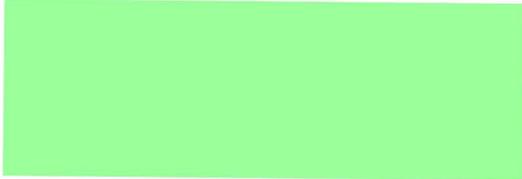


(b)(6)

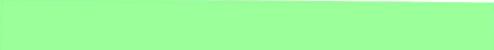
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **JUN 18 2014** 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" with a stylized flourish.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "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.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner described itself as an "Application Software development" firm with two employees, established in 2002. In order to employ the beneficiary in what it designates as a Senior Quality 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 establish that the petitioner 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.

II. THE LAW

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 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 former 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.

III. EVIDENCE

The period of requested employment stated on the visa petition is from October 1, 2013 to September 17, 2016. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Senior Quality Analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1799, Computer Applications, All Other from the Occupational Information Network (O*NET). We observe that the category Computer Occupations, All Other has recently been assigned a new SOC code, 15-1199, and that a summary report at 15-1199.01 addresses Software Quality Assurance Engineer and Tester positions more specifically. The LCA further states that the proffered position is a Level III position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in mathematics and a master of business administration degree with a concentration in information systems, both from [REDACTED] in India. An evaluation in the record states that the beneficiary's degrees, considered together with his training and employment experience, are

equivalent to a U.S. bachelor's degree with a dual major in computer information systems and mathematics.

Counsel also submitted (1) a document headed, "Planned Itinerary for [the beneficiary] until 9/17/2016; (2) a letter, dated February 21, 2013, from the vice president of engineering and new products of [REDACTED] (3) an employment agreement, executed by the petitioner's president and the beneficiary; and (4) a letter, dated March 25, 2013, from the petitioner's president.

The itinerary provided states the following about the duties of the proffered position:

Working with an [REDACTED] development teams(s), the [beneficiary] will be responsible for developing and continually refining the test strategy, plans, processes and standards, covering functional and non-functional testing, both manual and automated.

More concretely, it states that the beneficiary would:

- Design test plans, scenarios, scripts, or procedures.
- Document and implement test strategies, plans, processes and standards
- Define and maintain the test automation framework and ensure that appropriate testing tools are selected and applied optimally.
- Review the architecture and design of systems and features, and actively engage with Business Analysts and developers to provide input.
- Review and revise acceptance criteria to guarantee they are fit for purpose once fulfilled
- Create and maintain configuration notes for the testing environments, both functional and non-functional (e.g.) performance testing environments.
- Reviewing acceptance criteria (i.e. behaviors) for accuracy, clarity and completeness
- Extending and maintaining the regression test suite, this doubles as the system (behavior) specification
- Performing manual tests, recording the results and document software defects, using a bug tracking system, and report defects to software developers.
- Developing and maintaining automated functional tests, using tools such as Quality Center , Rational Tools and Selenium
- Installing, upgrading and configuring virtualized Linux/JVM/Oracle DB test environments
- Analyzing current system load, predicting future load and then defining appropriate performance baselines and targets
- Defining and executing performance testing (using jMeter) and troubleshooting/resolving performance related issues
- Using web application security tools such as IBM App Scan to identify security issues.
- Communicating security test results to technical and business stakeholders and working collaboratively to resolve security issues
- Developing and executing automated smoke tests

- Performing and coordinating exploratory testing
- Identify, analyze, and document problems with program function, output, online screen, or content.
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.
- Other similar professional responsibilities as needed.

As to the location at which the beneficiary would work, that itinerary states that he would work 20% of the time at the petitioner's office in [REDACTED] and 80% of the time at the office of [REDACTED] in [REDACTED]. It states that while the beneficiary is at the petitioner's offices, the appropriate contact person is [REDACTED] who is an HR manager and has an [REDACTED] address, which suggests that he works for the petitioner. The itinerary further states that while the beneficiary is working at the [REDACTED] location, the appropriate contact person is [REDACTED] who has a [REDACTED] e-mail address, which suggests that he works for [REDACTED].

