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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-A-, INC.

DATE: MAR. 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an IT development company, seeks to extend the Beneficiary's temporary employment as a [REDACTED] under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner claims that the proffered position is a specialty occupation.

Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

A. Legal Framework

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 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. Fed. 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.

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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 individuals 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 individual, 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 or 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*, 201 F.3d at 387-88, 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 387-88. 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.* 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.

B. The Proffered Position

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner indicated that it is a 13-employee “IT development” company located in [REDACTED] Virginia. The Petitioner is seeking to extend the Beneficiary’s employment as a [REDACTED] from March 4, 2015, to March 1, 2018. The Petitioner also indicated on the Form I-129 that the Beneficiary will work off-site in [REDACTED] Minnesota.

The labor condition application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title

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15-1131, “Computer Programmers,” from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I (entry) position. The LCA lists two places of employment for the Beneficiary: the Petitioner’s premises in Virginia, and the off-site address in Minnesota.

In a support letter dated February 27, 2015, the Petitioner explained that it “has a contractual relationship through [mid-vendor] to place the Beneficiary to work at [end-client] site as a [redacted].” The Petitioner then provided the following list of duties for the Beneficiary to perform at the end-client worksite (verbatim):

- Define, Design and Code various [redacted] FIN modules to receive and send data from the Legacy systems;
- Define and Design various Technical specification documents to implement [redacted] FIN and SCM modules;
- Design various Reports using Crystal Reports and [redacted] Query Manager;
- Work with the Project Manager to design Functional/Technical Design Documents for custom SQR and Application Engine Interface program;
- Work with Technical Team to write custom Integration Broker messages and monitor them.
- Work on to customize and enhance [redacted] pages, records and components based on the requirements.
- Writing Scripts to transfer data between environments.
- Interacting with End Users and documenting the requirements and developing the project accordingly.
- Designing/fine tuning complex SQL queries using Oracle Database and SQL editor;
- Provide Post go live production support to the [redacted] team to deal with any issues after they go-live.
- 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 stated that “[u]pon the conclusion of the aforementioned project, [the Petitioner] intend[s] to have the beneficiary return to [its] offices to work on [its] [redacted] development project.” The Petitioner explained that it has “only recently begun this undertaking and [has] leased new office space for the staff that [it is] currently hiring for this project. The product development is truly at the infancy stage so a final product or an advanced version has not been created at this point.” The Petitioner provided the following job duties for the Beneficiary specific to the Petitioner’s internal [redacted]¹ project (verbatim):

¹ The Petitioner refers to its in-house project as the [redacted] and [redacted] project. For the sake of consistency, we will refer to it as the [redacted] project.

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- Conduct requirement gathering and Fit-Gap analysis for implementing [REDACTED] General Ledger, Accounts Payables and Purchasing modules.
- Conduct interviews with the Business owners, Management and Stakeholders to review and understand the Client's [REDACTED] processes of their legacy systems for the Accounts Payable, Purchasing and General Ledger modules.
- Design various inbound and outbound interfaces that would transmit data to and from various legacy subsystems to the new [REDACTED] system.
- Integrate [REDACTED] Asset Management with Accounts Payable and Inventory module.
- Develop and implement Approval Work-Flow rule sets for designing the approval hierarchy for Accounts Payable and Purchasing modules.
- Create functional specification documents for the various [REDACTED] financials modules providing step by step information about various set-up and configuration processes.
- Host weekly status meetings for the Accounts Payable and General Ledger project plan to track the status of the project and identify any road blocks.
- Perform Vendor Clean up using MS Access database by designing queries for various vendor scenarios to eliminate duplicate entries of vendors with different address and Tax Identification Numbers (TIN)
- Define Test strategy and Test Plan for various testing phases including Unit test, System Test, Integration test and User Acceptance Testing.
- Provide Production support post go-live for Accounts Payable and Purchasing modules by handling day to day issues by logging them into [REDACTED] database tool and resolve them.
- Provide Standard Industry practice recommendations around implementation of PS Financials modules including General Ledger and Accounts Payable.
- Provide guidance and recommendations to the client to design their [REDACTED] security controls for General Ledger, Accounts Payable and Purchasing modules by reviewing their existing controls for Sarbanes Oxley (SoX) compliance.

