



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

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

MATTER OF K-, LLC

DATE: MAY 25, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology firm, seeks to temporarily employ the Beneficiary as a "senior sharepoint developer" under the H-1B nonimmigrant classification for specialty occupations. See 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 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 Petitioner had not demonstrated that the proffered position qualifies for treatment as a specialty occupation position and had not established a valid employer-employee relationship between the Petitioner and the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the evidence is sufficient to establish eligibility for the benefit sought.

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

## I. SPECIALTY OCCUPATION

### A. Law

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.

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The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

#### B. Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary would serve as a “senior sharepoint developer.”<sup>1</sup> On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Programmers” corresponding to the Standard Occupational Classification code 15-1131.

Although the Petitioner is located in [REDACTED] Georgia, it stated in the H-1B petition that the Beneficiary would work at [REDACTED] in [REDACTED] California. Evidence in the record indicates that this is an address of [REDACTED] the claimed end-client.

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<sup>1</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

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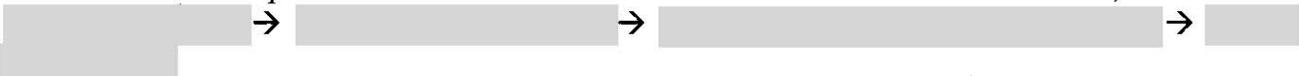
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In a letter submitted at the time of filing, the Petitioner stated the following as the duties of the proffered position:

- Actively collaborate with technical and non-technical business teams.
- Gather and document requirements, design solutions, and review with peers.
- Build and maintain custom solutions for the SharePoint platform using the back-end object model and services.
- Code, test, and release updates in response to SharePoint platform changes in partnership with SharePoint Administrators.
- Develop and maintain a deep understanding of the implications of Microsoft's SharePoint/Office 365 strategy as it relates to our past and future custom code projects. Recommend when it's time to change approaches, refactor, etc.
- Provide escalated Share Point support along with the rest of the team.
- Analyst , [sic] planning and task preparation
- Development and testing in the test environment
- Deployment and production support
- Weekly Change Control meeting with track managers about project status and Road blocks.

As to the educational requirements of the proffered position, the Petitioner stated, "[For the proffered position] we require a minimum of a bachelor's degree or its equivalent with a minor or concentration in any branch of Engineering, Computer Science, Computer Applications, Information Systems, or a related field."

In a letter submitted in response to the Director's request for evidence (RFE), the Petitioner stated that the contractual path of succession from the Petitioner to the end-client would be, Petitioner →



### C. Analysis

As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client (in this case, [redacted]) to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination.

*See id.*

In other words, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. In *Defensor*, 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

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occupation on the basis of the requirements imposed by the entities using a beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The record of proceedings lacks any substantive evidence from [REDACTED] the claimed end-client who would generate work for the Beneficiary to perform and whose business needs would ultimately determine what the Beneficiary would actually do on a day-to-day basis.<sup>2</sup> The record contains no evidence from [REDACTED] pertinent to the duties the Beneficiary would perform, the minimum educational credentials necessary to perform them, the period of time during which the Beneficiary's duties would be required, or even that [REDACTED] had agreed to use the Beneficiary's services at the time the petition was filed. The evidence provided does not, therefore, establish the substantive nature of the work the Beneficiary would perform if the visa petition were approved.

Also, the record lacks credible evidence that when the Petitioner filed the petition, the Petitioner had secured work for the Beneficiary to perform during the requested period of employment. USCIS regulations 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).<sup>3</sup>

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

<sup>2</sup> While the Beneficiary's [REDACTED] identification card is acknowledged, it cures none of these deficiencies since it does not provide information regarding position including the duties and educational requirements.

<sup>3</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 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.

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).

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 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.<sup>4</sup>

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed for this reason.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

### A. Legal Framework

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:

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<sup>4</sup> Even if the proffered position were established as being located within the “Computer Programmers” occupational category (the occupational classification certified on the submitted LCA), a review of the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook (Handbook)* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation. More specifically, the information on the educational requirements in the “Computer Programmers” chapter of the 2016-17 edition of the *Handbook* indicates that a bachelor’s or higher degree in a computer science or a related field may be a common preference, but not a standard occupational, entry requirement. To the contrary, the *Handbook* specifically states that some employers will hire an employee with an associate’s degree. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Computer Programmers,” <http://www.bls.gov/ooh/computer-and-information-technology/print/computer-programmers.htm> (last visited May 24, 2016).

As such, absent evidence that the position would actually be one located within the claimed occupational category, and that it would satisfy one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the petition could not be approved for this additional reason.

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

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

(Emphasis added); see 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).

