



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

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

MATTER OF S-S-, INC

DATE: SEPT. 14, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software consulting, training, and development company, seeks to temporarily employ the Beneficiary as a “computer programmer” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 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 did not sufficiently establish that the Petitioner: (1) would employ the Beneficiary in a specialty occupation position for the requested H-1B validity period; and (2) would have an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in denying the petition.

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

I. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “computer programmer.” In a letter of support, the Petitioner explained that it is developing a new software product, [REDACTED] and that the Beneficiary “will work solely” on this in-house project. The Petitioner stated that it “aims to bring this product suite to the market in late 2015 and is currently in the process of engaging with potential clients to solidify the systems requirements and conduct prototype building.” The Petitioner further explained that it “forecasts a consistent need for IT resources including but not limited to Systems Analysts, [and] Programmer/Analysts . . . for the duration of this development effort and during the support and maintenance beyond 2015.”

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In the same letter, the Petitioner submitted a lengthy list of duties for the proffered position, described as that of a “computer programmer analyst,” which include “business process analysis and design responsibilities,” “development responsibilities,” “test planning and execution responsibilities,” and “product support responsibilities.”

The Petitioner submitted a separate “Itinerary of Services” for the Beneficiary which listed the following job duties for the position titled “computer programmer analyst” (verbatim):

- Create a project plan and Implement selected business processes by mapping and adapting it in SAP as per the requirement gathered from the client.
- Participating and contributing to Sprint planning and Product Grooming to gather requirements and planning effort estimation.
- Creating prototypes and demo apps to showcase app concepts.
- Submitting and publishing apps and their updates to [REDACTED] and [REDACTED]
- Using an [REDACTED] app to showcase the product information and serves as a portfolio of the products and highlights the technology achievements of the client.
- Using an [REDACTED] application to book events, pay bills and used to send enquiries and requests to the business owner regarding the billing and availability. It showcases gallery, news and events[.]
- Developing, debugging and testing of native and cross platform [REDACTED] and [REDACTED] applications[.]
- Involve in developing [REDACTED] with [REDACTED] using [REDACTED] and [REDACTED]
- Assist in designing the User Interface (UI/UX) and overall look and feel of the app.
- Using services, [REDACTED] tasks and Alert Notification API to implement event reminder feature into the mobile app.
- Troubleshooting and fixing defects, ensuring coding standards are followed.
- Work with project teams and customer service teams as a technical resource and contribute to successful implementation.
- Proactive system monitoring to ensure smooth for client Presentations/Demos.

In a letter submitted in response to the Director’s request for evidence (RFE), the Petitioner clarified that its [REDACTED] system is a proprietary software technology targeting the hospitality industry. The Petitioner also submitted an affidavit by the Petitioner’s CEO, [REDACTED] who confirmed that this is the project to which the Beneficiary will be assigned. [REDACTED] further noted that the [REDACTED] system is “an ideal solution for hotel chains as well as independent hotels, motels, resorts and Inns,” and that in promoting its system, it has made “significant efforts to continue negotiating services contracts with major hotel chains such as [REDACTED] etc.,” noting specifically that it hoped to reach an agreement with [REDACTED] in the coming months.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Law

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:

- (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 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.¹

¹ 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

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19.²

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).³

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

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).

² 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))).

³ 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).

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, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries’ services, are the “true employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; 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, 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.”

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We find that the evidence of record is insufficient to demonstrate that the duties of the proffered position are in fact associated with a specialty occupation. That is, the Petitioner has not submitted sufficient, credible evidence to establish that the [REDACTED] project is a *bona fide* in-house project of the Petitioner, and that the Beneficiary will be exclusively assigned to it. Specifically, we find that there are discrepancies and concerns in the petition and supporting documents which do not support the Petitioner's credibility with regard to Beneficiary's claimed in-house assignment. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the Petitioner's assertions.

A position may be awarded H-1B classification only on the basis of evidence establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). We find that the documentary evidence upon which the Petitioner depends does not meet this requirement: it does not establish definite work that would engage the Beneficiary if the petition were approved.