The Petitioner submitted an itinerary with the visa petition and another in response to the Director's request for evidence. Each itinerary discusses the Beneficiary's assignments to the end-client site in Minnesota as well as to the Petitioner's internal [REDACTED] project. The itineraries list the same job duties for the Beneficiary as previously listed in the Petitioner's support letter. With respect to the end date of the project, the first itinerary states "TBD [to be determined]." The second itinerary also identifies the dates of the Beneficiary's assignment to the end-client as "TBD," but also indicates under "Dates of Service," "[u]pon approval of this petition with extensions anticipated through March 2018."

C. Analysis

Upon review of the record, we find that the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation.

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The Petitioner has submitted varying and inconsistent statements and evidence regarding where the Beneficiary will work and what he will be doing. The Petitioner initially indicated on the Form I-129 and LCA that the Beneficiary will be working at two locations: the end-client's premises in Minnesota, and the Petitioner's office in Virginia. The Petitioner specifically explained in its support letter that "[u]pon the conclusion of the [end-client] project, [the Petitioner] intend[s] to have the beneficiary return to [its] offices to work on [its internal] eFinancial development project."

However, subsequently submitted documentation indicates that the Beneficiary's assignment at the end-client will extend through the end of the requested validity period. Specifically, the mid-vendor's letter states "as per estimates provided by [REDACTED] the current project is expected to be continued through 2018." The Petitioner has not sufficiently explained why it is claiming that the Beneficiary will work on both the end-client assignment and the Petitioner's internal [REDACTED] project, when the Beneficiary's assignment at the end-client is expected to last through the end of the validity period requested in this petition.

In fact, the record of proceedings contains inconsistencies regarding duration of the end client assignment. Specifically, two itineraries provided by the Petitioner state that the "Project end-date" for the end-client is "TBD." However, as noted, in the second itinerary, the Petitioner also indicates in "Dates of Service," "[u]pon approval of this petition with extensions anticipated through March 2018." Further, "Schedule A" of the Independent Contractor Service Agreement between the Petitioner and the mid-vendor indicates "Anticipated Duration" as "As determined by client." The "Work Order Summary" provides a "start date" of "11/17/14," but the "duration" and the "end date" columns are left blank. As noted, the mid-vendor states that the project is expected to continue through 2018 per estimates provided by [REDACTED] however, its statements are not substantiated by documentary evidence.²

It is unclear what exactly the Beneficiary will be doing and where he will be working throughout the requested validity period. "[I]t is incumbent upon the Petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). "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." *Id.*

Regardless of whether the Beneficiary will be assigned to the end-client and/or will be working in-house on the Petitioner's internal project, we nevertheless find insufficient evidence to establish the substantive nature of the proffered position and its constituent duties.

² If the Petitioner and the end-client had not agreed to an end date for the Beneficiary's services as of the time of filing and the Petitioner was merely claiming that the Beneficiary would be assigned to its internal project if necessary, this, in essence, would amount to speculative employment, which is not permitted in the H-1B program. The agency made clear long ago that speculative employment is not permitted in the H-1B program. See *Petitioning Requirements for the H Nonimmigrant Classification*, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

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For instance, as noted, the Petitioner submitted the Independent Contractor Service Agreement between the Petitioner and the mid-vendor, as well as the accompanying “Schedule A” which assigned the Beneficiary to the end-client. However, this document is not sufficient for purposes of establishing the specific duties the Beneficiary will perform or other terms and conditions of his assignment. More specifically, the “Description of Services to be Performed” is described simply as “Application Systems Engineer 6,” without further details regarding the actual work to be performed. In contrast, the Beneficiary’s purported job title for the end-client is [REDACTED]. In addition, as previously noted, the anticipated duration of the assignment is “As determined by client.”

The Petitioner also submitted a “Work Order Summary” for Work Order [REDACTED] which summarizes the Beneficiary’s assignment to the end-client as an “APPS SYSTEMS ENGINEER 6.” This document, too, is insufficient, as it provides little relevant details regarding the specific work to be performed. Notably, this document indicates that more detailed descriptions of the position are available under the tab “Position and Resource Details,” and possibly under separate documentation.³ However, the Petitioner did not submit additional documentation detailing the Beneficiary’s assignment. Also notable is the work order summary which identifies the mid-vendor as the “Supplier Organization” of the Beneficiary, as opposed to the Petitioner. As noted, the work order summary also does not list an end date for the Beneficiary’s assignment.

