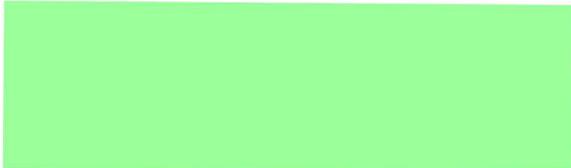


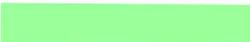
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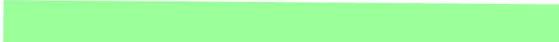
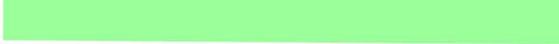
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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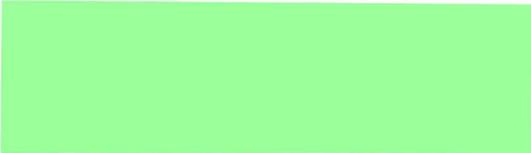


DATE: **NOV 29 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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, filed April 1, 2013, the petitioner describes itself as a software consulting firm. In order to employ the beneficiary in what it designates as a programmer analyst 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 failed to establish that it would employ the beneficiary in a specialty occupation position and failed to demonstrate that it would have an employer-employee relationship with the beneficiary. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

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

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The AAO will first address the specialty occupation basis of denial. Section 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 AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The petitioner states on the Form I-129 that it is located in Herndon, Virginia. On the visa petition, the petitioner requested to employ the beneficiary from October 1, 2013 to September 30, 2015 at

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a programmer analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position, and reiterates that the beneficiary would work at

The LCA is not certified for any other location.

With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor of technology degree in computer science and engineering from in India and a master's degree in computer science from in Massachusetts.

The petitioner also submitted, *inter alia*, (1) an undated document headed "Summary of the terms of the Oral Agreement under which the Alien will be employed"; (2) an undated document headed "Itinerary of services"; (3) an undated document headed "Position Description"; (4) an offer of employment dated March 5, 2013; (5) an undated document headed "Employment Agreement"; (6) a March 19, 2013 letter from the Manager – Data Warehousing of [REDACTED] (7) a copy of an e-mail, dated March 21, 2013, from the Business Relationship Manager of [REDACTED] to the beneficiary; and (8) a letter, dated March 29, 2013, from the petitioner's president.

The "Summary of the terms of the Oral Agreement under which the Alien will be employed" document is on the petitioner's letterhead and states, *inter alia*:

[The beneficiary] agrees that if his employment should terminate, prior to the completion of employment, due to resignation, just cause or misconduct, that he will repay the software training expenses, legal expenses, [and] moving expenses paid by the [petitioner].

The "Itinerary of services" provided is on the petitioner's letterhead and states that the beneficiary would work throughout the period of requested employment at the location of [REDACTED] in [REDACTED] Ohio. It also states: "[The beneficiary's] starting salary will be \$51,000 per annum and standard benefits, with a performance and salary review after 6 months." It is signed by both the petitioner's president and the beneficiary.

The undated Position Description states that the beneficiary would work at [REDACTED] Ohio. It also states: "The [proffered] position requires a Bachelor Degree in Science, Engineering, Computers or closely related field."

The March 5, 2013 employment offer states, *inter alia*: "Your starting salary will be \$51,000 per annum and standard benefits, with a performance and salary review after 6 months." It is signed by both the petitioner's president and the beneficiary.

The undated Employment Agreement, signed by the petitioner's president and the beneficiary, also states: "Your compensation shall be \$51,000 per annum with a salary review basing [sic] on performance after 6 months." Further, it states:

You agree that if your employment should terminate, prior to the completion of employment, due to resignation, just cause or misconduct, that [you] will repay the software training expenses, legal expenses, [and] moving expenses paid by the [petitioner].

The March 19, 2013 letter from the Manager – Data Warehousing of [REDACTED] states that it was issued upon request from [REDACTED]. It further states that the beneficiary was then currently assigned by [REDACTED] to work at [REDACTED] location, and that his duties include:

- Design and develop Informatica Mappings using Informatica tool for extraction, transformation and loading of data from source to target.
- Migrate Informatica mappings from development to production.
- Create test cases, perform unit testing for the Informatica Mappings and document unit testing.
- Use shell scripts for NDM and SFTP processes in the UNIX environment.
- Use Debugger to analyze data flow and evaluate transformations to identify bugs in existing mappings.