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 individual coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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 Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. 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."

*Id.*; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). 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 Am.*, 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>5</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

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<sup>5</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).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

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 318-19.<sup>6</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to the terms “employee” and “employer-employee relationship” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>7</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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *Defensor v. Meissner*, 201 F.3d 384 at 388 (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 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

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<sup>6</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 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

<sup>7</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 individuals).

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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 448-49; EEOC Compl. Man. 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 323-24. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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

## B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of 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." Specifically, we find that the record of proceedings does not contain sufficient, consistent, and credible documentation confirming and describing the circumstances of the Beneficiary's claimed assignment to [REDACTED] the claimed end-client. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

We preliminarily incorporate the findings made above with regard to the Petitioner not substantiating the existence, at the time of the petition's filing, of non-speculative work to be performed by the Beneficiary at the site of [REDACTED]. Consequently, we are unable to ascertain whether the Petitioner would in fact engage the Beneficiary in an employer-employee relationship while working there.

However, even if we were to ignore this foundational deficiency, we would still find the evidence of record insufficient to establish the requisite employer-employee relationship between the Petitioner and the Beneficiary. This is because the Petitioner, which is located in Georgia, has not explained and documented *in detail* how it would supervise and otherwise control the Beneficiary's day-to-day activities while he works for [REDACTED] in California.

The Petitioner asserts on appeal that "[the Beneficiary] will function at all times under exclusive direction and control of [the Petitioner's] management. Only the senior-level management at [the Petitioner] will be responsible for the Beneficiary's job duties and performance." The Petitioner, which is located in Georgia, is assigning the Beneficiary to develop software for an end-client company, through three intermediaries, at the end-client company's location in California. It is not

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clear how the Petitioner assigns the Beneficiary's tasks, and supervises and evaluates his performance of them.

We acknowledge the Petitioner's repeated claims that it will maintain control over the Beneficiary. However, the evidence of record does not establish that the Petitioner would supervise and otherwise exercise control over the Beneficiary's employment. For example, while the Petitioner claims to be a 47-employee company, it did not indicate whether any of them would also be working for [REDACTED] in California, and would, therefore supervise the Beneficiary. In short, the evidence of record provides no insight into how, from such a remote location, the Petitioner would control the Beneficiary's work on a daily basis. While the Petitioner states repeatedly in its letters that it would remain the Beneficiary's employer, it does not substantiate with documentary evidence how it would supervise and otherwise control, and evaluate, the Beneficiary's work.

These deficiencies are also true of the remaining evidence of record: it provides no insight into the specifics of the claimed control that the Petitioner would have over the Beneficiary. In other words, the generalized assertions regarding control contained in the record of proceedings lack any degree of specificity, and they do not specifically discuss, in probative detail, the degree of supervision, direction, or control that the Beneficiary would receive from a long-distance employer.<sup>8</sup> They are not sufficient to establish that the Petitioner would supervise or otherwise control the work of the Beneficiary. "[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer.

The evidence, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, "going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record does not establish that the Petitioner would

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<sup>8</sup> The Petitioner's claims that it would pay the Beneficiary's salary are noted, and the method of payment *is* a factor to be considered. However, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. See *Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

act as the Beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the Beneficiary.

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).

### III. BENEFICIARY QUALIFICATIONS

As the Petitioner did not overcome the Director's grounds for denying this petition, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.<sup>9</sup>

Specifically, the record does not currently demonstrate that the Beneficiary's combined education and work experience is the equivalent of a U.S. bachelor's degree in a specific specialty.

#### A. Legal Framework

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that a foreign national applying for classification as an H-1B nonimmigrant worker in a specialty occupation must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in [Section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)] for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and  
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) specifies that, to qualify to perform services in a specialty occupation, the foreign national must:

- (I) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

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<sup>9</sup> 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.").

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have [(1)] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [(2)] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first three criteria are not factors in this appeal. The record reflects that the Beneficiary does not hold a U.S. baccalaureate or higher degree from an accredited college or university; a foreign degree determined to be equivalent to such a degree; or an unrestricted state license, registration or certification authorizing full practice and immediate engagement in a specialty occupation.

We will apply the fourth criteria, however, as the Petitioner contends that a combination of experience and foreign education qualifies the Beneficiary for service in a specialty occupation.

The fourth criterion specifies two requirements for qualifying under it. The evidence of record must establish that the Beneficiary has attained (1) education, specialized training, and/or progressively responsible experience that is equivalent to completion of at least a U.S. baccalaureate in the specialty occupation, and also (2) recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) supplement the degree-equivalency requirement at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). First, they define “equivalence to completion of at least a U.S. baccalaureate or higher degree.” Second, they specify the means for establishing that degree equivalency.

