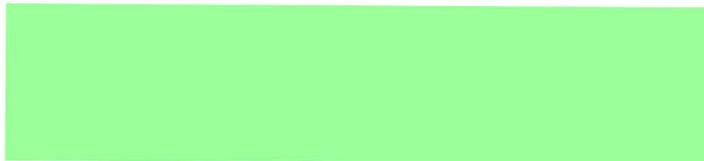




U.S. Citizenship  
and Immigration  
Services

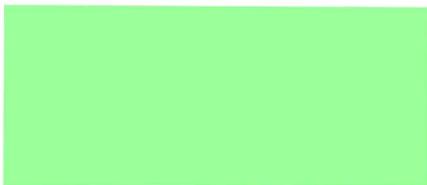


DATE: **MAY 31 2013** Office: CALIFORNIA SERVICE CENTER File:

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 (AAO) in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

*for Michael T. Helly*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on February 6, 2012. On the Form I-129 visa petition, the petitioner describes itself as a technology IT resources business with approximately 85 employees, established in 2004. In order to employ the beneficiary in a position to which it assigned the job title Programmer Analyst (QA), 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).

Upon reviewing the Form I-129 and the allied documentation submitted as support, the service center issued a request for additional evidence (RFE) which requested that the petitioner submit additional documentation to demonstrate that a valid employer-employee relationship will exist with the beneficiary for the duration of the requested H-1B validity period and to establish that the petitioner has the right to control the beneficiary for the duration of the requested H-1B validity period. The director provided a list of some of the types of specific evidence that could be submitted.

After reviewing the petitioner's response to the RFE, the director denied the petition, finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary. The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the RFE; (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish the proffered position as a specialty occupation in accordance with the applicable statutory and regulatory provisions. For this additional reason, the petition may not be approved.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a programmer analyst (QA) to work on a full-time basis at a salary of \$60,000 per year. In addition, the petitioner indicates that the beneficiary will be employed at

Among the documents submitted with the Form I-129 is a January 24, 2012 letter with the introductory heading, "Job Description and Letter of Support." This letter appears immediately behind an introductory page, on the petitioner's letterhead, which reads "Letter of Support." The letter is signed by the petitioner's president. (The AAO notes that the first sentence describes the letter as a "response to your request for evidence.") The letter's "Description of Position" section introduces the following list as "[s]ome of the major duties of the position":

1. Analyze requirements, data models and other documents to construct effective test scripts.
2. With direction, specify test cases and design scripts for efficient testing of data extraction, translation and load processes.
3. Interpret test plans to understand priorities, schedules, and expectations[.]
4. Review documented requirements to ensure testability, maintainability, accuracy and consistency. Document test coverage and traceability to requirements.
5. Develop test scripts and define test data for System Testing and Production Verification. This includes SQL scripts to validate data.
6. Execute test scripts and document test results[.]
7. Identify system defects and retest defect resolutions.
8. Design automated scripts for efficient testing of interfaces, data translations, batch outputs, or similar processes.

The AAO notes that the documents filed with the Form I-129 also include another letter, which is also dated January 24, 2012 and is also signed by the petitioner's president. This letter appears immediately behind a page, on the petitioner's letterhead, that states "H1B Petition Letter." In contrast to the petitioner's president's other letter of the same date, this one refers to the proffered position variously as that of a "Business Analyst" as well as that of a "Programmer Analyst (QA)."<sup>1</sup>

The opening paragraph of the letter references the proffered position as Programmer Analyst (QA). However, under the heading "Professional Nature of the Position Offered," the letter states that the Business Analyst would "perform the following job responsibilities":

This person will be responsible for applying his knowledge of him [sic] Programming analytical skills and Administration principles and practices to collect, review and analyze business and industry information in order to make recommendations to the management regarding effective business resources allocation, marketing, sales, consultancy, payroll, personnel, budget, small projects/programs, benefit analysis, legislative compliance analysis, research, and to his departmental functions. He would initially identify the different current work methods and resources and make suggestions, develop plans and work process methodologies for the management for the effective implementation of business resources management. He would research policies and procedures and provide explanations to the management regarding compliance and review the

---

<sup>1</sup> The AAO notes that the subject line of this second letter references as the beneficiary the same person that the Form I-129 identifies as the beneficiary.

processes for compliance and report back to the management. He will supervise the training department for effective allocation of training resources for the employees.

