



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 31 2014** OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

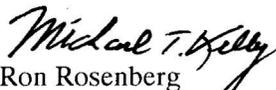
SELF-REPRESENTED

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,

for 
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the 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 petitioner on the Form I-129, Petition for a Nonimmigrant Worker, describes itself as an "Information Technology Consulting and Placement of Software Professionals" business. The petitioner states that it was established in 2011, and currently employs ten persons in the United States. It seeks to employ the beneficiary in a position to which it has assigned the job title Programmer Analyst and to classify her 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 on each of two separate and independent grounds, namely, (1) that the petitioner failed to establish an employer-employee relationship with the beneficiary as required to establish itself as a U.S. employer; and (2) that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B (Notice of Appeal or Motion) and the petitioner's brief.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. Facts and Procedural History

In the January 25, 2013 letter in support of the petition, the petitioner stated that it "is a Software Product Development and computer consulting and placement company that refer[s] professional workers to interested employers for employment in the workers[] area of professional expertise and education." The petitioner noted that it "offers a broad base of technical and consulting experts whose objective is to work with the client in establishing optimal product developments, addressing client company's specific business objectives." The petitioner noted further that it will pay the beneficiary's salary, withhold payroll taxes, and be responsible for the beneficiary's return transportation as well as "have the power to hire, pay, fire, supervise or otherwise have ultimate control over the work of [the beneficiary]." The petitioner stated that "[t]o meet [its] commitment to one of [its] client's [sic] and to stay ahead of the knowledge curve [it is] currently in immediate need of the services of a Programmer Analyst with education, knowledge and work experience in the field of Computer, Engineering or related field."

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The information in the Form I-129, the Labor Condition Application (LCA), and the other documents submitted with the Form I-129 and later in response to the RFE reflect the following facts about the proffered position. The petition was filed for only one work location, namely, [REDACTED]. The record also reflects that the petitioner would assign the beneficiary through an intermediary entity, namely, [REDACTED] which, the record also reflects, contracted with the petitioner to provide services to that [REDACTED] client.

In the aforementioned letter of support the petitioner listed the following duties and responsibilities for the proffered position:

- Sr. SharePoint Developer to help with various projects and migration work.
- Need to start figuring out how to **convert data view web parts into Apps for SharePoint** in the Marketplace.
- Need to convert to HTML5[.]
- **Sr. Front End Web Dev capabilities** – JavaScript, client object model[.]
- Dynamic layout[.]
- Help make architect decisions (does it bind to a list, or azure, or etc).
- Identify Best Practices – Lower Priority[.]
- Cross-Site Collection Functionality[.]
- Taking a group of sites and understanding how to knit them together with meta-data, etc.
- Build out newer structure[.]
- **Move the pieces in (Lift and Shift)**[.]
- Interest and researched SharePoint 2013[.]
- JQuery[.]
- REST[.]
- Azure and Office 365[.]

The petitioner stated that the beneficiary is well qualified for the proffered position as she holds a Bachelor of Engineering in Information and Communication Engineering from the [REDACTED] as well as having significant experience as a Software Engineer/Developer and Programmer Analyst. The petitioner also indicated that the beneficiary will perform services as a programmer analyst at the client site in [REDACTED]. The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which was certified for a job opportunity in the Computer Programmers occupational group, SOC (ONET/OES) Code 15-1131, at a Level I (entry level) wage.

Upon review of the initial record, the director requested additional information from the petitioner to demonstrate that it had an employer-employee relationship with the beneficiary and had the right to control the beneficiary's work. The director also requested, among other things, copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed, including a detailed description of the

duties the beneficiary will perform and the qualifications that are required to perform the job duties. The director further requested a description of who would supervise the beneficiary and a copy of the petitioner's organizational chart.

In its May 13, 2013 letter responding to the RFE the petitioner asserted that it is the beneficiary's ultimate employer and that the "client has no right to control, manage, supervise and/or evaluate the work performed by this employee and has not done so and is not so authorized to do so pursuant to [their] agreements." The petitioner also stated that "[t]he only power the end-client to whom the beneficiary provides services is to direct and extract work from the beneficiary." The petitioner reiterated that it has the ultimate authority to hire and fire the beneficiary. The petitioner stated that "[w]herever she is performing her temporary job assignment, the end-client will overlook [sic] the job details of the beneficiary's work, as they perform the work after [the petitioner] assign[s] them to go and work for the end-client."

