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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: **FEB 26 2015**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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,

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 on appeal. The appeal will be dismissed. The petition will be denied.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 151-employee "QA and Testing solutions firm" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "QA Healthcare Analyst / ETL Developer" position, the petitioner seeks 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our 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 the petitioner's submissions on appeal.

## II. THE LAW PERTINENT TO THE SPECIALTY OCCUPATION DETERMINATION

The issue presented on appeal is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. 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.

We note 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a "QA Healthcare Analyst / ETL Developer" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1131, Computer Programmers, from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position. The LCA is certified for employment at (1) [REDACTED] Massachusetts, and (2) [REDACTED] California.

The visa petition indicates that the [REDACTED] Massachusetts address is the petitioner's own address. It states that the beneficiary would work at the [REDACTED] California address. The period of employment requested on that visa petition is from October 1, 2014 to September 17, 2017.

With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor's degree in pharmacy from [REDACTED] in India and a master's degree in business administration from the [REDACTED]. The record also contains evidence pertinent to specialized training, employment experience, and college credit awarded by [REDACTED] Kentucky. An evaluation in the record states that the beneficiary's education, training, and employment experience, considered together, are equivalent to at least a U.S. bachelor's degree in computer information systems.

The petitioner also submitted (1) a copy of a Professional Information Services Staffing Contract dated March 14, 2014; and (2) a letter, dated March 25, 2014, from [REDACTED] the petitioner's HR Administrator.

The staffing contract provided purports to be an agreement between the petitioner and [REDACTED] to provide "IT personnel as requested by [REDACTED] to meet the staffing needs of [REDACTED]. That contract states:

Assignment details including Scope of Work, Start Date, Assignment Period, and Fee Rate shall be specified in a Scope of Work references as **Exhibit A**, attached and incorporated herein by reference.

Page 15 of that agreement is headed, "Exhibit A." It is otherwise blank. That term of that agreement is from April 14, 2014 to March 31, 2016.<sup>1</sup>

The March 25, 2014 letter from [REDACTED] states,

[The beneficiary] will be assigned to [REDACTED] facility located at [REDACTED]

As a QA Healthcare Analyst / ETL Developer, [the beneficiary's] duties will include:

- Design, develop, and implement ETL processes to extract data from various data sources using Business Objects Enterprise Suite;
- Create, test, debug, document, implement and manage complex ETL processes to extract data from a variety of data sources, transform the data, and load the data to specified destinations using Business Objects Data Services.
- Design and implement the data integration layers of application infrastructure.
- Define database data stores and file formats to connect to the source and target database and files.

<sup>1</sup> We observe that is a term of approximately two years.

- Design, create, and implement scripts, work flows, and data flows to facilitate ETL.
- Develop and unit test ETL processes in Data Services
- Collaborate with the development of Business Objects Universes, Crystal and Web-I reports.

Technical environments: ETL tools, e.g., Business Objects, SAP, Crystal Reports, Cognos, SQL

also observed that the beneficiary has an MBA and a bachelor's degree in pharmacy and stated that the petitioner believes that the beneficiary's academic background and training "uniquely qualify her" for the proffered position.<sup>2</sup>

On April 28, 2014, 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 service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, the petitioner submitted: (1) portions of the chapter of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to Computer Programmers; (2) an unofficial transcript of classes the beneficiary took at Sullivan University; (3) an organizational chart of the petitioner's operations; (4) vacancy announcements placed by other firms; (5) evidence pertinent to other employees of the petitioner; (6) an employment agreement executed by [redacted] and the beneficiary on March 18, 2014; (7) a letter from [redacted] dated May 9, 2014 and headed "Description and Itinerary of services for Employment at [the petitioner] for [the beneficiary]"; (8) a letter, dated May 13, 2014, from [redacted], a recruiter for [redacted] (9) a letter, dated June 2, 2014, from [redacted] president of [redacted] (10) an undated evaluation of the proffered position produced by [redacted] signing as "Professor/Principal Credential Evaluator of [redacted]"; and (11) a letter, dated June 13, 2014, from [redacted]

The organizational chart of the petitioner's operations indicates that the beneficiary would be supervised by [redacted] the petitioner's Vice President – Projects.<sup>3</sup>

Evidence submitted pertinent to other employees of the petitioner shows that [redacted] each have bachelor's degrees in electronics engineering awarded by universities in India.