The Petitioner asserts that the Beneficiary will be employed as a computer programmer on its [REDACTED] project, which it claims is specifically tailored to the hospitality industry, and which will benefit large hotel chains as well as smaller, independent outlets such as motels, inns, and resorts. The Petitioner's description of the duties of the proposed position indicates that the Beneficiary's duties will specifically entail "develop reporting models for Hospitality" and will "cover all requirements as per blue print agreed with client." In support of these assertions, the Petitioner submitted a document entitled "Technical Handbook," which it claims is the "Blue Print" for its [REDACTED] system. A large portion of this document, however, is not tailored specifically toward the hospitality industry as claimed by the Petitioner, but rather appears to pertain to the hospital/healthcare industry.

For example, section 1.1.9, "Guest operation," states in part "[p]atients, family members and guests can enjoy the Internet from most patient rooms at Hospital." Section 1.2.6, "Expense management," states that "[t]rained 'Professional Financial Advocates' work proactively with patients to explain their insurance benefits, ensure that [a]ll paperwork is organized and explained, help resolve any billing or claims issues that arise, and facilitate bill [p]ayment." Section 1.2.8 discusses "[t]he mission of every public hospital in Nigeria," and section 1.2.9 discusses "a local area network which communicates between the School of Medicine and the Hospital which . . . [has] access to the [REDACTED] in France)." These sections' contents do not correspond to the Petitioner's description of its [REDACTED] system, and have no apparent relationship to the hospitality industry.

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In addition, section 1.2.6 references a solution entitled [REDACTED] which public records reveal is a proprietary medical expense management service solution that targets the healthcare industry, developed by the company [REDACTED]. The Petitioner has not explained or documented its relationship to [REDACTED] in this matter. Moreover, the entire section 1.2.6 in the Petitioner's "Technical Handbook" appears to have been copied virtually verbatim from [REDACTED] whitepaper [REDACTED] available at [REDACTED] website.⁵

Upon review, it appears that much of the Petitioner's "Technical Handbook" – including the references to [REDACTED] – do not correspond to the Petitioner's description of its [REDACTED] system and appear to have been plagiarized. These discrepancies undermine the validity of the Petitioner's claims regarding the *bona fide* nature of the intended work for the Beneficiary. While a few typographical errors generally will not undermine the evidentiary value of a document, the fact that the Petitioner's evidence in this matter contains numerous references to an entirely different industry and a proprietary technology platform created by another company generated for the benefit of that dissimilar industry raises serious doubts regarding the legitimacy of the Petitioner's claims in this matter. Moreover, the fact that the document, which the Petitioner claims is the "blue print" for its [REDACTED] platform, contains information copied from other sources cannot be overlooked. Based on these discrepancies, it does not appear that sufficient, in-house H-1B caliber work exists for the Beneficiary for the requested validity period, or that such work constitutes specialty occupation employment.

On appeal, the Petitioner submits "updated documents of [REDACTED] development" in support of eligibility. Upon review, we find that this documentation, too, appears to have been copied from another source. More specifically, we find that the majority of the Petitioner's "updated" documentation contains screenshots and descriptions that are virtually identical to those found in an article posted on the Internet explaining how to configure master data management in [REDACTED]. While the Petitioner has stated that it utilizes [REDACTED] to develop its [REDACTED] product, the Petitioner has not sufficiently distinguished its [REDACTED] product from [REDACTED] or other existing modules. Furthermore, the Petitioner has not explained how its submitted document accurately represents its company's effort and progress towards developing [REDACTED]. We thus find that the Petitioner has not submitted sufficient reliable evidence that [REDACTED] is a *bona fide* ongoing internal project to which the Beneficiary will be assigned.

"[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591. Any attempt to explain or reconcile such

⁴ For more information about [REDACTED] (last visited Sept. 13, 2016).

⁵ The whitepaper can be accessed at [REDACTED] website, available at [REDACTED] (last visited Sept. 13, 2016).

⁶ This article, [REDACTED] was authored by [REDACTED] in 2011, who at that time was working for a company other than the Petitioner. The article is available at the [REDACTED] (last visited Sept. 13, 2016).

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inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. “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.* at 591.