The petitioner's RFE-response letter also commented upon the proffered position as follows:

Additionally, Programmer Analyst accomplishes software requirements by developing and maintaining applications and databases. The most important task of a Programmer Analyst is [to] code, test, debug, implement, and document highly complex programs. She will also develop complex test plans to verify logic of new or modified programs. She will support project personnel in resolving fairly complex program problems. Works with client and management to resolve issues and validate programming requirements within their areas of responsibility. She will also provide technical advice on complex programming.

The technical and functional skill of our are based on general occupational qualifications commonly recognized by most employers. This includes identifying requirements by establishing personal rapport with potential and actual requirements and with other persons in a position to understand service requirements. Analyst has to arrange project requirements in programming sequence by analyzing requirements; preparing a work-flow chart and diagram using knowledge of computer capabilities, subject matter, programming language, and logic. She has to program the computer by encoding project requirements in computer language; entering coded information into the computer. She has to confirm program operation by conducting tests; modifying program sequence and/or codes.

Thus, the petitioner opined that the "most important task of a Programmer Analyst is [to] code, test, debug, implement and document highly complex programs." The petitioner indicated that the beneficiary would, as paraphrased below with bullets added for clarity:

- Develop complex test plans to verify logic of new or modified programs.
- Support project personnel in resolving fairly complex program problems.
- Work with client and management to resolve issues and validate programming requirements within their areas of responsibility.

- Provide technical advice on complex programming.

The petitioner's letter also asserted that the "technical and functional skills of [its] Programmer Analyst are based on general occupational qualifications commonly recognized by most employers" which includes identifying requirements by establishing personal rapport with potential and actual clients. The petitioner added that the analyst [paraphrased and bullets added for clarity]:

- Arranges project requirements in programming sequence by analyzing requirements;
- Prepares a work flow chart and diagram using knowledge of computer capabilities, subject matter, programming language, and logic;
- Programs the computer by encoding project requirements in computer language;
- Enters coded information into the computer;
- Confirms program operation by conducting tests; and,
- Modifies program sequence and/or codes.

The petitioner also asserted that its programmer analyst "must therefore have the ability to identify complex problems and review related information in order to develop and evaluate options and implement solutions by using logic and reasoning to identify the strengths and weaknesses of alternative solutions, conclusions, or approaches to the problems specified by [its] end-clients."

The petitioner should note that the AAO accords no probative value to the range of duties that the petitioner ascribes to the proffered position here and elsewhere in the record. This is because neither [redacted] - the middle-man entity contracting with the petitioner on behalf of the end client, [redacted] itself has provided documentation that states or endorses the duties as described by the petitioner.

The petitioner's RFE-response also included a copy of its "Job Offer Letter" dated January 16, 2013 and signed by both it and the beneficiary. That letter identified the proffered position as a programmer analyst position and indicated that the beneficiary would be responsible for the fulfillment of various project tasks. The job offer required the beneficiary to provide monthly reports regarding her work to the petitioner.

The petitioner also submitted a January 16, 2013 Non-Competition and Non-Solicitation Agreement signed by both the petitioner and the beneficiary.

The petitioner further provided a "Corp-To-Corp Service Agreement" document, dated January 22, 2013, between the petitioner, as the contractor, and [redacted] wherein the petitioner agreed to perform services as set out in the agreement's Appendix A. Significantly, the agreement states, in part:

The entire direction, scope, control and interpretation of any systems work to be performed by CONTRACTOR shall be made exclusively by CLIENT. CLIENT shall provide the facilities and services necessary to the successful completion of this effort.

The purchase order attached as Appendix A identified the Client (i.e., the end-client for the services to be provided pursuant to Corp-To-Corp Service Agreement) as [REDACTED]. Significantly, the purchase order itself casts doubt on the nature of the work that the beneficiary would perform pursuant to it, as it specifies the beneficiary's job title as "Web Developer Lead" – and Web Developers comprise a different occupational group than Computer Programmers, the occupational group for which the petitioner's LCA was certified.² The purchase order specified the duration of the project as six months. The purchase order did not list the beneficiary's duties or provide further information regarding the duties of the position. The petitioner did not provide a copy of its organizational chart and did not identify the beneficiary's supervisor.