He will work independently to accomplish and develop solutions to problems identified by his analysis and will make recommendations, taking into account the nature of the organization relationships with his industry players and internal organizational culture. He may also help to implement solutions he has identified, through training and education on new procedures and functions. Interfacing with top management of the company as well as the clients to report progress of projects. Prov[i]ding status reports and new project initiation reports to management and clients[.]

In contrast to the above narrative, the letter then continues with comments addressing the proffered position as a programmer analyst position, including reference to the "Programmer Analyst" position as "the most analogous," based upon the petitioner's review of the Dictionary of Occupational Titles.

However, the letter then states both that "[the beneficiary] meets and fulfills all the criteria we require to fill the position of Business Analyst," and, shortly thereafter, the same letter states that "[the beneficiary] has excellent qualifications to be a Programmer Analyst (QA)." "

The AAO finds that the above noted differences with regard to the characterization of the proffered position are materially inconsistent and constitute attestations about the nature of the proffered position that are unreliable because of their materially conflicting information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The AAO further finds that the materially inconsistent and conflicting titles, characterizations, and information which the petitioner provided, and attested as true, regarding the proffered position and its constituent duties so undermine the credibility of the petition as to preclude its approval. Accordingly, the AAO here finds that for that reason alone, and independent of the other issues on appeal, this petition may not be approved.

In addition to the aforementioned letters, the documents filed with the Form I-129 included, *inter alia*, the following:

- An employment offer letter from the petitioner's president to the beneficiary, dated January 19, 2012, which states that "[i]n addition to your compensation, you will be eligible to receive the benefits, which are offered to all regular [redacted] employees."
- A copy of the [redacted] Confidentiality Agreement, signed by the beneficiary on

January 19, 2012.

- A two-page document entitled “Itinerary,” dated January 24, 2012, with the stated purpose of providing “a detailed itinerary of [the beneficiary’s] assignment on the [REDACTED] This document states, *inter alia*, that the project’s start date is January 30, 2012; that it relates to an “Open Contract;” that the vendor’s name is [REDACTED] that the client’s name is [REDACTED] and, under the section entitled, “Client Information,” that the “Immediate Supervisor Name” is [REDACTED]
- A copy of a document entitled “Master Subcontracting Agreement (Staff Augmentation),” executed on May 19, 2011, between the petitioner (referred to as “Subcontractor” therein) and its vendor, [REDACTED] identified in the document as a subsidiary of [REDACTED] (We will hereinafter refer to this document as the Staff Augmentation MSA.) This MSA calls for the petitioner to provide [REDACTED] with personnel to fill assignments for the benefit of a third-party client.
- A copy of a document identifying itself as a “Schedule A” that was “executed in accordance with, and made a part of, that certain Master Subcontracting Agreement dated 11<sup>th</sup> of January, 2012, between [REDACTED] a subsidiary of [REDACTED] and [the petitioner] (“Subcontractor”).” The AAO notes that, on its face, this Schedule A does not relate to the above-described Staff Augmentation MSA, which was executed on a date prior to the January 11, 2012 date of the Master Services Agreement referenced in the Schedule A. Thus, it appears that the Schedule A does not relate to the Staff Augmentation MSA submitted with the petition, but rather to a different Master Subcontracting Agreement, which the petitioner failed to submit into the record of proceeding. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N at 591. The AAO here finds that this unexplained inconsistency further compounds the lack of credibility of this petition as a whole. Further, because of the inconsistency, the AAO accords no weight to this document.
- A copy of an undated “Employment Verification Letter” from the petitioner’s vendor, [REDACTED] addressed “To whom it may concern,” in which [REDACTED]’s Senior Technical Recruiter states that “[the beneficiary] will be working for us as a[n] IT Test Analyst<sup>2</sup> at [REDACTED]” and that “[w]e anticipate the project lasting at least a year.” [REDACTED] states that the beneficiary’s job duties will be the following:
  1. Analyze requirements, data models[,] and other documents to construct effective test scripts.

---

<sup>2</sup> The AAO notes that the job title differs in the various documents submitted, e.g., programmer analyst (QA) on the petition and supporting LCA, technical analyst on the Schedule A, and IT test analyst in [REDACTED] letter.