While the evidence of record contains letters from the Petitioner and the mid-vendor which identically list the Beneficiary’s proposed duties, we accord little probative value to these letters, as they were not issued directly by or from the end-client.⁴ Even if we considered these letters, however, we find that the job duties listed therein are insufficient to convey the substantive nature of the proffered position. That is, the job descriptions provided by the Petitioner and the mid-vendor

³ The work order summary states: “The Summary Page below provides the pertinent terms of the Work Order. For greater details on a particular section, select the appropriate tab(s) above.” One of the tabs appears to be “Position and Resource Details.” The work order summary further states that “[a]s a precondition to the commitment of the work assignment described in this Work Order, Supplier Organization shall cause the Resource identified below to deliver an Acknowledgement of Temporary Assignment. A form of Acknowledgement will be provided under separate cover following Supplier Organization Approval of this Work Order.” Neither the Beneficiary’s Acknowledgement of Temporary Assignment nor the mid-vendor’s Acknowledgement was submitted for the record.

⁴ The Petitioner asserts that it “requested a letter from [the end-client] but was told that per their policy at this worksite, [they] will not issue a client letter for non-employees such as the Beneficiary.” However, the Petitioner did not provide evidence to corroborate this statement regarding the end-client’s “policy.” “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for a petitioner not providing such a document if that document is material to the requested benefit. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the “respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.”).

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are overly broad and inadequate to convey the specific tasks to be performed. For example, the Beneficiary is listed as performing the duty of “[p]rovide [p]ost go live production support to the PeopleSoft team to deal with any issues after they go-live.” However, there is no further explanation of (1) what is meant by the phrase “[p]ost go live production support,” (2) who the [REDACTED] team” is, and (3) what system(s) or application(s) is to be developed or is otherwise involved.

Another example of the generalized job descriptions is the stated duty of “[i]nteracting with End Users and documenting the requirements and developing the project accordingly.” There is insufficient explanation of what is meant by the vague terms “[i]nteracting” and “developing the project accordingly,” and who the “End Users” are. Despite this job duty’s reference to “the project,” the Petitioner has not submitted any explanation and documentation identifying what specific “project” the Beneficiary will be assigned to at the end-client site.

In addition to the concerns regarding the Beneficiary’s claimed assignment to the end-client, the evidence of record also contains discrepancies and deficiencies with respect to the Petitioner’s claim that it will assign the Beneficiary to its internal [REDACTED] project.⁵

For instance, on page 3 of the [REDACTED] project document which was submitted with the visa petition, the Petitioner stated that “[t]he development of [the] project will begin starting the second quarter of year 2009 and initial design and documentation of the project is under way” However, in the timeline that appears in the same document at pages 46-47, the Petitioner stated that the first “Requirements” phase will start more than two years later, on October 15, 2011. In other documentation submitted at the same time, the Petitioner provided conflicting information. Specifically, in its support letter dated February 27, 2015, the Petitioner stated that it has “only recently begun” developing the eFinancials product, and that “product development is truly at the infancy stage.” It is not clear when the Petitioner actually begun work on its eFinancials project. In fact, there is insufficient evidence that the eFinancials project has actually begun.

It is also unclear when or how the Beneficiary’s services will be utilized on the [REDACTED] project. In the Labor Requirements section of the project document at page 47, the Petitioner stated: “Since the project is in requirements phase, current labor requirements are identified as Business Analyst/s who will perform the requirements gathering and functional design process.” According to the first

⁵ We observe that the “Market Analysis” portion of the Petitioner’s [REDACTED] project document appears to have been plagiarized from a copyrighted document by [REDACTED] 2006-2011, available at: [REDACTED] (last visited Mar. 29, 2016). For example, the content in pages 48-49 of the Petitioner’s project document is identical to content found in pages 1-2 of the [REDACTED]. The Petitioner did not credit [REDACTED] in its project document. The Petitioner’s apparent unauthorized reproduction of copyrighted literature undermines the Petitioner’s credibility. For instance, because the Petitioner copied the work of others in its [REDACTED] project document, we cannot determine the level of research, planning, and other resources that the Petitioner has actually devoted to this project. We also cannot determine which aspects of the document are credible and accurately represent the Petitioner’s work, and which do not. It is again emphasized that doubt cast on any aspect of the Petitioner’s proof may 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. at 591.