Upon review of the record, the director denied the petition for the reasons stated above.

On appeal, the petitioner repeats the director's decision and references the previously submitted documents. The petitioner asserts that the end-client "simply exercises control over the worker's daily tasks, such as working hours or similar conditions of employment based on their standard daily practices with their respective organization" and that if a problem arises during the work assignment, the end-client would be required to inform the petitioner, who has the ultimate control over the beneficiary. The petitioner claims that the scope of responsibilities to be performed by the beneficiary were stipulated in the statements of work and work orders between the petitioner, [REDACTED] that the petitioner states as having been e previously submitted.

The petitioner also repeats the duties of a programmer analyst as those duties are set out in the Department of Labor's Dictionary of Occupational Titles and lists the various programs and languages required to perform the duties of a programmer analyst. The petitioner re-states the duties of the proffered position as initially provided and provides an overview of the duties of the position and the percentage of time spent on the duties as follows:

Analyze the web application development with active involvement in all phases of software development life cycle (SDLC) and convert the data view web parts into Apps for SharePoint - 40%

Convert to HTML5 Sr. using Front End Web Dev capabilities, in conjunction with JavaScript, utilizing the client object model Dynamic layout and assist in making architectural decisions in order to help determine whether the system binds to a list, REST or Azure, Office 365 – 40%

² The petitioner should note, then, that, to the extent the petitioner is claiming that the proposed duties are those of a web developer rather than a computer programmer, the petition would be materially inconsistent.

Research the designs and development of the SharePoint 2013 system – 20%.

The petitioner contends that the "complex and demanding professional position of Programmer Analyst requires a specialized worker with a Bachelor's Degree in Computer Science or related field and at least 4 years of extensive ITS experience."

II. Law and Analysis

A. Employer-Employee Relationship

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation, but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship would exist between the petitioner and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.

As will be discussed below, we conclude that the evidence of record does not establish that requisite relationship. In making this determination, the AAO has considered all of the petitioner's arguments for a favorable resolution of this issue, and it has taken into account the factors that the petitioner's brief on appeal claims as sufficient indicia of control to establish the requisite employer-employee relationship.

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)

[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 (emphasis added):

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.

The AAO reiterates that 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, however, 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)).

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 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

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).

There are also 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).

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).

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).

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))).

Moreover, 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).

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." The petitioner indicated that the beneficiary will work offsite in Redmond, Washington and that her work will be for the end-client, Microsoft. In response to the director's RFE, the petitioner indicated: "[t]he only power the end-client to whom the beneficiary provides services is to direct and extract work from the beneficiary." The petitioner further stated: "[w]herever she is performing her temporary job assignment, the end-client will over look [sic] the job details of the beneficiary's work." Thus, the petitioner acknowledges that the end-client will direct and extract work from the beneficiary and that the end client is the entity that will directly supervise the beneficiary's day-to-day work. The contract between the petitioner, as contractor, and [REDACTED] the company signing the purchase order for the beneficiary's work assignment states:

The entire direction, scope, control and interpretation of any systems work to be performed by CONTRACTOR shall be made exclusively by CLIENT. CLIENT shall provide the facilities and services necessary to the successful completion of this effort.

The petitioner's acknowledgment of the end-client's direction of the beneficiary's work and daily supervision of the beneficiary as well as the petitioner's agreement with [REDACTED], that the client will control the work to be performed by the beneficiary establishes that the beneficiary's daily work is not controlled by the petitioner. The job offer signed by both the petitioner and the beneficiary requires only that the beneficiary provide monthly reports regarding her work to the petitioner, further confirming that the beneficiary's daily tasks are reviewed and assessed by the end-client in compliance with the petitioner's agreement with [REDACTED]. Moreover, despite the director's RFE request for such evidence, the petitioner did not provide its organizational chart and the petitioner does not identify the beneficiary's supervisor. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the

time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The request for the organizational chart and specific information regarding the beneficiary's supervisor is material to the issue of determining who has the right to control the beneficiary and her work. As the evidence of record does not establish who or how the petitioner supervises the beneficiary or how it would control her daily work at the [REDACTED] worksite, the petitioner has not established the necessary elements to establish the employer-employee relationship.