2. With direction, specify test cases and design scripts for efficient testing of data extraction, translation and load processes.
3. Interpret test plans to understand priorities, schedules, and expectations[.]
4. Review documented requirements to ensure testability, maintainability, accuracy[,] and consistency. Document test coverage and traceability to requirements.
5. Develop test scripts and define test data for System Testing and Production Verification. This includes SQL scripts to validate data.
6. Execute test scripts and document test results.
7. Identify system defects and retest defect resolutions.
8. Design automated scripts for efficient testing of interfaces, data translations, batch outputs, or similar processes.
9. Other duties as assigned.

The above project/assignment is ongoing and [the beneficiary's] services are required for successful execution. During his contract, his primary employer[, the petitioner] is responsible for his salary, benefits, and training needed to perform his job duties[,] in addition to any discretionary decision[-]making[,] such as hiring and firing[,] and performance evaluation.

On February 28, 2012, in response to the director's RFE, the petitioner provided additional supporting evidence, including, *inter alia*, the following:

- A copy of the petitioner's quarterly federal tax return for 2011.
- A copy of the petitioner's organizational chart, listing the beneficiary as reporting weekly to an offsite coordinator.
- A document entitled "[redacted]'s Performance Review Procedures and Process," which describes the petitioner's performance review process and states that "[a] quarterly review is done by the Offsite Coordinator and the President (who also acts as the Director of Technical Operations) on whether the employees have met the Key elements on a scale of 1-5."
- Copies of documents that the petitioner describes as "2-3% of [the petitioner's] contracts with implementation partner[s]." The petitioner stated that these contracts demonstrate the petitioner's "ability to place the beneficiary as and when required all over the USA."

The issue before the AAO 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). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

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 term “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.

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

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) (2012). 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) (2012). 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 former Immigration and Naturalization Service (“INS”) nor U.S. Citizenship and Immigration Services (“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. at 440 (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)).

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>3</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). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by

---

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

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>4</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>5</sup>

Thus, 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 384, 388 (5th 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).

---

<sup>4</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>5</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).

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, and not who has the *right to* provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, the “mere existence of a document styled ‘employment agreement’” shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. “Rather, . . . the answer to whether [an individual] 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 will be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.”

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the director specifically noted this type of evidence in the RFE. However, the record of proceeding does not contain an employment agreement or summary of the terms of an oral agreement, between the petitioner and the beneficiary, detailing the terms and conditions of employment.

Section 5, “Independent Contractor,” of the Staff Augmentation MSA document signed by the petitioner, as a subcontractor, and by Technisource, as vendor, states:

- (a) Subcontractor and [REDACTED] are independent contractors. . . . The Subcontractor Employees shall be the employees of Subcontractor, and shall not be deemed employees of [REDACTED] or any Client<sup>6</sup>. Subcontractor shall have sole responsibility to screen, hire, counsel, discipline, review and terminate Subcontractor Employees. Subcontractor assumes full responsibility for and represents and warrants that it shall make any and all

---

<sup>6</sup> Under the MSA, a “Client” is a company with which [REDACTED] has entered into contract(s) to provide flexible staffing services.

contributions, taxes and assessments with respect to Subcontractor Employees under all applicable federal, state and local laws (including withholding from wages of Subcontractor Employees where required).

Section 1 of the Staff Augmentation MSA includes the following language:

**This Agreement is subject to the terms of a services agreement between [REDACTED] and each Client (each, a “Prime Contract”), which may be made available for inspection by Subcontractor at the above-listed [REDACTED] location upon prior written request.** This Agreement (and the various Schedules hereto, if any) are subject to the terms and conditions of [REDACTED] Prime Contract(s) with the Client(s) to whom Subcontractor will provide Services hereunder. (Emphasis in original.)