That letter further states:

[REDACTED] is solely responsible for [the beneficiary's] wages, hours, terms and conditions of employment, all required insurance coverage and the withholding and payment of all applicable employment and payroll taxes. In addition, [REDACTED] is solely responsible for the manner and means by which [the beneficiary] will perform his work on the current project within the parameters of [the agreement between [REDACTED] All [REDACTED] personnel remain [REDACTED] employees throughout their duration of their assignment on projects for [REDACTED]. Under no circumstances will they be construed as PNC employees at any time. [REDACTED] retains complete discretion to remove [the beneficiary] from the project at any time and to replace him.

The March 21, 2013 e-mail from the Business Relationship Manager of [REDACTED] to the beneficiary provides a duty description substantially similar to that provided by [REDACTED]. It states that the [REDACTED] project is expected to continue for three years. It further states:

This [e-mail] is to verify that [the beneficiary] has been providing services to [REDACTED] since Sep 2011 as a Programmer Analyst on our project for [REDACTED]. [REDACTED] has contracted [the beneficiary's] services through [the petitioner]. [The beneficiary works for our financial domain project, which is being executed at [REDACTED] and works under the supervision of [REDACTED].

That e-mail does not indicate for what company [REDACTED] works. As to the company that would assign the beneficiary's tasks and supervise his performance, that letter states:

[REDACTED] is not the employer of [the beneficiary][.] Rather the actual employer [the petitioner] shall function as his employer and shall have the following responsibilities such as: Payroll controlling his work, Hiring and firing Decisions as well as performance evaluations. [REDACTED] will have no managerial authority over [the petitioner's] employees.

That e-mail does not indicate, however, that the petitioner would place a supervisory employee at the [REDACTED] Ohio site to oversee the beneficiary. It also does not address the statements in the

March 19, 2013 letter from [REDACTED] is responsible for the beneficiary's wages, hours, terms and conditions of employment, the manner and means by which he performs his work, and other indices of an employer-employee relationship.

The petitioner's president's March 29, 2013 letter states, in two places, that the proffered position requires "a Bachelor Degree in Science, Computers, Engineering or closely related field."

On April 23, 2013, the service center issued an RFE in this matter. The service center requested evidence to establish an employer-employee relationship and evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, the petitioner submitted (1) an agreement, dated July 20, 2011, between the petitioner and [REDACTED]; (2) a letter, dated May 6, 2013, signed by the Business Relationship Manager – [REDACTED] Relationship, of [REDACTED] (3) a letter, dated June 11, 2013, from the HR Manager of [REDACTED] (4) two letters from the petitioner's president, both dated June 25, 2013; (5) a document signed by both the petitioner's president and by the beneficiary on June 30, 2013; (6) the first page of undated document headed, "Statement of Work" (SOW); (7) a single page, which may be part of the same SOW, purporting to show that an unidentified entity agreed, on September 6, 2011, to provide the beneficiary to work at the unidentified location of another unidentified entity; and (8) a single page of a document headed, "External Labor Resource Setup Form," which also may be part of that same SOW.

The July 20, 2011 agreement between the petitioner and [REDACTED] purports to be a master agreement specifying the terms in accordance with which the petitioner might, pursuant to future requests, provide [REDACTED] with unidentified personnel to perform unspecified services. It states that, if services were ever provided pursuant to that agreement:

The daily activities of [the petitioner's] staff assigned by [REDACTED] in fulfillment of this agreement will be directed and controlled by [REDACTED] is the sole judge as to the acceptability and capability of an individual contractor and/or team member, and may at any time request the removal of said contractor.

It further states:

[REDACTED] agrees to provide reasonable working space, computer machine time and other services and materials which may be necessary in connection with the performance of services requested.

The May 6, 2013 letter from the business relationship manager of [REDACTED] states that the petitioner will provide the beneficiary to [REDACTED] which will provide him to [REDACTED] which will use him on a project at [REDACTED] Ohio project. It states that the project is expected to continue for more than two years. It states that the beneficiary's duties will be:

- Gathering the Business Requirements with various business people.
- Extracted Data from different source systems like Oracle, Sql Server and Flat Files.
- Designed and developed Informatica Mappings using Informatica tool for Extraction, Transformation and Loading of data from source to target.
- Used PL/SQL to write store procedures to increase the performance.
- Involved in Migration of Informatica mappings from Development to Production
- Created test cases and performed unit testing for the Informatica Mappings. Documented Unit testing.
- Extensively worked in the UNIX environment using Shell Scripts for NDM and SFTP processes.
- Extensively used Debugger in identifying bugs in existing mappings by analyzing data flow, evaluating transformations.
- Provide the necessary support to allow the users to effectively use the application.

