not established that it has standing to file the visa petition as the beneficiary's prospective U.S. employer.

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

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

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

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

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

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The director denied the petition based on the petitioner's failure to establish that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Applying a common-law test provided by the Supreme Court of the United States, the director concluded that the record does not establish that the petitioner will have an "employer-employee relationship" with respect to the beneficiary.

Although this relationship was not otherwise revealed initially, a Form 941 Quarterly Federal Tax Return for the third quarter of 2009 identified the beneficiary as the petitioner's president. In the February 15, 2011 RFE, the service center asked counsel to address the issue of the beneficiary's possible ownership of the beneficiary.

In his March 31, 2011 response to the RFE, counsel stated that the petitioner is owned in equal parts by two [redacted]. Counsel further stated, "[redacted] is owned 99% by [the beneficiary], **but he does not have any ownership interest in [redacted]**."

In his own affidavit, the beneficiary stated that he is the "titular president" of the petitioner, but did not reveal in what way his presidency of the petitioner is nominal, rather than actual. The beneficiary also reiterated that the petitioner is owned, in equal shares, by [redacted] that he has an ownership interest in [redacted].

On appeal, counsel emphasized that the beneficiary's ownership interest in the petitioner is indirect; that is, that the beneficiary owns, in large part, a company that owns 50% of the petitioner, rather than directly owning any portion of the petitioner. Counsel noted that a joint venture agreement indicates that [redacted] shall have equal control over the petitioner's management, operations, and activities, and equal veto power. Counsel stated: "Based on the joint venture agreement, and despite [the beneficiary's] nominative [sic] position as president of the CEO [sic], **he does not and cannot control the petitioner in any way.**"

Counsel cited *Administrator, Wage and Hour Div. v. Avenue Dental Care aka Mahadeep Virk, DDS*, 2006-LCA-29 (ALJ June 28, 2007) at pages 20 – 21, for the proposition that "more than 50% ownership interest may defeat the employer-employee relationship, but . . . a 50% interest does not."

As to that case, the AAO first observes that counsel has not demonstrated, nor even alleged, that a decision of an ALJ in a wage and hour dispute has any binding precedential power in this matter. Counsel is permitted, of course, to assert that the reasoning of any case is persuasive and should be extended. However, he did not, and the case cited appears to have no value as precedent. Further, that case does not contain the proposition for which counsel cites it, nor any related proposition. Yet further, if it did contain any such proposition, it would clearly be dictum, as the decision makes explicit that it was decided without reference to the plaintiff's possible partial ownership of the defendant company in that case.

In any event, counsel addressed various indices of an employer-employee relationship, and asserted that, based on the joint venture agreement, the petitioner would supervise and direct the beneficiary's work, and that the petitioner is able to fire the beneficiary.

The issue presented is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question is 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).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner as its sole member, sole employee, and managing member.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. 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) (2011). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2011). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (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").

Neither the legacy Immigration and Naturalization Service (INS) nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide 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)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (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. 254, 258 (1968)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be

addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

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. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>6</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii).

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<sup>6</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 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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 of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>7</sup>

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" 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).<sup>8</sup>

In the past, the legacy INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." *See id.*; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." *See Clackamas*, 538 U.S. at 440.

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<sup>7</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>8</sup> That 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).

Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *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 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (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).

Moreover and as detailed above, in addition to the sixteen factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). 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 established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." Counsel refers to the beneficiary as the petitioner's "nominative" president, by which, the AAO assumes, he means its "nominal" president, its president in name only. Counsel did not, however, detail the limitations on the beneficiary's powers as the petitioner's president, except by reference to the joint venture agreement pertinent to the petitioner's operation.

The joint venture agreement indicates that both Oserco and Botey have veto power over the petitioner's operations. Counsel asserts that the beneficiary owns 99% of [REDACTED]. Thus, notwithstanding the attenuated nature of his interest in the petitioner, the beneficiary has effective veto power over all of the petitioner's activities. This does not support the proposition that the petitioner would direct and control the beneficiary's activities and maintain the ability to fire him. To the contrary, it appears that the petitioner would be unable to do any of those things without the beneficiary's consent. Not only would the beneficiary control the petitioner, he would share in its profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed and the petition denied for this additional reason

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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.

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.

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