The February 21, 2013 letter from [REDACTED] vice president of engineering and new products reiterates the description of duties provided in the itinerary. It also states: "We are not supervising [the beneficiary] on any technical details of his work." Yet further, it states: "[The beneficiary] is being supervised by Mr. [REDACTED] HR Manager, of [the petitioner at the petitioner's address]." Finally, he stated, "The minimum educational requirement to perform these job duties is a Bachelor's degree in Engineering, Mathematics or a related field."

In the employment agreement provided, the petitioner and the beneficiary state that the petitioner will control various aspects of the beneficiary's work and remuneration.

The March 25, 2013 letter from the petitioner's president reiterates the duty description previously provided and states, "No written contract has been entered into with [the beneficiary]."

On July 10, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel submitted: (1) a document headed Independent Contractor Agreement for Software Consultant; (2) a document dated December 22, 2011 headed, "Subcontractor Agreement; (3) a document headed, Verification Letter; (4) the petitioner's organizational chart; (5) documents pertinent to other employees of the petitioner; (6) a letter, dated August 31, 2013, from the petitioner's president; (7) a document on the petitioner's letterhead headed, Performance Review Process; (8) an employment agreement dated January 2, 2013; (9) an evaluation of the proffered position; and (10) five vacancy announcements. The vacancy announcements provided will be addressed below.

The Independent Contractor Agreement provided was ratified by [REDACTED] vice president for engineering and the petitioner's president on March 14, 2006 and states the terms pursuant to which

may use the petitioner's workers to perform "Software Design and Development." It does not otherwise describe the services to be performed or state where the services would be performed. It does state: "[The petitioner] is an independent contractor, and neither [the petitioner] nor [the petitioner's] staff is, or shall be deemed, employees."

The Subcontractor Agreement provided states terms pursuant to which the petitioner may provide services to or its clients. As the record contains no indication that the beneficiary would work pursuant to that agreement, the AAO finds no direct relevance between that document and the issues in this case.

The document headed Verification Letter is signed by the petitioner's president and states that the petitioner has three employees, a Java Architect, a .Net Architect and a Business Development Manager, and that all three have bachelor's degrees. The petitioner's organizational chart show that is the petitioner's President/Architect, that is the petitioner's Manager, that is the petitioner's Architect, and that the beneficiary is the petitioner's "Sr. QA Analyst." That chart also indicates that a software developer and an unspecified number of consultant positions are vacant. Although the beneficiary is designated as the petitioner's senior quality assurance analyst, the chart indicates that the petitioner does not employ any subordinate quality assurance analysts.

The documents pertinent to the petitioner's other employees include documents indicating that has a bachelor's degree in mathematics; that has a bachelor's degree in mathematics, physics, and chemistry; and that has a bachelor's degree in aeronautical engineering, a master's degree in electrical and computer engineering, a doctorate in geophysical engineering, and a master's of divinity degree in theology. Evidence pertinent to states that she has a master's degree in business administration and a bachelor's degree in technology from universities in India.

In his August 31, 2013 letter, the petitioner's president stated that is the petitioner's Senior ETL Developer and has a bachelor's degree in "Mathematics/Engineering." The petitioner's president did not attempt to reconcile that statement with the petitioner's organizational chart and the Verification Letter, which do not indicate that the petitioner now employs or with the evidence that degree is only in mathematics. The petitioner's president also stated that has a bachelor's degree in "Mathematics/Engineering," but did not attempt to reconcile that assertion with the evidence provided. Further, the petitioner's president stated that previously worked as a consultant for the petitioner and has a bachelor's degree in "Mathematics/Engineering," but provided no evidence to establish that has that degree. Finally, the petitioner's president stated, "Please note this is the first time Petitioner has recruited for the [proffered position]."

The document headed, Performance Review Process states, in its entirety:

The performance review process at [the petitioner] is as follows:

Goals of the performance evaluation process are to facilitate open communication and performance planning, review the individual's contribution toward the organization's success, encourage continuous improvement and development, and recognize and reward individual performance.