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<sup>2</sup> [redacted] did not otherwise state any educational requirements of the proffered position.

<sup>3</sup> That document does not indicate that [redacted] would work at the California location where the beneficiary would work, rather than at the petitioner's location in Massachusetts, or elsewhere.

In the May 9, 2014 letter headed: "Description and Itinerary of services for Employment at [the petitioner] for [the beneficiary]" Shana Sullivan reiterated the duty description contained in her March 23, 2014 letter. She also stated:

At present we have identified the need for the professional services of [the proffered position]. We have identified [the beneficiary] to ideally suit to perform these duties for [the project at ] [redacted] California location].

However, the beneficiary's March 18, 2014 employment agreement states, *inter alia*:

The [beneficiary] agrees to be assigned to any facility/client sites as [the petitioner] deems it necessary in fulfillment of the terms set forth herein [the beneficiary] acknowledges that placement by [the petitioner] will be in sole discretion of [the petitioner] and who shall have full authority to assign employee to certain client sites or in-house projects. [The beneficiary] is required to travel or relocate to various client sites throughout the United States for both short and long term projects.

It reiterates:

[The petitioner] has the right to assign additional work to [the beneficiary] and/or to change the work assignment or relocate the [beneficiary] throughout the United States for short and long term assignments.

It further states: "[The petitioner] solicits regular feedback from the client about the work product of [the beneficiary]" and:

Upon the occurrence of any of the following, [the petitioner] may terminate the [employment] agreement, for cause, immediately.

\* \* \* \*

In the event that the [beneficiary] shall fail to perform his/her duties to the satisfaction of the entity in which the [beneficiary] has been placed. However [the beneficiary] will be given a fair opportunity to correct and address any complaint relating to his/her performance . . . .

The May 13, 2014 letter from [redacted] of [redacted] reiterates that the term of the agreement between the petitioner and Memorial is two years. It also states that the beneficiary has been selected to work at [redacted] location in [redacted] California and reiterates the duty description from [redacted] March 23, 2014. As to the education required for the proffered position, that letter states:

The minimum requirements for this position is [sic] a Baccalaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [sic].

The body of the June 2, 2014 letter from [redacted] of [redacted] states, in its entirety:

This is to verify and confirm the fact that the [proffered position] is a professional engagement with complex and sophisticated job duties.

I personally have been in a comparable business for 14 years with average sales of \$25 million/year to [the petitioner] for many years, and I hold Bachelors [sic] in Engineering and have employed lot of employees in similar positions and that qualifies me to give my opinion regarding the requirements for that position.

In our industry, the minimum and mandatory requirement for the [proffered position] is a Bachelor's Degree in Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field.

Please be advised that the Information Technology Industry is very ambitious and challenging, and it is essential in order to stay in the recommended and preferred list of agencies, to employ individuals who have qualifications and the preparation to handle the subjects of our business.

After reviewing the duties of the job offered for [the proffered position], I can declare that the job duties of [the proffered position] are clearly advanced and exceptional in nature and only an individual with at least the equivalent of a Bachelor's Degree in Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field would be qualified.

If you have any further questions, please feel free to contact the undersigned.

[redacted] undated evaluation of the proffered position states that positions such as the proffered position require, *inter alia*, "A four year Bachelors [sic] (BS) degree in Computer Information Systems, Information Technology, Business Administration or Engineering or a related field . . . ."4

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<sup>4</sup> [redacted] did not attempt to reconcile that opinion with [redacted] opinion, expressed in his May 13, 2014 letter, that the educational requirement of the proffered position could be satisfied by a degree in pharmacy or healthcare management, or with [redacted] opinion, stated in his June 2, 2014 letter, that a degree in pharmacy or healthcare would be a sufficient educational qualification for the proffered position.

