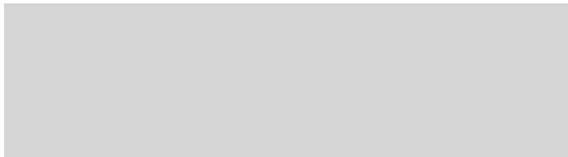




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 26 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 26-employee "Software Development and IT Solutions Provider" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition finding that the petitioner failed to establish that (1) the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; (2) it will be a "United States employer" having an employer-employee relationship with the beneficiary as an H-1B temporary employee; and (3) the beneficiary is qualified for the proffered position. On appeal, the petitioner asserts that the director's bases for denial are erroneous and contends that the petitioner has satisfied all evidentiary requirements.

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.

For the reasons that will be discussed below, we agree with the director's decision that the petitioner failed to establish eligibility for the benefit sought.<sup>1</sup> Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## II. THE PETITIONER AND THE PROFFERED POSITION

In a letter dated March 22, 2014, the petitioner indicated that it is a "leading global consulting and IT services company." The petitioner further stated that it has a contract with [REDACTED] to provide qualified personnel to work on projects for [REDACTED] client, [REDACTED]. The petitioner indicated that "in this particular instance, [REDACTED] has requested the services of a qualified Programmer Analyst to work on [REDACTED] Project," and that it has provided the beneficiary's services per its contract.

The petitioner described the beneficiary's duties as a programmer analyst as follows:

As a Programmer Analyst, the Beneficiary's duties will include:

- Execute account management campaigns.
- Design, develop and administration of analytical data constructs/structures.

<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Create analysis datasets, and produce SAS based reports with the areas of data access and delivery technologies.
- Building programs to create SAS datasets from the external data sources, and other sources
- Conduct advanced ad hoc analysis through data extraction queries and interpret findings; make recommendations to support decisions.
- Submit weekly reports regarding the work that has been completed for that week as well as work that will be completed in the coming week.

The petitioner further indicated that the "requirements of this position include a minimum of a Bachelor degree, or its equivalent, in Engineering, Computer Science, Information Technology, or a closely related field."

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES) Code 15-1121, at a Level II (qualified) wage. The LCA is certified for employment at [REDACTED] Illinois.

### III. EMPLOYER-EMPLOYEE

We will now address whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted

that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). 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>2</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 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>3</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

<sup>2</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).

<sup>3</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))).

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>4</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 hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to

<sup>4</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).

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).

The petitioner claims that it will have an employer-employee relationship with the beneficiary. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. 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)). For the reasons explained in detail below, the record does not establish that the petitioner will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."<sup>5</sup>

#### A. Offer of Employment Letter

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). With the Form I-129 petition, the petitioner submitted an offer of employment letter dated March 1, 2014. Notably, the petitioner states it is offering the position as "Sr. .NET Developer," but lists the beneficiary's duties as a programmer analyst. The petitioner did not explain the variance.

#### B. Employment Agreement

In response to the RFE, the petitioner submitted an employee agreement. It is stated that the agreement is between the petitioner of [redacted] Florida [redacted] and the beneficiary of [redacted] Il [redacted]. However, in section 12, it states that the agreement will be governed by the laws of the State of Virginia. The petitioner did not provide further explanation. Moreover, the agreement is dated January 11, 2014 and signed by the beneficiary, but is not signed by the petitioner.

On appeal, the petitioner submitted another copy of the same employee agreement. However, this agreement is dated September 2, 2014, and signed by both the beneficiary and the petitioner. Notably, the section 12 has been changed and states that the agreement will be governed by the laws of the State of Florida. The petitioner did not explain the variance.

#### C. Employee Handbook

In response to the RFE, the petitioner submitted a few pages from its employee handbook. Notably the petitioner's address is listed as [redacted] VA [redacted].

<sup>5</sup> Furthermore, as will be discussed, there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to several aspects of the beneficiary's claimed employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner only provided the pages for the table of content and section 9 to 12, which discusses overtime, wage and performance review, and promotion. Notably, the preceding section to overtime is cut off, but emphasizes that "[i]t is necessary for each employee to 'clock in' at the start of work and 'clock out' when he or she leaves." The petitioner did not provide information on how an off-site employee would comply with this procedure. The petitioner did not provide pages pertinent to provision of employee benefits.