We hold discussions with employees at the end of the year, going through the projects they have worked on and their performance on each of the projects as measured against their primary job responsibilities, deliverables and expectations that are unique to each project.

Individual accomplishments, outstanding performance and efforts going over and beyond their job responsibilities are recognized and rewarded.

The January 2, 2013 employment agreement is a contract, signed by the beneficiary and by [REDACTED] as the petitioner's human resources manager. The AAO observes that the petitioner's president's March 25, 2013 letter stated that no such written contract existed between the petitioner and the beneficiary. 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 Dec. 582, 591 (BIA 1988).

The August 9, 2013 evaluation of the proffered position was prepared by a professor at the Department of Statistics and Computer Information Systems of [REDACTED] at the [REDACTED]. The evaluation states that, based on a description of duties provided, the position of senior quality analyst requires a minimum of a bachelor's degree in computer science or in information systems, or its equivalent.

The director denied the petition on October 10, 2013, finding, as was noted above, that the petitioner had not demonstrated that it would have an employer-employee relationship with the beneficiary and had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, as to the specialty occupation issue, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel provided (1) a purchase order, (2) two additional vacancy announcements, and (3) a brief. The vacancy announcements will be addressed below.

The purchase order provided purports to be a request from [REDACTED] that the petitioner provide the beneficiary to it to provide "Consulting Services." Although it contains an order date of September 1, 2010, it also shows a delivery date of October 23, 2013. That purchase order has a signature line subscribed, "Authorized Signature," however, it is unsigned, and is therefore of very little evidentiary weight.

The petitioner's president, rather than counsel, signed the brief submitted. In it, the petitioner's president reviewed the evidence of record and asserted that it demonstrates both that the proffered position qualifies as a specialty occupation position and that the petitioner is the beneficiary's prospective employer.

IV. SPECIALTY OCCUPATION ANALYSIS

To determine whether the proffered position qualifies as a specialty occupation position, the AAO turns first 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 is a senior quality analyst position and corresponds to SOC title Computer Occupations, All Other, and SOC code and 15-1799 from O*NET, which is now SOC code 15-1199.

The *Handbook* does not contain a chapter dedicated specifically to "Computer Occupations, All Other" positions. The AAO observes, however, that its chapter pertinent to Computer Systems Analysts describes the duties of those occupations as follows:

What Computer Systems Analysts Do

Computer systems analysts study an organization's current computer systems and procedures and design information systems solutions to help the organization operate

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 2014 – 2015 edition available online.

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 information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals

Computer systems analysts use a variety of techniques to design computer systems such as data-modeling, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. Analysts conduct in-depth tests and analyze information and trends in the data to increase a system's performance and efficiency.

Analysts calculate requirements for how much memory and speed the computer system needs. They prepare flowcharts or other kinds of 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 analysts do some programming in the course of their work.

Most computer 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.

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

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.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

Systems designers or **systems architects** specialize in helping organizations choose a specific type of hardware and software system. They translate the long-term business goals of an organization into technical solutions. Analysts develop a plan for the computer systems that will be able to reach those goals. They work with management to ensure that systems and the IT infrastructure 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 in order to make sure that critical 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 than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm> (last visited June 17, 2014).

The duties attributed to the proffered position in all of the descriptions provided indicate that the beneficiary's duties will almost exclusively involve testing and debugging software. In addition, the proffered position requires understanding of the business requirements and specifications of the software under development. The AAO finds that the proffered position is a computer systems analyst position and, more particularly, a software quality assurance (QA) analyst as described in the Computer Systems Analyst chapter of the *Handbook*.

The *Handbook* states the following about the educational requirements of computer systems analysts 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 have skills in information technology or computer programming.

Education

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

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

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 understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and 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 figure out 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.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited June 17, 2014).

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 indicates that many systems analysts have a liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis.