In her June 13, 2014 letter, [REDACTED] cited [REDACTED] letter, [REDACTED] evaluation of the proffered position, the evidence pertinent to the petitioner's other employees, and O\*NET's classification of computer programmers in Job Zone Four as evidence that the proffered position qualifies as a specialty occupation position. She also provided a more detailed description of the duties of the proffered position, as follows:

Original Duty	Additional Details
Design, develop, and implement ETL processes to extract data from various data sources using Business Objects Enterprise Suite. <b>40%</b>	<ul style="list-style-type: none"> <li>• Extracting data from source clarity system.</li> <li>• Transform the data collected as per the requirement.</li> <li>• Load the final data in enterprise data warehouse target tables.</li> </ul>
Create, test, debug, document, implement and manage complex ETL processes to extract data from a variety of data sources, transform the data. <b>20%</b>	<ul style="list-style-type: none"> <li>• Collecting the requirement from vendors on Healthcare claims (Pharmacy, Professional, Medical)</li> <li>• Creating mapping and design documents for the requirement.</li> <li>• Develop jobs, workflows and data flows in order to run the data.</li> <li>• Extracting data by mapping in the table and transform data.</li> </ul>
Load the data to specified destinations using Business Objects Data Services. <b>5%</b>	<ul style="list-style-type: none"> <li>• Validate the complete job that we are running before loading to check for errors.</li> <li>• Load the data into the specified target tables or template tables.</li> </ul>
Define database data stores and file formats to connect to the source and target database and files. <b>5%</b>	<ul style="list-style-type: none"> <li>• Collect the required data stores from central repository and get the latest version of it.</li> <li>• Create own data stores and flat files to run them in the Data Services job.</li> </ul>
Design, create, and implement scripts, work flows, and data flows to facilitate ETL. <b>10%</b>	<ul style="list-style-type: none"> <li>• Creating workflows in the jobs within the projects.</li> <li>• Creating data flows using several complex transforms like data integrator, data quality, and platform transforms.</li> </ul>
Develop and unit test ETL processes in Data Services. <b>10%</b>	<ul style="list-style-type: none"> <li>• Sending the files to DEV and PROD environments to UNIX and test files for errors.</li> <li>• Validate data by running and using rules in Information steward.</li> <li>• Review the DQA reports for exceptions in data count and errors.</li> </ul>
Design and implement the data integration layers of application infrastructure. <b>5%</b>	<ul style="list-style-type: none"> <li>• Changing the environments, creating share drives and folders in it.</li> </ul>
Collaborate with the development of Business Objects Universes, Crystal and	<ul style="list-style-type: none"> <li>• Working with BO/BI team in generating e-reports using crystal reports and BO.</li> <li>• Develop user required WEB I using BO.</li> </ul>

Web-I reports. 5%

The director denied the petition on June 30, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, 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, the petitioner submitted: (1) additional vacancy announcements; (2) a letter, dated May 2, 2014, from [redacted] signing as president of [redacted] (3) a letter, dated June 2, 2014, from [redacted] signing as CEO of [redacted] and (4) a letter, dated July 31, 2014 and headed, "Appeal and Motion to Reconsider," from [redacted]

[redacted] May 2, 2014 letter is almost identical to the June 2, 2014 letter from [redacted]

The body of [redacted] letter states, in its entirety:

This is to verify and confirm the fact that the [proffered position] is a professional engagement with complex and sophisticated job duties.

I personally have been in a comparable business for many years and I hold Bachelors [sic] degree and have employed employees in similar positions and that qualifies me to give my opinion regarding the requirements for that position.

In our industry, the minimum and mandatory requirement for the [proffered position] is a Bachelor's Degree in Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field.

I have reviewed the duties of [the proffered position], I can declare that the job duties of [the proffered position] are clearly advanced and exceptional in nature and only an individual with at least equivalency of a Bachelor's Degree in Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field would be qualified.

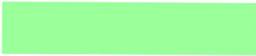
If you have any further questions, please feel free to contact the undersigned.