The petitioner failed to provide a copy of the services agreement between [REDACTED] and the Client [REDACTED] referenced in the Staff Augmentation MSA. In the RFE, the director noted that this type of evidence would be helpful. As such, the key element in this matter, which is who exercises actual control over the beneficiary and his work, was not substantiated. The director noted this lack of documentation from the end-client in discussing the beneficiary’s employment in the March 12, 2012 decision denying the petition. Thus, without the services agreement between [REDACTED] a key piece of evidence, the AAO finds that (1) the record of proceeding does not indicate whether the Client [REDACTED] has endorsed the language in the MSA, particularly the language in section 5, “Independent Contractor,” and (2) the petitioner has failed to establish that it exerts any substantial control over the beneficiary and the work he would perform while on assignment to its client’s client, [REDACTED]

The AAO also finds that the title (Master Services Agreement (Staff Augmentation)) and the entire tenor of the agreement between [REDACTED] and the petitioner is indicative of a contractual scenario wherein the beneficiary would be assigned to [REDACTED] clients solely to augment [REDACTED] clients’ staff – a role which, in the absence of countervailing evidence – is indicative of day-to-day control by the end-client, whose staff is normally subject to the end-client’s direction.

Next, the AAO notes that, on appeal, the petitioner submitted a letter, dated March 21, 2012, from the end-client (and the beneficiary’s immediate supervisor), [REDACTED] Team Leader – Enterprise Portfolio Management Office at [REDACTED] stating that the beneficiary has been working as a consultant IT Test Analyst since January 30, 2012. The letter provided the following job summary and responsibilities of the beneficiary:

**Job Summary:**

Responsible for developing test cases for newly developed and existing functionality within IT projects **using [REDACTED] guidelines.** Must be able to understand business requirements and assess for testability and gaps. Responsible for conducting functional and regression testing of modified software programs and working with team members to resolve issues. Will write and execute SQL queries used for test validation. Responsible for logging defects to

systems from test execution results.

Detailed Accountabilities:

1. Analyze requirements, data models and other documents to construct effective test scripts.
2. Ability to test slowly changing dimensions and Fact tables.
3. Design automated scripts for efficient testing of interfaces, data translations, batch outputs, or similar processes. This includes using SQL scripts to validate data movement from source to target as well as performing data integrity and referential integrity in Data Warehouse tables.
4. **With direction**, specify test cases and design scripts for efficient testing of data extraction, translation and load processes.
5. Interpret test plans to **understand priorities, schedules, and expectations**[.]
6. Review documented requirements to ensure testability, maintainability, accuracy and consistency. Document test coverage and traceability to requirements.
7. Develop test scripts and define test data for System Testing and Production Verification.
8. Execute test scripts and document test results for IT projects.
9. Identify system defects and retest defect resolutions.
10. **Support and adhere to** [REDACTED] **operational procedures and development and security standards.** [Emphasis added.]

Upon review of the aforementioned letter from [REDACTED] the AAO finds that the duties listed above appear to indicate that the end-client – and not the petitioner - will exercise the most immediate and substantial control over the beneficiary, the beneficiary’s day-to-day work, and make determinations regarding the performance requirements and acceptability standards that would dictate the substantive nature of the beneficiary’s daily work. As noted above, in executing the job duties, at [REDACTED] offices, the beneficiary’s immediate supervisor at [REDACTED] stated that the beneficiary will be “using [REDACTED] guidelines,” “interpret[ing] test plans to understand [the end-client’s] priorities, schedules, and expectations,” and “support[ing] and adher[ing] to [REDACTED] operational procedures and development and security standards.”

Further, the AAO finds materially significant the absence of any mention by this end-client’s representative of any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED]

While social security contributions, worker’s compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary’s employer. Without full

disclosure of all of the relevant factors relating to the end-client, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Without evidence from the end-client supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the AAO finds that there are discrepancies and inconsistencies in the record of the proceeding with regard to the beneficiary's dates of intended employment. For instance, in the Labor Condition Application (LCA), the petitioner indicates that the dates of intended employment for the beneficiary are January 13, 2012 to August 12, 2013. The Form I-129 indicates that the dates of intended employment are January 24, 2012 to August 12, 2013. The "Itinerary" document, submitted with the petition, indicates that the "project start date" is January 30, 2012 and does not list an end date. Also, the letter from [REDACTED] states that the beneficiary will begin work on January 30, 2012 and that they "anticipate the project lasting at least a year." In addition, the letter from [REDACTED] submitted on appeal, states that the beneficiary has been working for [REDACTED] since January 30, 2012 and does not list an end date. No explanation for the variance was provided.