Where, 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 this criterion by a preponderance of the evidence standard, 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 sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the duties ascribed to the proffered position indicate a need for a range of technical knowledge in the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

The record does contain an evaluation of the proffered position, submitted in response to the RFE. That evaluation, however, does not list any reference materials on which the evaluator relied as a basis for his conclusion that the proffered position requires a bachelor's degree in computer science, information systems, or a related field. The evaluator appears not to have based his opinion on any objective evidence, but instead to have relied on his own subjective judgment in that determination.

Further, the evaluator did not address the evidence from the *Handbook*, which suggests that computer systems analysis may not require such a specialized degree.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). The AAO accords little evidentiary weight to the evaluation of the proffered position and finds that it does not establish that the proffered position is 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, or the equivalent, in a specific specialty, 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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.

The petitioner did submit four vacancy announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Specifically, the petitioner submitted advertisements for the following positions posted on the Internet:

1. Senior Quality Assurance Analyst for [REDACTED] a software company, requiring a minimum of a bachelor's degree in business, computer science, mathematics, or a related field;
2. Senior Quality Assurance Analyst for [REDACTED] a defense and security company, requiring a bachelor's degree in systems engineering, computer science, or a related technical area;

3. Senior Quality Analyst for [REDACTED] an aerospace and defense products supplier, requiring a bachelor's degree in engineering, quality assurance, or supply chain management;
4. Senior Java QA Test Engineer/SDE for an unidentified employer in an unidentified industry requiring a "B.S. in Computer Science or equivalent."
5. Senior Quality Assurance Analyst for [REDACTED] an investment research company, requiring a bachelor's degree in management information systems, computer or electrical engineering, or a related field, and five years of experience; or a master's degree and one year of experience, plus experience in creating, documenting, and executing automated test cases; experience using various bug-tracking systems; experience with Agile/Scrum methodologies; experience with automation scripting and regression testing; and advanced statistical modeling experience using Microsoft Excel and Mathematica.

The first vacancy announcement indicates that a degree in business administration would be a sufficient educational qualification for the position it announces. A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. The first vacancy announcement does not, therefore, announce a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, even if business administration were considered a specific specialty, the first vacancy announcement would still not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent because of the wide array of degrees that would satisfy the educational requirement stated.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). In addition to business, the first vacancy announcement states that a bachelor's degree in computer science or mathematics would be a sufficient educational qualification for the position announced. It does not, therefore, contain a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Similarly, the third vacancy announcement indicates that an otherwise unspecified bachelor's degree in engineering would be a sufficient educational qualification for the position it announces. The

field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). Because that vacancy announcement suggests that a degree in any branch of engineering would be a sufficient qualification for the position it announces, it does not contain a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Yet further, as was explained above, a requirement of a bachelor's degree that may be in any of a wide array of subjects is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. In addition to any branch of engineering, the third vacancy announcement indicates that a degree in either quality assurance or supply chain management would be a sufficient educational qualification for the vacancy it announces. Therefore, for this additional reason, it does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

The fourth vacancy announcement indicates a requirement for a "B.S. in Computer Science or equivalent," apparently referring to some amount and type of employment experience the hiring authority would consider to be equivalent to the otherwise requisite bachelor's degree. However, what type and amount of experience the hiring authority would consider equivalent to that bachelor's degree is not stated, and the AAO is unable to determine what amount and type of experience the hiring authority would consider to be equivalent to a bachelor's degree, and whether it would also qualify as equivalent to a bachelor's degree pursuant to the salient regulation. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), which requires a minimum of three years of specialized training and/or work experience, and various other conditions, for each year of college-level training to be compensated for by experience in order for experience to qualify as equivalent to a four-year bachelor's degree. The AAO is unable to find that the fourth vacancy announcement states a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent within the meaning of the salient regulation.

The fifth vacancy announcement does not appear to be for a position that is parallel to the proffered position and located in an organization that is similar to the petitioner.