In addition, the petitioner does not specify, nor do the agreements between the petitioner and the beneficiary and the agreement between the petitioner and [REDACTED] that the beneficiary will use the tools and instrumentalities of the petitioner. We further note that, while the documentary evidence indicates that the petitioner can fire the beneficiary, the overall evidentiary record indicates that the end client retains at least a primary right to determine how long it would retain the service of the beneficiary.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where the work will be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. In this matter the beneficiary will work at the end-client facility. The record does not demonstrate who will provide the computer, desks, software, and other tools and instrumentalities for the beneficiary's work. In addition, the record shows that it is the end-client that will direct and review the beneficiary's actual daily work to ensure that it meets that firm's needs. Again, the record does not establish that it is the petitioner would exercise the requisite control over the beneficiary, the nature and content of the beneficiary's day-to-day work, or that it controls the means or instrumentalities of that work. In short, the petitioner has not established the requisite employer-employee relationship because the record of proceeding does not provide sufficient indicia or indications of where control under the common-law master-servant principles discussed above lies. Accordingly, the evidence is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The petitioner's claim that it exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the appeal must be dismissed and the petition denied on this basis.

B. Specialty Occupation

The next issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the

statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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), 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, as here, 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 H-1B specialty occupation 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 AAO reviewed the record in its entirety and concurs with the director's determination that the record is insufficient to establish the proffered position as a specialty occupation. As recognized in *Defensor v. Meissner*, where, as here, the beneficiary as holder of the proffered position would perform his services pursuant to the particular needs and requirements set by an end-client to which the beneficiary would be assigned, the extent and quality of evidence from the end-client as to the specific work that would be involved and as to whatever educational, training and/or experience credentials it may have required for the beneficiary's assignment are critical aspects of our assessment of the merits of the petitioner's claim that the beneficiary would perform specialty-occupation work during his assignment to the end-client. So, too, as also reflected in the *Defensor* court's analysis, the petitioner's assertions as to the position as it would be performed at the end-client and the qualifications required to perform that work are irrelevant to a specialty occupation determination, unless they are substantiated by evidence from the end-client itself. *See id.* Such is not the case here.

The petitioner in this matter has not provided documentary evidence substantiating the actual work to be performed for the end-client. The petitioner's description of proposed duties is insufficient to establish the beneficiary's actual daily duties at the end-client's facility. The only reference to the beneficiary's work for [REDACTED] is the reference to the beneficiary as a "Web Development Lead" on the [REDACTED] purchase order. The record does not include a description from Microsoft identifying the daily duties the beneficiary will be required to perform. Moreover, [REDACTED] does not describe the beneficiary's actual duties on its purchase order. Identifying a position by title is insufficient to establish the actual duties of the position and thus is insufficient to establish the position as a specialty occupation. The petition also lacks any substantive submissions from [REDACTED], which we find to be the prime mover and most significant party in the circumstances before us, as it appears that [REDACTED] through whatever relevant contractual agreements it may have entered, is the entity ultimately deciding the substantive nature, scope, and details of whatever project and project-work the beneficiary would perform and material terms and conditions under which the beneficiary would perform his work.

Here, the record of proceeding lacks probative evidence from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company and regarding whatever requirements [REDACTED] may have imposed with regard to the qualifications of the persons to be assigned to it. Consequently, we find that, under the preponderance-of-the-evidence standard, the record of proceeding fails to substantiate the accuracy of the petitioner's claims about what the beneficiary would do for [REDACTED] and what education and/or education-equivalent attainment would be required to perform the proffered position's services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, the appeal will be dismissed, and the petition will be denied.

The findings above are decisive, and they require the dismissal of the appeal and the denial of the petition. Nevertheless, the AAO will analyze continue its analysis in order to identify additional aspects of the record that also preclude approval of this petition.

To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵

While the petitioner assigned "Programmer Analyst" as the proffered position's job title, by the LCA it submitted to support the petition, the petitioner attested that the position belonged within the Computer Programmers occupational group and that the beneficiary would work and be paid accordingly.