#### D. Performance Review Process

We also reviewed the record of proceeding with regard to how the beneficiary's performance would be evaluated. In the letter dated March 22, 2014, the petitioner stated that it "supervise[s] the beneficiary's work through weekly reports the beneficiary is required to send us." However, the petitioner did not explain how such weekly reports would translate to performance standards, how they are used for assessing and evaluating the beneficiary's work, and/or the criteria for determining bonuses and salary adjustments. On appeal, the petitioner submitted documents entitled "Weekly Reports for September." Notably, the project title is "Sales Engineer/Retentions," which differs from the project described in the petitioner's letter dated March 22, 2014. The report lists the project name, for example, "Debt Product Code," and also the tasks associated with the project, such as "started coding, data pull from daily, and analytical files."

The record does not contain any further specific information from the petitioner regarding if and when the reports are reviewed or analyzed and, if so, by whom; the methods used for assessing the reports; any instructions provided to the beneficiary regarding the reports; the consequences, if any, of failing to prepare the reports; etc. Thus, the petitioner has not demonstrated the probative value and relevance of its claim regarding the weekly reports to the question presented here, i.e., whether the petitioner will have the requisite employer-employee relationship with the beneficiary. It appears that if the petitioner were controlling the work of the beneficiary, then the petitioner would be directing the work to be completed, not requesting a report from the beneficiary regarding his own duties or the end-client's plans for the work to be performed.

The petitioner also submitted a copy of the Performance Evaluation. Upon review, the document lacks sufficient information regarding how work and performance standards were established, the methods for assessing and evaluating the beneficiary's performance, the criteria for determining bonuses and salary adjustments, et cetera. Importantly, there is a lack of information as to how the day-to-day work of the beneficiary has been and will be supervised and overseen when the beneficiary is placed approximately 1,200 miles away from the petitioner in Illinois.

#### E. Independent Contractor Agreement

In its initial submission with the Form I-129, the petitioner provided an "Independent Contractor Agreement," dated February 20, 2014 with [REDACTED]. The agreement states that the petitioner will provide specialized services directly to the third party user client, [REDACTED]. It further states that "[the petitioner]'s services under this Agreement shall terminate at the end of the minimum time requirement stated in the Purchase Order and any renewals or extensions thereof (the "end date"), or upon twenty-four hours' notice if for any reason the [REDACTED] no longer desires the services of

[the petitioner]."

Notably, the agreement states "if [ ] determines that [the petitioner]'s personnel is not qualified for the position and is to be replaced, [the petitioner] will forego payment for up to five days of services." This provision suggests that it is [ ] or the end-client that will evaluate the beneficiary's credentials and performance.

#### F. Purchase Order

The petitioner submitted a "Purchase Order," issued by [ ] to the petitioner for the beneficiary's services. The Purchase Order states that the petitioner is contracted to perform work for [ ] beginning March 1, 2014 and terminating on September 9, 2014. It further states that "unless otherwise notified...this Purchase Order shall be deemed to have been extended beyond the original 'end date' on a month-to-month basis to a new 'end date'...until such time as the above mentioned project is completed or [the petitioner] provides 2 weeks/14 days prior written notice of a refusal to extend this Purchase Order." It further adds that "the purpose of this paragraph is not to extend the end date indefinitely and create a continuous relationship, but is instead to cover situations where the original estimates for project completion require adjustment." Based on the purchase order, there is no evidence that this contract would be valid for the duration of the requested H-1B period.

#### G. Letters from [ ]

The record contains a March 12, 2014 letter from [ ], Assistant Manager-HR of [ ]. The letter states that [ ] has engaged [ ] for the project "[ ]" and [ ] has subcontracted with the petitioner. Again, this project description differs from what was stated in the petitioner's letter dated March 22, 2014. The letter further states that [ ] has an ongoing contract with [ ] and it has a Master Service Agreement, but it will not be shared with any third party due to confidential nature of the agreement. The letter provides a job description, which overlaps with the petitioner's job duties, but includes additional duties.

In response to the RFE, the petitioner submitted a July 9, 2014 letter from [ ] HR Specialist of [ ]. The letter states that [ ] has engaged [ ] for the Data Analyst and [ ] has sub contracted with [the petitioner] to help full up this future requirement." It further indicates that the services will be rendered at [ ] office location at [ ] IL [ ]. The letter provides a job description, which is verbatim from the petitioner's letter. The letter further states that the beneficiary "is expected to be reinstated on the Project again eff[sic] 09/01/2014 with [ ]" and it would be "ongoing, long term project and the services for this project will be substantiated through the terms of the Purchase Order."

The letters provided by [ ] contain discrepancies regarding the work location, project description, proffered position, and dates of service. However, the petitioner did not provide explanation for the variance.