To demonstrate that one of the companies that placed those vacancy announcements is "similar" to the petitioner, the petitioner would be obliged to submit evidence sufficient to demonstrate that the petitioner and the other organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the

particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). As none of the vacancy announcements have been shown to have been placed by organizations similar to the petitioner, they are not persuasive evidence for the proposition that parallel positions in organizations similar to the petitioner and in the petitioner's industry require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Not only has the petitioner failed to demonstrate that the positions announced are in organizations similar to the petitioner, but the petitioner has not demonstrated any of them are positions in the petitioner's industry, which is applications software development. The AAO observes that the first vacancy announcement is for a position in a defense and security company, the third is for a company in the aerospace and defense products industry, the fourth is for a position with an unidentified company in an unidentified industry, and the fifth is for a position with an investment research company. At least three of the five vacancy announcements provided are for positions that are demonstrably not in the petitioner's industry.

Even further, although each of the vacancy announcements contains some descriptions of the duties of the positions they announce, none contain a description so detailed that it shows that the position announced is truly parallel to the proffered position and would necessarily require the same type and amount of education as the proffered position. For this additional reason, none of the vacancy announcements provided has been shown to be within the scope of the first alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Further, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from five announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.²

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 parallel to the proffered position and 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).

² USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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 that comprise the proffered position 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 that collectively constitute the proffered position 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 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.

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 degrees acceptable for such positions, including degrees 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 AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.³

³ 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

The petitioner submitted some evidence pertinent to the education of current and past employees. However, none of them were employed in the proffered position. In fact, the petitioner's president made explicit, in his August 31, 2013 letter, that the petitioner has never employed anyone in the proffered position before. Therefore, the record contains no evidence pertinent to anyone that the petitioner has previously hired anyone 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).⁴

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.

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 consist, in essential part, of testing systems, that is, running tests, diagnosing problems with the system, and conforming a system to business requirements. Those essential duties have not been shown to require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Even the more concrete descriptions submitted, which include designing test plans, scenarios, scripts, or procedures; documenting and implementing test strategies, plans, processes, and standards; defining and maintaining the test automation framework and ensuring that test tools are selected appropriately and optimally applied, etc., contain no indication that they require a minimum of a bachelor's 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 computer systems analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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").

⁴ 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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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.

V. EMPLOYER-EMPLOYEE ANALYSIS

The remaining issue upon which the visa petition was denied is the director's finding that the petitioner has not demonstrated that it has standing to file the visa petition as the beneficiary's prospective employer. 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.⁵

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.*

⁵ 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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

Darden, 503 U.S. at 318-319.⁶

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).⁷

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

⁶ 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))).

⁷ 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).

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).

In the instant case, the petitioner has stated that, if the visa petition is approved, the beneficiary will be assigned to work at [REDACTED] location in [REDACTED]. The February 21, 2013 letter from [REDACTED] vice president of engineering and new products states that [REDACTED] would not supervise the beneficiary if the visa petition was approved but, rather, that he would be supervised by [REDACTED] an employee of the petitioner.

There is no indication, however, that [REDACTED] would accompany the beneficiary to work at [REDACTED] site. Further, there is no indication that the petitioner, rather than [REDACTED] has control of the project or projects at [REDACTED] location. Whether [REDACTED] is designing the software and parsing out duties to technical personnel, or whether that responsibility will be undertaken by some other company has not been revealed. However, no reason exists to believe that responsibility will fall to the petitioner.

Further, although the petitioner claims to evaluate the beneficiary's performance, reference to the Performance Review Process document in the record indicates that evaluation is performed once per year, and is a discussion of the tasks the beneficiary has performed. The balance of the evidence in the record indicates that those tasks would mostly be performed for [REDACTED].

Under these circumstances, the AAO finds neither likely nor even feasible that the petitioner would assign the beneficiary's tasks and supervise his performance of them. His duties will be assigned by the entity controlling the software development project or projects at [REDACTED] and his performance of those duties will be supervised by that same entity. Given that the petitioner would not assign the beneficiary's tasks and would not directly supervise his performance of them, the AAO finds that the petitioner is not the beneficiary's prospective employer within the meaning of the tests outlined above, and that the petitioner does not have standing to file the instant visa petition. The visa petition will be denied for this additional reason.

(b)(6)

NON-PRECEDENT DECISION

Page 25

VI. CONCLUSION

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. The petition is denied.