[redacted] June 2, 2014 letter is almost identical to the letters from [redacted] and [redacted]

The body of [redacted] letter states, in its entirety:

This is to verify and confirm the fact that the [proffered position] is a professional engagement with complex and sophisticated job duties.

I personally have been in a comparable business for 12 years to [the petitioner] for many years [sic], and I hold Masters [sic] in Computer Science and have employed



lot of employees in similar positions and that qualifies me to give my opinion regarding the requirements for that position.

In our industry, the minimum and mandatory requirement for the [proffered position] is a Bachelor's Degree in Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field.

Please be advised that the Information Technology Industry is very ambitious and challenging, and it is essential in order to stay in the recommended and preferred list of agencies, to employ individuals who have qualifications and the preparation to handle the subjects of our business.

After reviewing the duties of the job offered for [the proffered position], I can declare that the job duties of [the proffered position] are clearly advanced and exceptional in nature and only an individual with at least the equivalent of a Bachelor's Degree in or [sic] Engineering or Pharmacy or Healthcare or Computer Science, CIS or its equivalent in a related field would be qualified.

If you have any further questions, please feel free to contact the undersigned.

In her July 31, 2014 letter, [redacted] cited Professor [redacted] evaluation of the proffered position, the letter from [redacted] the letters from other businesses, the vacancy announcements provided, and the duty description she provided in her June 13, 2014 letter as evidence that the proffered position qualifies as a specialty occupation position.

#### IV. SPECIALTY OCCUPATION ANALYSIS

We reiterate that, 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. In the instant case, as was noted above, an agreement with [redacted] indicates that the petitioner will provide "IT personnel as requested by [redacted] to meet the staffing needs of [redacted]" This indicates that [redacted] would be, at least initially, the end-user of the beneficiary's services. As such, the educational requirement that [redacted] imposes for the proffered position is the critical consideration, rather than the requirement the petitioner imposes on the position.

The educational requirements that [redacted] imposes on the proffered position are explicitly stated in [redacted] May 13, 2014 letter. He stated:

The minimum requirements for this position is [sic] a Baccalaureate or higher or its equivalent in Computer Science, Pharmacy, Healthcare Management, Computer Information Systems (CIS), Electronics Engineering, Management Information Systems (MIS) or a related fields [sic].

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" 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 either of two disparate fields, such as business management and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty." Section 214(i)(1)(B) (emphasis added).

In the instant case, [REDACTED] indicated that various degrees would satisfy the educational requirement of the proffered position, including degrees in computer science, pharmacy, healthcare management, and electronics engineering. Computer science, pharmacy, healthcare management, and electronics engineering do not, even arguably, delineate a specific specialty. That a degree in any of that wide array of disciplines would be a sufficient educational preparation for the proffered position makes clear that the position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent, and does not, therefore, qualify as a specialty occupation position. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, we turn next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors we consider when determining these criteria include: whether the *Handbook* on which we routinely rely 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)).

We 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. We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup>

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1131, Computer Programmers from O\*NET. We reviewed the chapter of the *Handbook* entitled

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<sup>5</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

"Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of computer programmers:

### **What Computer Programmers Do**

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.

### **Duties**

Computer programmers typically do the following:

- 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

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*, 2014-15 ed., Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Feb. 25, 2015).

As was explained above, [REDACTED] will be assigning the beneficiary's duties and supervising her performance, at least at first, and the duties that [REDACTED] attributes to the proffered position are the salient consideration. The May 13, 2014 letter from [REDACTED] reiterated the duty description provided in [REDACTED] March 25, 2014 letter. Although [REDACTED] subsequently provided the "Additional Details" shown in the table, above, those details were never addressed by [REDACTED]. As such, they have not been shown to be duties to which [REDACTED] would assign the beneficiary, and have not been shown to be relevant to what type of position the proffered position is or what duties the beneficiary would perform if the visa petition were approved. The "Additional Details" will not, therefore, be considered.