In addition, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. Moreover, the record does not contain a written agreement between the petitioner and [REDACTED] or any other organization, establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period. While the letter from [REDACTED] "anticipate[s] the project lasting at least a year," the Schedule A that was submitted with the petition and signed by the petitioner and [REDACTED] does not list the start or end date for the beneficiary's services. Moreover, as noted earlier in this decision, the relevance of the "Schedule A" document has not been established, in light of the aforementioned internal inconsistencies between it and the Staff Augmentation MSA. In short, the petitioner has not established that the "Schedule A" document relates to the Staff Augmentation MSA.

Moreover, the AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary.<sup>7</sup> Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from January 24, 2012 to

---

<sup>7</sup> While, in response to the RFE, the petitioner stated that it is "attaching a copy of 2-3% of [its] contracts with implementation partner[s] showing the ability to place the beneficiary as and when required all over the USA," there is no evidence of schedules or statements of work evidencing that such contracts would apply to the beneficiary.

August 12, 2013, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed in response to the RFE that “[p]roject completion dates are flexible with various extensions from [REDACTED]

[REDACTED] It is Open Ended Contract with [REDACTED] with extensions.” However, as previously noted, there is no documentary evidence from [REDACTED] establishing the duration of the project. Moreover, the petitioner did not provide sufficient evidence as to what work the beneficiary was doing for the petitioner from the requested date of employment of January 24, 2012 to January 30, 2012, the project start date at [REDACTED]. Thus, the record does not demonstrate that the beneficiary would even be working, let alone maintaining an employer-employee relationship with any entity for the duration of the validity of the requested 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)(1). Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (‘Reg. Comm’r 1978).

Based on the 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). Accordingly, the appeal will be dismissed and the petition will be denied.

Moreover, even if it were determined that the petitioner had overcome the director’s grounds for denying this petition (which it has not), the petition still could not be approved.

Beyond the decision of the director, the AAO will now address whether the petitioner’s proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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 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. *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.

As a preliminary matter, the AAO notes that the petitioner has not provided information regarding the specific educational requirements for the proffered position. In a letter dated January 24, 2012, the petitioner stated that “attainment of a minimum of [a] bachelor’s level university degree is essential” for the position, but did not specify that the degree be in any specific specialty.

In this matter, the petitioner submitted a copy of the beneficiary’s three-year Bachelor of Commerce degree from the [REDACTED] in India. In addition, the petitioner submitted an Evaluation of Academic Qualifications and Experience, dated March 25, 2009, rendered by [REDACTED] which states that the combination of the beneficiary’s professional experience and his foreign degree in commerce equates to a U.S. Bachelor of Science degree in Computer Information Systems.

The AAO finds no evidentiary value in the opinion rendered by [REDACTED]. As the [REDACTED] evaluator professes that his evaluation is rendered “pursuant to [the] requirements of [USCIS],” he should know that USCIS recognizes as competent to evaluate the educational equivalency of training and/or work experience only “an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual’s training and/or work experience.” 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The evaluator provides no documentation that this evaluator is such an official. Further, the evaluator’s discussion of the beneficiary’s experience is cursory, superficial, and insubstantial. It provides no substantive analysis of how the beneficiary’s work experience equates to the years of college-level coursework pronounced by the evaluator. Further, as [REDACTED] and its evaluators should know, USCIS recognizes evaluation agencies as competent to render evaluations of education, but not training or experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(4). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the job title listed on the LCA is “programmer analyst (QA)” and that the LCA designation for the proffered position corresponds to the occupational classification of “Computer Programmers” – SOC (ONET/OES Code) 15-1131.00, at a Level I wage.