#### H. Letters from [ ]

The record contains a letter from [REDACTED] of [REDACTED] dated March 6, 2014. The letter states that the beneficiary is "currently based at [REDACTED] IL, [REDACTED]" The letter further indicates that [REDACTED] "provides various consulting services to [REDACTED]" and that the beneficiary "has been assigned to work at [REDACTED] in the professional position of Data/Information Analyst." The letter further states to "refer to the enclosed support statement from the beneficiary's employer for a detailed description of the offered position." However, there is no further information regarding which support statement that this letter is referring to.

On appeal, the petitioner submitted a September 4, 2014 letter from [REDACTED] Data Analysis Manager at [REDACTED]. The letter states that the beneficiary is "currently based at [REDACTED] IL [REDACTED]" The letter further indicates that [REDACTED] "provides various consulting services to [REDACTED]" and that the beneficiary "has been assigned to work at [REDACTED] in the professional position of Data/Information Analyst." The letter further states to "refer to the enclosed support statement from the beneficiary's employer for a detailed description of the offered position." Again, there is no further information regarding which support statement that this letter is referring to.

#### I. Dates of Employment

We note that there are inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2014 to September 9, 2017. The petitioner also submitted a Purchase Order, which indicates that the project will begin March 1, 2014 and terminating on September 9, 2014. As noted, while the purchase order stated that it "shall be deemed to have been extended beyond the original 'end date' on a month-to-month basis," this provision is "not to extend the end date indefinitely and create continuous relationship" but "is instead to cover situations where the original estimates for project completion requires adjustment."

Further, the letters from [REDACTED] does not indicate the duration of its projects. As mentioned, while the letters from [REDACTED] state that it has ongoing contract with [REDACTED] through a master services agreement, such agreement was not provided due to confidential nature of the agreement.<sup>6</sup>

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<sup>6</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is

## J. Itinerary

On the Form I-129 and the LCA, the petitioner indicated that the beneficiary would be employed at [REDACTED] IL [REDACTED]. However, as mentioned above, the beneficiary appears to be employed at more than one location. The letter from [REDACTED] dated July 9, 2014, and the letter from [REDACTED] dated September 4, 2014 indicated that the beneficiary was working at [REDACTED] IL [REDACTED]. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

*Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

Therefore, the petitioner did not comply with the itinerary requirement.

## K. Conclusion

Upon review, there is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

Notwithstanding the lack of non-speculative work for the beneficiary for the requested employment period, we assessed and weighed the available relevant factors as they exist or will exist, and the evidence does not support the petitioner's assertion that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). The petitioner claims that the beneficiary will be employed at [REDACTED] and the evidence indicates that [REDACTED] or possibly some other future client will have discretion over when and how long the beneficiary will work, as well as assigning projects to the beneficiary. It appears that he will use the tools and

unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

instrumentalities of the client. There is a lack of evidence establishing the petitioner's right to control or actual control in the instant case, as well as the beneficiary's role (if any) in hiring and paying assistants. Furthermore, as discussed, a substantive determination cannot be made or inferred with regard to the provision of benefits. The petitioner failed to establish such aspects of the employment, such as who will oversee the day-to-day work of the beneficiary and who will be responsible for his performance evaluations. In the instant case, it appears that the petitioner's role is likely limited to invoicing and proper payment for the hours worked by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client. See *Defensor v. Meissner*, 201 F.3d at 388.

Upon review of the record of proceeding, we therefore cannot conclude that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). 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).

#### IV. SPECIALTY OCCUPATION

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 the director set out, 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 at 387. 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS therefore 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.

Moreover, we reiterate that 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, 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. It must be emphasized that determining whether a proffered position qualifies as a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

A critical aspect of this matter is whether the record adequately demonstrates the requirements for the proffered position. We find that, as currently constituted, it does not do so.

In this matter, the petitioner stated that the "requirements of the position include a minimum of a Bachelor degree, or its equivalent, in Engineering, Computer Science, Information Technology, or a closely related field." Such an assertion, i.e., that the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., engineering, computer science, information technology, or a related field) suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the

particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the petitioner indicated that a bachelor's degree in a number of disciplines is acceptable for the proffered position, specifically, engineering, computer science, information technology, or a closely related field. However, it must be noted that these include broad categories that cover numerous and various specialties. Therefore, it is not readily apparent that a degree in any and all of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter.

Moreover, 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 company's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the former INS 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. Here, we observe that both [REDACTED] and [REDACTED] did not specify the requirements for the position.

Furthermore, none of the job descriptions in the record provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Consequently, the record does not establish which tasks are major functions of the proffered position and the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). Moreover, the duties of the proffered position have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. As a result, we cannot discern the primary and essential functions of the proffered position.