Most of the duties [REDACTED] attributed to the proffered position are consistent with the duties of computer programmers as described in the *Handbook*. On the balance, we find that the proffered position, as it would be performed while the beneficiary is working for [REDACTED] is a computer programmer position as described in the *Handbook*.

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

### **How to Become a Computer Programmer**

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

### **Education**

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field 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.

### **Licenses, Certifications, and Registrations**

Programmers can become certified in specific programming languages or for vendor-specific programming products. Some companies may require their computer programmers to be certified in the products they use.

### **Other Experience**

Many students gain experience in computer programming by completing an internship at a software company while in college.

### **Advancement**

Programmers who have general business experience may become computer systems analysts. With experience, some programmers may become software developers. They may also be promoted to managerial positions. For more information, see the profiles on computer systems analysts, software developers, and computer and information systems managers.

### **Important Qualities**

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

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

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

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

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Feb. 25, 2015).

The *Handbook* makes clear that computer programmer positions as a category do not require a minimum of a bachelor's degree or its equivalent, as it indicates that an associate's degree may suffice for some positions. Further, even as to those computer programmer positions that may

require a bachelor's degree, the *Handbook* does not indicate that the degree must be in any specific specialty. The *Handbook* states that "most" computer programmers have degrees in computer science or a related subject, which implies that others do not.

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 a 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." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. 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)(1). To satisfy this requirement, the petitioner cited the classification of computer programmer positions in Job Zone Four in O\*NET.

As was noted above, the O\*NET Internet site, addresses Computer Programmers under the Department of Labor's Standard Occupational Classification code of 15-1131.00. Contrary to the petitioner's position, however, O\*NET does not state a requirement for a bachelor's degree. Rather, it assigns Computer Programmers a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree."<sup>6</sup> Further, O\*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the O\*NET information is not probative of the proffered position's being a specialty occupation.

As was noted above, [redacted] undated evaluation of the proffered position states that the position requires, *inter alia*, "A four year Bachelors [sic] (BS) degree in Computer Information Systems, Information Technology, Business Administration or Engineering or a related field . . . ." He did not seek to reconcile that opinion with the statement of [redacted] of [redacted] the firm which will utilize the beneficiary's services, that a degree in pharmacy or healthcare management would be a sufficient educational qualification for the proffered position. He did not seek to reconcile his opinion with the statements of [redacted] who all attest that they have considerable experience in a company similar to the petitioner's business, and that a degree in pharmacy or healthcare would be a sufficient educational qualification for the proffered position.

Moreover, [redacted] finds that the proffered position requires the attainment of a bachelor's degree in business administration or engineering, among other possibilities. The requirement of a

<sup>6</sup> For an explanation of Job Zones, see <http://www.onetonline.org/help/online/zones>.

bachelor's degree in business administration or engineering is inadequate to establish that a position qualifies as a specialty occupation. 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, 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). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Furthermore, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. It is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is directly related to the duties and responsibilities of the particular position proffered in this matter.

Further, the evaluator did not list any reference materials on which he relied as a basis for his conclusion that the proffered position requires a bachelor's degree. The evaluator appears not to have based his opinion on any objective evidence, but instead to have relied on his own subjective judgment.

Further still, the evaluator's description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, the professor nowhere discusses this aspect of the proffered position. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the professor's ultimate conclusion as to the educational requirements of the position upon which he opines.

For all of the above reasons, we accord no probative weight to the evaluation of the proffered position. We may, in our 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, we are 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).

Further, we find that, to the extent that they are described in [REDACTED] May 13, 2014 letter, the duties of 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.

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, we find 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 record contains the letters from [REDACTED] as set out above. Each of those letters indicates that the educational requirement of the proffered position could be satisfied by a bachelor's degree in engineering, pharmacy, healthcare, computer science, or a related field.

As was explained above, an educational requirement that may be satisfied by a degree 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. A requirement of a degree in engineering, pharmacy, healthcare, computer science, or in any field related to them is not a requirement of a degree in a specific specialty. As such, the letters of [REDACTED] are not persuasive evidence of the proffered position being a specialty occupation position.