At the outset, the AAO notes that there is insufficient evidence in the record of proceeding to support the broad proposition that a programmer analyst position constitutes an occupational category that qualifies as a specialty occupation, especially in light of the information in the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* that this is not the case. Furthermore, the evidence in the record is insufficient to support that this particular proffered position qualifies as a specialty occupation.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a programmer analyst (QA) position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>8</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the occupational group "Computer Programmers."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.<sup>9</sup> The AAO also reviewed the information in the *Handbook*

---

<sup>8</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

<sup>9</sup> For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer

regarding the occupational category "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.<sup>10</sup> Although the petitioner titled the position "programmer analyst (QA)," upon review of the job description provided by the petitioner, the AAO finds that the proffered position most closely falls under the occupational classification of "Computer Systems Analysts." The AAO notes that the *Handbook* does not support a conclusion that either occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupational category:

Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

### **Education**

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field in addition to their degree in computer programming. In addition, employers value experience, which many students get through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree also gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and many other tasks that they will do on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

### **Certification**

Certification is a way to demonstrate a level of competence and may provide a jobseeker with a competitive advantage. Certification programs, generally available through product vendors or software firms, offer programmers a way to become certified in specific programming languages or for vendor-specific

---

Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited May 8, 2013).

<sup>10</sup> For additional information regarding the occupational category "Computer Systems Analysts," see *id.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited May 8, 2013).

programming products. Some companies may require their computer programmers to be certified in the products they use.

### **Advancement**

Programmers who have general business experience may become computer systems analysts. Programmers with specialized knowledge of, and experience with, a language or operating system may become computer software developers. They also may be promoted to managerial positions. For more information, see the profiles on computer systems analysts, software developers, and computer and information systems managers.

### **Important Qualities**

**Analytical skills.** Computer programmers must understand complex instructions in order to create computer code.

**Concentration.** Programmers must be able to work at a computer, writing lines of code for long periods of time.

**Detail oriented.** Computer programmers must closely examine the code they write because a small mistake can affect the entire computer program.

**Troubleshooting skills.** An important part of a programmer's job is to check the program for errors and fix any they find.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited May 8, 2013).

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

### **Education**

Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).

Some employers prefer applicants who have a Master of Business Administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Some analysts have an associate's degree and experience in a related occupation.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

### **Advancement**

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

### **Important Qualities**

**Analytical skills.** Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to predict how changes may affect the project.

**Communication skills.** Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

**Creativity.** Because analysts are tasked with finding innovative solutions to computer problems, an ability to "think outside the box" is important.

**Teamwork.** The projects that computer systems analysts work on usually require them to collaborate and coordinate with others.

*Id.*, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited May 8, 2013).

The *Handbook* does not report that, as an occupational group, "Computer Systems Analysts" require at least a bachelor's degree in a specific specialty. The *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field," but "many analysts have technical degrees," and "[s]ome analysts have an associate's degree and experience in a related occupation."

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the

prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.<sup>11</sup> This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>12</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Moreover, since the proffered position appears to be that of a computer systems analyst, the LCA submitted in support of the petition was not certified for, and therefore does not correspond to or support, a petition for a computer systems analyst position.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the Computer

---

<sup>11</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>12</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

*Id.*

Systems Analysts occupational group. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into that occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships.

The *Handbook* states that most computer programmers have a bachelor's degree, but the *Handbook* does not report that it is an occupational, entry requirement.<sup>13</sup> The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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

---

<sup>13</sup> The statement that "most computer programmers have a bachelor's degree" does not support the view that all computer programmer positions qualify as a specialty occupation. The statement does not indicate that most employees in this occupation have a bachelor's degree *in a specific specialty*, or its equivalent, that is directly related to the duties and responsibilities of the position. Although a general-purpose bachelor's degree 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 147.

Furthermore, the term "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of employees in this occupation have a bachelor's degree, it could be said that "most" of the individuals have such a degree. It cannot be found, therefore, that a statement that "most" employees possessing such a degree in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a Level I low, entry-level position relative to others within the occupation). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record of proceeding has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or the equivalent.<sup>14</sup>

---

<sup>14</sup> To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The evidence of record does not convey either the substantive nature or the specialization and complexity of any specific duties that the beneficiary would perform, and it does not distinguish the duties of the proffered position from the generic duties generally performed in either the Computer Systems Analysts occupational group or the Computer Programmers occupational group, which are ones for which the *Handbook* indicates no usual association with at least a bachelor's degree in a specific specialty.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the pertinent occupational category. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

For the reasons related in the preceding discussion, 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. Accordingly, for this additional reason, the petition cannot be approved.

Further, for the reasons earlier discussed with regard to the materially defective evaluation of experience submitted into the record, the petitioner has also failed to establish the beneficiary as qualified to serve in any specialty occupation position.

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

---

USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

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