The definitional segment at 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

[F]or purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty. . . .

The regulation then states that the degree-equivalency “shall be determined by one or more of following” five means:

- (1) An evaluation from an official who 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>10</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that [(a)] the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that [(b)] the [foreign national] has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The means for degree-equivalency determinations identified at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2) and (h)(4)(iii)(D)(4) will not detain us: there is no evidence of college-level equivalency examinations or special credit programs to which those provisions apply.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated [(1)] that the [beneficiary's] training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the [beneficiary's] experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [(3)] that the [beneficiary] has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

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<sup>10</sup> In accordance with this provision, we will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

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- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;<sup>11</sup>
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

By its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination. Also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

## B. Analysis

### 1. The Evaluation of the Beneficiary's Degree and Work Experience

The record contains an evaluation prepared by [REDACTED] of the [REDACTED] entitled "Expert Opinion Evaluation of Academics and Work Experience." We shall separately address the two major divisions of the evaluation, which [REDACTED] introduces with the headings "Academics" and "Professional Experience."

#### a. The "Academics" Portion of the Evaluation

[REDACTED] stated his opinion that it "becomes apparent" that the Beneficiary "has satisfied requirements that are substantially similar to those required toward the completion of three years of undergraduate course work toward a four-year Bachelor's Degree program at an accredited institution of higher education in the United States."

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<sup>11</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

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We are not persuaded that the “Academics” section of the baccalaureate-degree equivalency evaluation establishes the Beneficiary’s foreign education as equivalent to coursework toward a U.S. bachelor’s degree, as [REDACTED] claims. Specifically, while [REDACTED] opinion concludes that the U.S. equivalency is “apparent,” but it provides no substantive analysis to support that position, and it cites no references, sources, or research materials as the basis of its conclusion. “[G]oing 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 at 165 (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Because the claims in the evaluation’s “Academics” section are not substantiated, we find that they are insufficient to establish U.S. equivalency of the Beneficiary’s foreign coursework.

b. The Evaluation’s “Professional Experience” Section

The second part of [REDACTED] “Expert Opinion Evaluation of Academics and Work Experience” concludes that the Beneficiary’s employment equates to at least one year of U.S. university-level coursework in computer information systems. As we shall now discuss, we do not agree.

As evident in the regulatory description, to merit consideration for the beneficiary-qualification path at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), a petitioner must submit an evaluation of training and/or experience that satisfies certain requirements. As well as being an accredited U.S. college or university, the evaluator’s educational institution must:

1. Operate a program for granting college-level credit for training and/or experience; and
2. Have designed that program to include granting of college-level credit in the relevant specialty – which [REDACTED] claims to be computer information systems.

Also, the evaluator of the training and/or experience must be an official whom the college or university has authorized to grant college-level credit in the relevant specialty, as part of a program for granting college-level credit for training and/or experience in that specialty.

[REDACTED] submitted a letter from the Dean of the [REDACTED] School of Business. It states in pertinent part that [REDACTED] is “authorizes the granting of ‘life experience’ credits through the [REDACTED] degree completion program offered through the [REDACTED].

However, there is no evidence of the extent of the Business School Dean’s participation in or personal knowledge of the [REDACTED] program, which the Dean’s own letter acknowledges as one administered by an entity other than his Business School, namely, the [REDACTED].

The record, however, does not include a submission from the Dean of the [REDACTED] or documentation that the Dean of the Business School is authorized to speak for the [REDACTED] with regard to its [REDACTED] program and the authority that it has delegated under that program. We find that these aspects of the record are sufficient reasons for us to accord no significant weight to the letter from the Dean of the Business School, particularly as this Dean presents no substantive information or documentation to support his

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conclusory declaration that [REDACTED] is “authorized and qualified to grant ‘life experience credits’ through the [REDACTED] degree-completion program.”

We also find that the totality of the evidence does not indicate course offerings or degrees in computer information systems that would be available through the [REDACTED] program. Thus, the evidence of record establishes neither that the [REDACTED] program awards college-credit in the relevant specialty nor that [REDACTED] has authority to award college-credit in the relevant specialty.