In addition, the petitioner provided several vacancy announcements, as was stated above, apparently to show that parallel positions with firms that are in the petitioner's industry and are otherwise

[REDACTED]

similar to the petitioner commonly require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The vacancy announcements are for positions with various job titles, including ETL Developer, ETL Quality Assurance Analyst, Quality Assurance Analyst I, IT QA Specialist, ETL Quality Assurance Analyst, ETA Tester/QA Analyst, Quality Assurance Specialist, and IT Specialist. Only a few of the vacancy announcements are for positions specifically entitled, "Programmer," or "Computer Programmer." We observe that the LCA indicates that the proffered position is a computer programmer position and, further, that we have found, based on the duty description ratified by [REDACTED] that the proffered position is a computer programmer position.

Although the job titles of those positions are not dispositive of whether they announce positions parallel to the proffered position, we observe that software quality assurance (QA) analyst positions are addressed in the Computer Systems Analyst chapter of the *Handbook*, and are included in that job classification.<sup>7</sup> Further, the duty descriptions included in the vacancy announcements are insufficiently detailed to demonstrate that they are truly parallel to the proffered position. Most of the vacancy announcements provided have not been shown to announce positions parallel to the proffered position.

Further, the petitioner appears to be in the business of providing computer personnel to work for other companies. In this case, the petitioner would provide the beneficiary, at least in the beginning, to work for [REDACTED] which appears to provide healthcare. Most of the vacancy announcements have not been shown to be either in the petitioner's industry or in the healthcare industry.<sup>8</sup> As such, they are not collectively indicative of any requirement common to parallel positions in the salient industry, and not directly relevant to the criterion of the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Some of the vacancy announcements state that the positions they announce require a bachelor's degree, but not that they require a bachelor's degree in any specific specialty. Those vacancy announcements do not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent and are not, therefore, evidence that the proffered position, by extension, requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Some of the vacancy announcements state that the educational requirements of the positions they announce may be satisfied by a degree in any branch of engineering or in business administration.

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<sup>7</sup> 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#tab-2> (last visited Feb. 25, 2015).

<sup>8</sup> Some of the announcements were placed, for instance, by [REDACTED] the [REDACTED] [REDACTED] a [REDACTED], and the [REDACTED].

One of the vacancy announcements requires a bachelor's degree in "Business, Engineering, or Science."

As noted above, 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.

Similarly, the requirement of a bachelor's degree in engineering is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of degrees with generalized titles, such as engineering,<sup>9</sup> 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).

Yet again, a degree in any branch of science, which includes chemistry, meteorology, and botany, is not a requirement in a specific specialty. An educational requirement that may be satisfied by a degree in any of the wide array of subjects which, considered together, comprise "Science" is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

For all of those reasons, a vacancy announcement with an educational requirement that may be satisfied by a degree in any field of engineering, any field of science, or in business administration does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further still, some of the announcements indicate that a short period of experience (e.g. four years) may be substituted for the otherwise requisite bachelor's degree. Such a short period of experience is not equivalent to a minimum of a bachelor's degree in a specific specialty or its equivalent pursuant to the salient statutes. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Those vacancy announcements are not indicative of a common requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Additionally, most of the vacancy announcements provided are for positions that require specific experience, and some require a considerable amount of very specific experience, whereas the proffered position is an entry level position for an employee who has only basic understanding of the occupation, as indicated on the LCA where the petitioner designated the proffered position as a

<sup>9</sup> As noted above, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. It is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is directly related to the duties and responsibilities of the particular position proffered in this matter.

Level I position.<sup>10</sup> Those vacancy announcements that state an experience requirement, and especially those that state a requirement of a great amount of very specific experience, are unlikely to be Level I positions and unlikely, therefore, to be positions parallel to the proffered position.

Finally, 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 the announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>11</sup>

Thus, the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to positions that are (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner, and does not satisfy the criterion of the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record also does not 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." 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 a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has

<sup>10</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>11</sup> 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. 369, 376 (AAO 2010). 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).

failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level I computer programmer, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of computer programming. This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* suggests that some computer programmer positions do not require such a degree.