Upon review, the job descriptions submitted in this matter do not adequately convey the specific tasks the beneficiary is expected to perform to establish eligibility for H-1B classification. For example, the abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary's duties include "execute account management campaigns," "design, develop and administration of analytical data constructs/structure," "create analysis datasets, and produce SAS based reports with the areas of

data access and delivery technologies," "building programs to create SAS datasets from the external data sources," and "conduct advanced ad hoc analysis through data extraction queries and interpret findings." The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

For the reasons discussed above, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. Accordingly, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will be employed.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary 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.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary for the entire employment period requested, we will next discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts." We recognize the U.S. 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.<sup>7</sup> We reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.<sup>8</sup> However, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the

<sup>7</sup> All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed on the Internet at <http://www.bls.gov/OCO/>.

<sup>8</sup> For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited March 25, 2014).

following about this occupational category:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

### **Education**

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

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

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited March 25, 2015).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. This section of the narrative begins by stating that a bachelor's degree in a related field is not a requirement. The *Handbook* continues by stating that there are a wide-range of degrees that are acceptable for positions in this occupation, including general purpose degrees such as business and liberal arts. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, it does not report that such a degree is normally a minimum requirement for entry.

According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. It further reports that many analysts have technical degrees. We observe that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, it specifically states that such a degree is not

always a requirement. Thus, the *Handbook* does not support the claim that the occupational category of computer systems analyst is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level computer systems analyst position, would normally have such a minimum, specialty degree requirement or its equivalent.

In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record regarding 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 such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard, industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the relevant industry attesting that such firms "routinely employ and recruit only degreed individuals." The petitioner did not provide any documentation to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents. We reviewed the record of proceeding in its entirety. However, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

More specifically, the petitioner has not credibly demonstrated that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. 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 it may assert are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has not shown 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 proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Systems Analysts" at a Level II wage. In accordance with the relevant DOL explanatory information on wage levels, a Level II position is indicative that, relative to other positions falling under the occupational category, the beneficiary is expected to have a good understanding of the occupation but that he will only perform moderately complex tasks that require limited judgment. Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>9</sup> The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

The petitioner indicated that the beneficiary is highly qualified programmer analyst. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it (or in this case, the end-client) normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's (or end-client's) past recruiting and hiring practices, as well as information regarding employees who previously held the position, as well as any other documentation submitted by the petitioner in support of this criterion.

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<sup>9</sup> For additional information regarding wage levels as defined by DOL, 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).

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's (or end-client'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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must therefore show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner (or end-client) has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In the instant matter, the petitioner did not submit any documentation in support of this criterion of the regulations. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

We reviewed the petitioner's statements and the documentation provided regarding its business operations and the proffered position. However, the petitioner has not established that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

We hereby incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four assignable wage-levels) relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage. The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not submitted any evidence to satisfy this criterion of the regulations. We therefore conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, we cannot conclude that the proffered position qualifies as a specialty occupation.

## V. BENEFICIARY QUALIFICATIONS

If the petitioner had demonstrated that the proffered position is a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent, then the petitioner would also have been obliged to demonstrate that the beneficiary is qualified to work in that position by virtue of having a minimum of a bachelor's degree *in that specific specialty* or its equivalent. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968). In the instant case, the petitioner is relying on an evaluation of the beneficiary's education, training, and professional experience, considered together, to demonstrate that he has such a specific degree equivalent in Quantitative Business Analysis.

When such an evaluation will rely on employment experience or on professional training, other than college education, *even in part*, the evaluation must be accompanied by evidence that the evaluator "has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." *See* 8 C.F.R. § 214.2(h)(4)(iii)(D).

In the instant case, the evaluation is accompanied by a letter from [REDACTED] the department chair and a professor of economics at [REDACTED], stating: "Dr. [REDACTED] has gained extensive experience in the mechanism by which credit is granted (for prior studies, transfer credits, experiential learning, internships, and other appropriate qualifications)." Neither that letter nor any other evidence in the record indicates that Dr. [REDACTED] the evaluator, has authority to grant college-level credit for training and/or employment experience either at [REDACTED] or elsewhere.<sup>10</sup> His evaluation, therefore, is not competent evidence, pursuant to the strictures of the salient regulation, that the beneficiary has the equivalent of a bachelor's degree in Quantitative Business Analysis.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree in a specific specialty, or its equivalent, and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, we need not engage in any more exhaustive examination of the beneficiary's qualifications.

#### VI. CONCLUSION

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 denial. 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. 128. Here, that burden has not been met.

**ORDER:** The director's decision is affirmed. The petition is denied.

<sup>10</sup> Further, the letter pertinent to Dr. [REDACTED] experience awarding transfer credits, internship credits, etc. is dated roughly one and a half years earlier than Dr. [REDACTED] first evaluation.