In his June 11, 2013 letter, [REDACTED] HR Manager stated:

Throughout [the beneficiary's engagement on the project at [REDACTED] neither Enterprise [REDACTED] nor [REDACTED] will have any employment relationship with [the beneficiary]. His employer, [the petitioner] is responsible for his salary, benefits and training needed to perform his duties at the worksite[.] In addition to any discretion decision making such as hiring, firing, controlling and performance evaluations etc.

In both of his June 25, 2013 letters, the petitioner's president stated that the petitioner will retain all control over the "salient employment attributes," and that the evidence provided shows that the petitioner has the exclusive right to exercise control over the beneficiary's work. He also reiterated, "The minimum education requirements to perform these job duties are a Bachelor's degree in Science, Computers, Engineering or a related field."

The June 30, 2013 document signed by the petitioner's president and the beneficiary states that it is documentation of the implicit contractual commitment between the petitioner and the beneficiary. It states that the petitioner has the right to control the beneficiary's work, including how it is performed, during what hours, and the applicable standards of performance.

The single page SOW provided indicates that it is subject to the terms of a January 1, 2007 master services agreement between [REDACTED]. That master services agreement is not in the record and its terms are unknown to the AAO. The SOW further states that [REDACTED] may utilize contractors provided by [REDACTED] and that such contractors will be employees of [REDACTED]. It further states that [REDACTED] is entitled to request the removal of any of [REDACTED] employees from its workplace at any time.

Another single page, which is not numbered, indicates that an unidentified entity agreed to provide the beneficiary to work at the unidentified location of another unidentified entity. That page states: the "Sign date of Schedule 14 Acknowledgement" as "09/06/11, but provides very little additional information. Whether that page is related to the single page of the SOW described above is unclear.

Another single-page document is dated December 3, 2012 and headed, "External Labor Resource Setup Form." It indicates that [REDACTED] would provide the beneficiary to work on a [REDACTED] project in [REDACTED]. It states that the start date would be January 1, 2013 and the end date December 31, 2013. That period includes only two months of the period of requested employment.

The director denied the petition on July 16, 2013, finding, as was noted above, that the petitioner failed to establish that it will have an employer-employee relationship with the beneficiary and 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.

On appeal, counsel provided additional evidence pertinent to the issue of whether the petitioner has an employer-employee relationship with the beneficiary, and additional evidence pertinent to whether the petitioner would employ the beneficiary in a specialty occupation position. Counsel asserted that the evidence provided demonstrates that the visa petition is approvable.

The evidence provided on appeal includes (1) a letter, dated July 1, 2013, from a Mortgage ETL Manager for [REDACTED] (2) an evaluation of the proffered position, dated July 6, 2011, provided by an associate professor of computer science and head of the computer engineering program at [REDACTED] and (3) counsel's own letter, dated July 29, 2013.

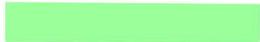
The July 1, 2013 letter from [REDACTED] confirms that the beneficiary is working at its facility in Miamisburg. It reiterates the description of duties provided by [REDACTED] in the May 6, 2013 letter described above, and that the project is expected to exceed two years. It further states:

While [the beneficiary] is working for us a Contractor, this fact shall not render [REDACTED],I able as employer.Rather the actual employer [the petitioner] shall function as his employer and is responsible for all immigration issues,Payroll,hiring,firing ,controlling his work ,and any employee benefits according to relevant ,federal and /or state law, regulation or rules

[Errors in the original]

The professor who provided the position evaluation stated that he reviewed a document pertinent to the proffered position that included the following duty description:

- 1) [P]erform software analysis and design, 2) perform software testing, 3) monitor installed programs, 4) perform coding of new application programs, 5) perform requirements analysis, 6) modify software systems, and 7) train staff and end users.



He did not state who generated that list of duties. The evaluator stated that, based on that description of duties, the proffered position requires a bachelor's degree in engineering or a computer-related field as a minimum educational requirement.

In his July 29, 2013 letter, counsel asserted that the evidence submitted demonstrates that the petitioner would have an employer-employee relationship with the beneficiary and that it would employ the beneficiary in a specialty occupation position.