Therefore, the evidence of record does not establish that this position is significantly different from other computer programmer positions 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).

We 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.<sup>12</sup>

As noted above, the petitioner submitted evidence pertinent to [REDACTED]. However, the equivalencies of those degrees

<sup>12</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

to U.S. degrees have not been established. Further, the petitioner has not submitted sufficient evidence that those individuals worked for the petitioner in the proffered position.<sup>13</sup>

In any event, however, the petitioner stated that it was established in [REDACTED] and that it currently has 151 employees. The number of computer programmers it employs, and the number it has employed in the past, is not demonstrated in the record. Submission of the degrees of four of the petitioner's employees, who have not even been demonstrated to work in the proffered position, is insufficient to show that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position, and the petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, we 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 contain insufficient indication of a nature so specialized and complex they require knowledge usually associated attainment of 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 programmer positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

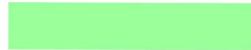
Further, as was noted above, the petitioner filed the instant visa petition for a Level I computer programmer position, a position for a beginning level employee with only a basic understanding of computer programming. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to computer programming, especially as the *Handbook* indicates that some computer programmer positions require no such degree.

For the reasons discussed above, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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<sup>13</sup> In fact, we note that [REDACTED], who may be the same person as [REDACTED] is listed on the petitioner's organizational chart as the petitioner's vice president -- projects, a position that is probably not a Level I computer programmer position.



We observe, in addition, that the petitioner has asserted that the beneficiary will be assigned to work for [REDACTED] in California. However, the petitioner's agreement with [REDACTED] indicates that its term will end on March 31, 2016. The period of employment requested in this case continues through September 17, 2017. The record contains insufficient evidence that the petitioner will have any work for the beneficiary to perform from March 31, 2016 to September 17, 2017. The beneficiary's employment contract makes explicit that the petitioner contemplates that, during that period, the petitioner may change the beneficiary's work assignment. Even if the work the petitioner would perform for [REDACTED] had been established to be specialty occupation work, and even if the visa petition were otherwise approvable, the visa petition could not be approved for any period after March 31, 2016.

V. EMPLOYER-EMPLOYEE RELATIONSHIP

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.<sup>14</sup>

A. THE LAW

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.

<sup>14</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

## B. ANALYSIS OF THE LAW PERTINENT TO THE EMPLOYER-EMPLOYEE ISSUE

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.<sup>15</sup>

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

<sup>15</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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.

additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>16</sup>

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).<sup>17</sup>

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

<sup>16</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>17</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

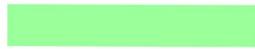
Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

### C. ANALYSIS OF THE EVIDENCE

The petitioner is located in Massachusetts. It has indicated that it will provide the beneficiary, at least initially, to work for ██████████ in California. Although the petitioner's organizational chart indicates that ██████████ the petitioner's vice president for projects, would supervise the beneficiary, there is insufficient indication that ██████████ would work in California. Under these circumstances, it appears unlikely that ██████████ would assign the beneficiary's tasks and supervise her performance of them.

Further, the March 14, 2014 agreement between the petitioner and ██████████ does not indicate that the petitioner will perform specified services for ██████████ but, rather, that the petitioner will "provide temporary Information Technology (IT) personnel" to ██████████

Further still, the beneficiary's employment agreement indicates that if ██████████ or whatever other end-user the beneficiary may subsequently be assigned to, disapproves of the beneficiary's performance, she may, after being accorded an opportunity to correct the situation, be discharged. Clearly, ██████████ and the subsequent end-users of the beneficiary's services would have considerable input into whether the petitioner is discharged. This is another index of control the end-users of the beneficiary's services would exercise over the beneficiary, and another indication



that the petitioner would not be the beneficiary's true employer within the meaning of the law as set out above.

Based on the tests outlined above, the petitioner has not established that, if the visa petition were approved, it would be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." The visa petition will be denied for this additional reason.

## VI. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis). Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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