In the chapter on computer programmers, the *Handbook* provides the following overview of the occupation:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

⁵ The AAO references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

The *Handbook* lists the typical duties of a computer programmer as:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

The *Handbook* reports:

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Mar. 26, 2014).

Regarding the education and training for computer programmers, the *Handbook* states:

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

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new

computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Mar. 26, 2014).

Here, although the *Handbook* indicates that most computer programmers have a bachelor's degree it also indicates that some employers hire workers who have an associate's degree. Accordingly, a bachelor's degree is not the minimum requirement necessary to enter into the occupation. In addition, although most programmers get a degree in computer science or a related subject "most" is not indicative that a computer programmer position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)). The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmer positions require at least a bachelor's degree in computer science or a closely related field, it could be said that "most" computer programmer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the generally described position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Although the position is generally described and it is not apparent that the proffered position could be classified as a computer systems analyst, the AAO has reviewed the *Handbook's* report on the education and training for such a position.⁶ In the chapter on computer systems analysts,

⁶ Although the petitioner did not attest to the occupational classification of "Computer Systems Analyst" on the submitted LCA, the *Handbook's* chapter on computer systems analysts, the *Handbook* states that 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. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited Jan. 9, 2014).

the *Handbook* indicates at most that a bachelor's degree in computer or information science may be a common preference, but not a standard occupational, entry requirement. In fact, this chapter notes that many systems analysts only have business or liberal arts degrees and skills in information technology or computer programming.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Mar. 26, 2014).

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must demonstrate that a baccalaureate or higher degree in a specific discipline is normally the minimum requirement for entry into the particular position. Thus, the proffered position must require a precise and specific course of study that relates directly and closely to the position in question. Although a general-purpose bachelor's degree, or a degree in a variety of fields, may be acceptable for a particular occupation, such general requirements do not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position. Accordingly, the *Handbook* does not identify a degree in a specific discipline as required to perform the duties of a computer programmer/programmer analyst as here described.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this first alternative criterion at 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 qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The petitioner has not provided such additional probative evidence establishing that a degree in a specific discipline is required. Moreover, the AAO observes that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁷ As the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

⁷ See U.S. Department of Labor (DOL), Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Although the petitioner claimed that the "technical and functional skills of [its] Programmer Analyst are based on general occupational qualifications commonly recognized by most employers," the petitioner has not submitted documentary evidence in support of the claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*. Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner in this matter provided an overview of the duties of the proffered position and failed to provide a description of duties from the end-client. Thus, it is not possible to ascertain what the beneficiary will actually do on a routine basis. Again, absent supporting documentary evidence the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici, id.* Thus, the petitioner fails to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Again, the AAO observes that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. Paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy. See U.S. Department of Labor (DOL), Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Additionally, given the *Handbook's* indication that computer programmer positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into those occupations, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* support such a requirement, at least in the evidentiary context of this petition.⁸ Further, the petitioner acknowledges that "the technical and functional skills of [its] Programmer Analyst are based on general occupational qualifications commonly recognized by most employers." Thus, 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. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other computer programmers or programmer analyst positions 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).

Turning to the third criterion, the petitioner has not provided evidence that it previously employed anyone to perform the duties of the proffered position. Accordingly, the petitioner's recruiting and hiring history cannot be examined. We also observe that while a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We find that all of the petitioner's descriptions identify numerous functions that the beneficiary would perform, but they fail to explain, in concrete and substantive terms, why the

⁸ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Computer Programmer," <http://flcdatacenter.com/OesQuickResults.aspx?code=13-2052&area=41140&year=13&source=1> (last visited Jan. 9, 2014).

nature of those duties or functions are more specialized and complex than the nature of the duties of positions in the pertinent occupational category whose performance does not require knowledge usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

In addition, we note the negative evidentiary impact here of the LCA's Level I wage level. Again, the petitioner has designated the proffered position as a Level I position by the submitted LCA, thereby attesting that it is an entry-level position for an employee who has only basic understanding of the occupation.⁹ We find that this aspect of the petition is materially inconsistent with a claim that nature of the duties of the proffered position meets this criterion's specialization and complexity threshold.

Upon review of the totality of the record, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

Accordingly, the appeal will be dismissed for the above stated reasons. 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.

⁹ 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.