As a preliminary matter, the AAO observes that the petitioner has repeatedly asserted that an otherwise unspecified bachelor's degree in engineering would be a sufficient educational qualification for the proffered position. The undated position description provided with the initial evidence in support of the visa petition states this. The petitioner's president's March 29, 2013 letter states, in two places, that an otherwise undifferentiated degree in engineering is a sufficient educational qualification for the proffered position. The petitioner's president reiterated that assertion in one of his June 25, 2013 letters. The Seattle Pacific University professor also indicated, in his July 6, 2011 evaluation, that an otherwise undifferentiated degree in engineering would be a sufficient educational qualification for the proffered position.

The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, that the educational requirement of the proffered position may be satisfied by an otherwise undifferentiated bachelor's degree in engineering indicates that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). That it does not require a minimum of a bachelor's degree in a specific specialty or its equivalent indicates that the proffered position is not a specialty occupation position. This is sufficient reason to dismiss the appeal and to deny the visa petition.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1121, Computer Systems Analysts from O*NET. The AAO reviewed the chapter of the *Handbook* (2012-2013 edition) entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of computer systems analysts:

What Computer Systems Analysts Do

Computer systems analysts study an organization's current computer systems and procedures and make recommendations to management to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

Duties

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if computer upgrades are financially worthwhile
- Devise ways to make existing computer systems meet new needs
- Design and develop new systems by choosing and configuring hardware and software
- Oversee installing and configuring the new system to customize it for the organization
- Do tests to ensure that the systems work as expected

¹ 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.

- Train the system's end users and write instruction manuals, when required

Analysts use a variety of techniques to design computer systems such as data-modeling systems, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. They also do information engineering, designing and setting up information systems to improve efficiency and communication.

Because analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

Analysts determine requirements for how much memory and speed the computer system needs, as well as other necessary features. They prepare flowcharts or diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up.

Most systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers. For more information, see the profile on computer and information systems managers.

The following are examples of types of computer system analysts.

Systems analysts specialize in developing new systems or fine-tuning existing ones to meet an organization's needs.

Systems designers or systems architects specialize in helping organizations choose a specific type of hardware and software system. They develop long-term goals for the computer systems and a plan to reach those goals. They work with management to ensure that systems are set up to best serve the organization's mission.

Software quality assurance (QA) analysts do in-depth testing of the systems they design. They run tests and diagnose problems to make sure that certain requirements are met. QA analysts write reports to management recommending ways to improve the system.

Programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging the code than other types of analysts, although they still work extensively with management to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers. For more information, see the profiles on computer programmers and software developers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm> (last visited Nov. 27, 2013).

In determining whether the duties of the proffered position show that it is a computer systems analyst position, an initial inquiry is which of the descriptions of the proffered position's duties is the description to be considered for this purpose. As was explained above, where work is to be performed for entities other than the petitioner, the requirements of the end-user of the beneficiary's services is the critical consideration. The end-user of the beneficiary's qualifications in the instant case does not appear to be the petitioner or [REDACTED] but either [REDACTED] at whose facility the work will take place, or [REDACTED] who will be the direct supplier of the beneficiary to work at that site. The duty description provided by [REDACTED] in its Business Relationship Manager's March 21, 2013 e-mail and that provided by [REDACTED] in its Manager – Data Warehousing's March 19, 2013 letter are the same description, and that is the duty description that will be considered in determining whether the proffered position is a computer systems analyst position.

The duties described by representatives of [REDACTED] are consistent with the duties of computer systems analysts as described in the *Handbook*. The AAO finds that the proffered position is a computer systems analyst position as described in the *Handbook*.

The *Handbook* states the following about the educational requirements of computer systems analyst positions:

How to Become a Computer Systems Analyst

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. at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-4> (last visited Nov. 27, 2013).

The *Handbook* makes clear that computer systems analyst positions do not, as a category, require a minimum of a bachelor's degree or the equivalent, as it states, "A bachelor's degree in a computer or information science field is common, although not always a requirement." It further indicates that computer systems analyst positions may go to graduates with business or liberal arts degrees who know how to write computer programs, rather than to those with a degree in a specific specialty closely related to computers, and that some analysts have only an associate's degree and related experience. Accordingly, as the *Handbook* indicates that working as a computer systems analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation it does not support the proffered position as being a specialty occupation.

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 the equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations 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.

The record does contain the July 6, 2011 position evaluation, mentioned above. That evaluation states, "The attorney representing [the petitioner] provided a job description for the position," and that the evaluation is based on that job description.