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submitted itinerary, the Beneficiary will specifically perform the following duties for the internal [REDACTED] project: “[c]onduct requirement gathering,” and “[c]onduct interviews with the Business owners, Management and Stakeholders to review and understand the Client’s [REDACTED] processes of their legacy systems” These duties essentially amount to requirements gathering, which, according to the project document, were supposed to have been performed in 2009, or alternatively, from October 15, 2011, to April 13, 2013.

Another example of the conflicting information surrounding the Beneficiary’s role in the [REDACTED] project is the project document timeline which states that the last phases (“Support” and “Migration/Conversion/Go Live”) will end on December 24, 2016. However, the Petitioner is requesting a March 1, 2018, end date for the Beneficiary’s services. The Petitioner has not explained what other phases of the project the Beneficiary would or could be involved in, as the last phases of the project are scheduled to be completed at the end of 2016. Moreover, the Petitioner has not explained, nor is it readily apparent, why the Beneficiary would conduct interviews with “Business owners,” “Stakeholders” and “Client[s]” to review and understand their legacy systems when [REDACTED] is purportedly an internal project in its infancy stage.

Further, the Petitioner claimed in the first itinerary that the Beneficiary will work on its internal [REDACTED] project at its office located in [REDACTED] Virginia. The Petitioner also claimed that it has “leased new office space for the staff that we are currently hiring for [the [REDACTED] project.” However, the Petitioner has not established that it has or will have sufficient work space to house the Beneficiary, other staff purportedly being hired for the [REDACTED] Project, as well as any of the Petitioner’s 13 other employees who may work on-site.⁶ The Petitioner’s lease to [REDACTED] which expired on March 31, 2015, indicates that [REDACTED] consists of only 340 rentable square feet.⁷ The record does not contain a new lease or other documentation confirming its lease, and the size, of a “new office space.”⁸

Overall, we cannot find that the Petitioner’s claimed internal [REDACTED] project is *bona fide*, or even if it were *bona fide*, that the Beneficiary would be assigned to this project.

For all of the above reasons, we find that the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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

⁶ According to the project document, the staff required for the [REDACTED] project consists of one or more Business Analysts, System Analysts, ERP Developers, Programmer Analysts, Database Analysts, Oracle Developers, and a Project Manager.

⁷ The instant petition was filed on March 4, 2015.

⁸ On the second itinerary, the Petitioner listed a new address of [REDACTED]. However, on the Form I-290B and accompanying G-28, the Petitioner again listed its address as [REDACTED]. It is not clear what the [REDACTED] address represents.

alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation.

II. ADDITIONAL ISSUES

Because the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify additional issues to inform the Petitioner that these matters should be addressed in any future proceedings.⁹

Specifically, we find that the Petitioner has not demonstrated that (1) it qualifies as a United States employer; and (2) it is in full compliance with the applicable statutory and regulatory provisions regarding payment of the required wage, fees, and costs.

A. Employer-Employee Relationship

The Petitioner has not established that it qualifies as a United States employer.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant, in pertinent part, as an individual:

[S]ubject 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:

⁹ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director’s 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) (“The AAO may deny an application or petition on a ground not identified by the Service Center.”).

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- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing services. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again and as previously discussed, there is insufficient evidence detailing where the Beneficiary will work, the specific project(s) to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services.