Further, we find that, even taken at face value, the letter from the Business School Dean does not establish that [REDACTED] involvement in the [REDACTED] qualifies him as “an official who has authority to grant college-level credit for training and/or experience in the specialty” in a [REDACTED] “program for granting such credit based on an individual's training and/or work experience.” Specifically, the Dean of the Business School states that [REDACTED] is authorized to grant “life experience” credits, *not* “college-level credit” and *not* “college-level credit in the [pertinent] specialty” as specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

We will not speculate as to the nature, qualifying grounds, or academic weight of what is meant by “life-experience” credits, and the record of proceeding throws little light on this aspect of the [REDACTED] program. It is the petitioner’s burden to establish both what constitutes “life experience” as defined for credit-assessment in the [REDACTED] program, and that “life experience” evaluated for credit in the [REDACTED] program is substantially the same as “training and/or work experience” which must be the basis of college-credit awarded by a person whom a petitioner holds out as qualifying as an 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) official. For this reason, too, we find that the Petitioner has not established that [REDACTED] is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college of university which has a program in granting such credit based on an individual's training and/or work experience.

In addition to the material deficiencies noted above, we also find that the evaluation misinterprets and misapplies the so-called “three-for-one” rule. [REDACTED] stated that USCIS has “established that three years of work experience and/training is equivalent to one year of university-level training.” This statement is an erroneous simplification.

The only section of the H-1B beneficiary-qualification regulations that provides for application of a three-for-one ratio is the provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, that provision reserves its application exclusively for USCIS agency-determinations.<sup>12</sup> Further, that provision

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<sup>12</sup> That the application is exclusively a measure for USCIS is clear in the language of the regulation. Additionally, the supplementary comments to the Final Rule that first introduced the ratio into agency regulations include the following statements:

For the benefit of petitioners and applicants who may have difficulty in seeking and obtaining a determination of equivalency through authoritative sources, the Service adopted its own standard for substituting specialized training and/or experience for college-level training, and for assuring that the alien is recognized as a member of the profession. The three-for-one formula which will be used is

requires substantially more than simply equating any three years of work experience in a specific field to attainment of a year's worth of U.S. college credit in that field or specialty. In fact, the provision inserts a number of elements of proof into the experience and/or training equation that both evaluators have overlooked. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) - which, as we have seen, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) introduces as one of the avenues towards establishing a beneficiary's qualifications - reads as follows:

A determination *by the Service* that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . *It must be clearly demonstrated* [(1)] that the [beneficiary's] training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the [beneficiary's] experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; *and* [(3)] that the [beneficiary] has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the [beneficiary] in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

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based on a survey of relevant precedent decisions which reflect the number of years of experience held by aliens who did not have degrees, but were regarded by the Service as members of their profession. . . .

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(Emphasis added.)

Neither [redacted] evaluation, the documents accompanying it, nor any other part of the record of proceedings provides sufficient work-experience evidence for us to reasonably conclude that the Petitioner has satisfied the 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) requirements for application of the “three-to-one ratio.” Accordingly, we cannot conclude that the evidence of the Beneficiary’s work experience qualifies for recognition of any years of college-level credit by correct application of the H-1B beneficiary-qualification regulations’ “three-for-one” standard.

We also find that the evaluation’s misapplication of a truncated and materially incomplete version of the true “three-for-one” rule is in itself sufficient grounds for dismissing the appeal and denying the petition, for the ultimate opinion expressed in [redacted] evaluation depends in material part upon that misapplication.

We may, in our discretion, use advisory opinion statements submitted by the petitioner as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm’r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.* USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (“[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to ‘fact’ but rather is admissible only if ‘it will assist the trier of fact to understand the evidence or to determine a fact in issue.’”).

2. No Basis for Service Determination of College Credit under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)

As the application of the so-called three-for-one rule is a matter solely for USCIS determination, on our own initiative we have considered whether the documentary evidence of the Beneficiary’s work experience would support USCIS assigning college-level credit to the Beneficiary on the basis of the so-called “three for one” rule at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). We find that the totality of the evidence, including all of the previous employment letters in the record on appeal, does not establish the recognition of expertise required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Neither [redacted] evaluation, the documents accompanying it, nor any other part of the record of proceedings provides sufficient evidence for us to reasonably conclude that the work-experience evidence satisfy the 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) requirements for application of the “three-to-ratio.” Accordingly, we cannot conclude that the evidence of the Beneficiary’s work experience qualifies for recognition of college-level credit by correct application of the H-1B beneficiary-qualification regulations’ “three-for-one” standard.

Therefore, based upon the findings articulated above, we conclude that the totality of the evidence regarding the Beneficiary’s foreign education and work experience does not satisfy any criterion at

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8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (h)(4)(iii)(D). For this additional reason, the petition may not be approved.

#### IV. PRIOR H-1B APPROVALS

We recognize that this is an extension petition. The Director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the Beneficiary. If the previous nonimmigrant petitions were approved based on the same evidence and deficiencies contained in the current record, those approvals would constitute material and gross error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

#### V. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of K-, LLC*, ID# 17120 (AAO May 25, 2016)