The instant visa petition was filed on April 1, 2013, almost two years after the date of that evaluation. The record contains no indication that the petitioner was then represented by counsel or, if it was, the identity of that counsel. Further, there is no indication that any position that may have been described to the evaluator was, in fact, the position proffered in this case.

Further, the evaluator stated, based on the duty description provided to him, "Companies similar to [the petitioner] routinely recruit and employ only degreed individuals into [the position described]." However, he indicated that an otherwise undifferentiated bachelor's degree in engineering would be a sufficient educational qualification for the proffered position, which, if believed, demonstrates that the position described is not a specialty occupation position, as is explained above. In any event, it is certainly not evidence that the position described to the evaluator, or the proffered position, qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

Thus, based upon a complete review of the record, the petitioner has not established 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. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Further, as was also noted above, the LCA submitted in support of the visa petition is certified for a Level I computer systems analyst, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of computer systems analyst duties. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. This appears to be inconsistent with the proposition that the proffered position is so complex or unique relative to other computer systems analyst positions such that it can only be performed by a person with at least a specific bachelor's degree.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for such positions, including degrees that are less than a bachelor's degree and degrees that are not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to anyone the petitioner has ever previously hired to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).²

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.

² 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 a 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").

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as designing and developing Informatica Mappings, migrating Informatica mappings, creating test cases, performing unit testing, etc., have not been demonstrated to be so specialized and complex that they require knowledge usually associated with attainment of a bachelor's or higher degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of systems analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner filed the instant visa petition for a Level I computer systems analyst position, a position for an entry-level employee with only a basic understanding of computer systems analysis. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex relative to other computer systems analysts that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to computer systems analysis.

For the reasons discussed above, 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 upon which the visa petition was denied was the director's finding that the petitioner had failed to demonstrate that it would have an employer-employee relationship with the beneficiary.

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 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).

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

Although "United States employer" is defined in the regulations 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. 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)).

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.³

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and

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 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 318-319.⁴

Accordingly, 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).⁵

to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

⁴ 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))).

⁵ 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

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 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).

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.

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).

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).

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."

In the instant case, the evidence submitted suggests that the petitioner would provide the beneficiary to Enterprise, which would provide the beneficiary to [REDACTED] to work on a project at the location of [REDACTED] Ohio, whereas the petitioner is located in Virginia. This attenuation of the beneficiary from the petitioner, in itself, suggests that the petitioner may be only a token employer, rather than being the entity that would actually assign the beneficiary's tasks and supervise his performance of them.

On appeal, counsel stated that the evidence shows that the petitioner would exercise such dominion over the beneficiary that their relationship would be an employer-employee relationship. The petitioner has repeatedly so asserted, and other entities have also provided various statements to that same effect.

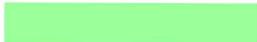
However, the March 19, 2013 letter from [REDACTED] states that, if the visa petition were approved, [REDACTED] would be responsible for the manner and means by which the beneficiary would perform his work. It states that the beneficiary would be an employee of [REDACTED] and that [REDACTED] would have the authority to remove the beneficiary from the project at any time.

The SOW provided reiterates that, in the event that [REDACTED] utilizes any contractors provided by [REDACTED] on [REDACTED] project, those contractors will be employees of [REDACTED]. It also states that [REDACTED] is entitled to request their removal from the project at any time, which suggests that [REDACTED] would have the authority to supervise the beneficiary's performance, either instead of [REDACTED] or in addition to [REDACTED].

Further, the July 20, 2011 agreement between the petitioner and [REDACTED] states that if beneficiary provided services pursuant to that agreement the beneficiary's daily activities will be directed and controlled by [REDACTED] which would be the sole judge of the acceptability of his performance, and that [REDACTED] would provide the beneficiary with work space, computer machine time, and other services and materials.

All of that evidence, provided by the petitioner, indicates that [REDACTED] and Enterprise share the indices of control over the beneficiary's work, and suggests that the petitioner would not have an employer-employee relationship with the beneficiary.

That contradictory evidence, coupled with the fact that the beneficiary would work at a location far removed from the petitioner, and the fact that the record does not indicate any arrangement for a supervisory employee of the petitioner working in Miamisburg to assign the beneficiary's tasks and supervise his performance of them, all cast considerable doubt on the petitioner's assertion that it would have an employer-employee relationship with the beneficiary. The petitioner has not, therefore, demonstrated, by a preponderance of the evidence, that it and the beneficiary would have



such a relationship. The appeal will be dismissed and the visa petition denied for this additional reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.