To this end, we observe that the Petitioner's itinerary identifies the end-client project coordinator as [REDACTED] Project Manager. However, the Petitioner has not provided additional details regarding [REDACTED] such as what company he works for and the extent of his control over the Beneficiary's work. The Petitioner also has not described in detail the nature of the relationship between [REDACTED] and the Petitioner's President, who is identified as the Beneficiary's immediate supervisor at the Petitioner's premises, with respect to the supervision and control of the Beneficiary's day-to-day work conducted off-site. Furthermore, neither the work order summary nor other documentation in the record describes in detail the role of the mid-vendor, i.e., the "Supplier Organization," in assigning, supervising, and otherwise controlling the Beneficiary's work. We note the Petitioner's statement that "we allow [the end-client] to schedule and prioritize the work that we have assigned to the beneficiary due to the nature of the project, but we reserve the right, per our contractual agreement with [the mid-vendor] to control the work of the beneficiary on a day-to-day basis should we have to." However, the employer-employee relationship must also take into account *actual* control over the Beneficiary's day-to-day work, not just the *right* to control. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

As the evidence of record is insufficient to establish that the Petitioner qualifies as a U.S. employer having an employer-employee relationship with the Beneficiary, the petition is further precluded from approval.

B. Payment of Required Wage, Fees, and Costs

The Petitioner has not established that it is in full compliance with the applicable statutory and regulatory provisions regarding payment of the required wage, fees, and costs.

The Petitioner's offer letter to the Beneficiary states, in pertinent part:

In the event that you breach the termination notice or other provisions of this agreement or that your employment is terminated voluntarily for cause, you agree (1) to repay in full all expenses towards obtaining work permit, relocation, air fare expenses, training costs or other advances paid or reimbursed to you by [the Petitioner] and you authorize [the Petitioner] to deduct and withhold such repayment in full from any compensation or amounts otherwise owed or payable to you. (II) to pay [the Petitioner] as liquidated damages and not as a penalty a further sum of Ten Thousand (\$10,000) Dollars or any penalties that the client imposes on [the Petitioner] whichever is higher (III) to pay eight thousand (\$8,000) Dollars towards the cost of the training provided.

The Petitioner signed, under penalty of perjury, the Form I-129, H Classification Supplement, thereby certifying that it: agrees to and will abide by the terms of the LCA for the duration of the Beneficiary's authorized period of stay for H-1B employment; it understands that it cannot charge the Beneficiary the additional fees mandated by the American Competitiveness and Workforce Improvement Act (ACWIA) and that any other required reimbursement will be considered an offset against wages and benefits paid relative to the LCA; and that it will be liable for the reasonable costs of return transportation of the Beneficiary abroad if he is dismissed from employment before the end of the period of authorized stay. In addition, when filing and signing the LCA, the Petitioner declared that it would comply with the statements as set forth in the cover pages of the LCA and the DOL regulations at 20 C.F.R. § 655, Subparts H and I. The Petitioner also signed the Form I-129 petition under the penalty of perjury, certifying that the information supplied to USCIS on the petition and supporting evidence was true and correct.

Pursuant to the terms of the Petitioner's offer letter, if the Beneficiary's employment is terminated, he is obligated to repay the Petitioner an unspecified amount for "all expenses towards obtaining work permit, relocation, [and] air fare expenses," in addition to \$18,000 in liquidated damages and training costs. However, under the H-1B program, the Petitioner is prohibited from deducting an H-1B employee's wages with regard to recouping a business expense of the employer, which includes "attorney fees and other costs connected to the performance of H-1B program functions

which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition).” *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(9)(iii).

The Petitioner is also prohibited from requiring an H-1B employee to pay a penalty for ceasing employment with the Petitioner prior to a contracted date. *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(10)(i). The Petitioner also may not recoup any part of the ACWIA additional filing fee, whether directly or indirectly, voluntarily or involuntarily, from the Beneficiary. *See* section 214(c)(12)(A) of the Act; 20 C.F.R. § 655.731(c)(10)(ii). Moreover, the Petitioner is legally liable for the reasonable costs of return transportation of the Beneficiary abroad, and thus, may not require him to repay such costs. *See* Section 214(c)(5) of the Act; 8 C.F.R. § 214.2(h)(4)(iii)(E). The Petitioner’s offer letter imposes conditions that violate statutory and regulatory provisions related to the Petitioner’s payment of the required wage, the ACWIA fee, and reasonable costs of return transportation. *See generally* 20 C.F.R. § 655.731(a), (b), (c).

III. CONCLUSION

The evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation, that the Petitioner will have an employer-employee relationship with the Beneficiary, and that the Petitioner is in compliance with legal requirements relating to the payment of the required wage, fees, and costs.

The appeal will be dismissed 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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of P-A-, Inc.*, ID# 16090 (AAO Mar. 31, 2016)