For all of the above reasons, we find that the evidence of record does not sufficiently demonstrate that the Beneficiary will be assigned to the in-house [REDACTED] project, if such a project exists. Therefore, 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. SPECIALTY OCCUPATION

The petition must also be denied because the Petitioner has not established that the proffered position qualifies for classification as a 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.

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

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- (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). 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 at 387.

B. Analysis

As discussed above, the Petitioner submitted documentation with respect to the [REDACTED] project; however, the documents do not sufficiently establish that *bona fide* in-house work is available for the duration of the Beneficiary’s requested employment period. Specifically, the Petitioner did not submit credible, objective documentation corroborating its claims regarding the Beneficiary’s assignment to the [REDACTED] project. We incorporate our previous discussion on the matter.

In addition, the document [REDACTED] contains no references to the Beneficiary or to the proffered position. In fact, this document contains a table entitled “Phase I Budget” listing the resources needed for “Phase I” of the project. However, this table does not include a computer programmer or computer programmer analyst position as one of the required resources.⁷ The document also does not contain schedule, budget, or resource information beyond “Phase I,” which is expected to end on February 17, 2016. The absence of this information is significant, in that the Petitioner requested employment dates from September 12, 2015, until September 11, 2018.

Without further information regarding the specific project to which the Beneficiary will be assigned that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary will do, where the Beneficiary will work, as well as how this will impact circumstances of his relationship with the Petitioner. “[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)).

Moreover, even if it were established that the Beneficiary will be assigned to the [REDACTED] project, the evidence still does not sufficiently describe the duties to be performed by the Beneficiary. That is, while the Petitioner submitted a lengthy list of job duties in its initial support letter, the “Itinerary of Services” contains only a fraction of those job duties (i.e., only those duties listed as “development

⁷ The Petitioner interchangeably refers to the proffered position as a “computer programmer” and a “computer programmer analyst.”

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responsibilities”). The Petitioner has not explained why its support letter and itinerary contain different lists of duties. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. at 591. Furthermore, of the job duties that appear in both the support letter and the itinerary, we observe that several of them are vaguely worded, such as “[t]roubleshooting and fixing defects, ensuring coding standards are followed,” and “[w]ork with project teams and customer service teams as a technical resource and contribute to successful implementation.” These job duties, as presently stated, do not adequately convey the actual tasks the Beneficiary will perform within the context of the [REDACTED] project, the complexity of such tasks, and the knowledge necessary to perform them.

Furthermore, the Petitioner identifies additional duties for the Beneficiary, such as “[s]ubmitting and publishing apps and their updates to [REDACTED] and [REDACTED] which suggests that the Beneficiary will be engaged in developing [REDACTED] applications, but provides no details regarding the manner in which these duties will coincide with the Petitioner’s proposed [REDACTED] project targeted to the hospitality industry. In addition, the duties identified as “[u]sing an [REDACTED] app to showcase the product information and serves as a portfolio of the products and highlights the technology achievements of the client” suggests that the Beneficiary may be engaged in sales and marketing duties by highlighting the client’s achievements and showcasing their products. These job duties do not correspond to the Petitioner’s descriptions of its [REDACTED] project which targets the hospitality industry.”

Overall, we find that the evidence of record does not demonstrate the substantive nature of the proffered position and its constituent duties. We are therefore precluded from 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 alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, we will review the Petitioner’s general description of duties and the evidence of record to determine whether the proffered position as described would qualify for classification as a specialty occupation.⁸

⁸ 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.

1. First Criterion

To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹

On the 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 at a Level I wage.¹⁰ The *Handbook* subchapter entitled "How to Become a Computer Programmer" states in pertinent part: "Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree."¹¹ The *Handbook* indicates that a bachelor's degree in computer science may be common, but not that it is a *requirement* for entry into these jobs, indicating that associate's degrees are also acceptable prerequisites.

On appeal, the Petitioner cites to *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) for the proposition that the Beneficiary's knowledge is what is relevant, and not the title of the degree. The Petitioner also cites to *Raj and Co. v. USCIS*, 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) and an unpublished decision issued by our office to support similar propositions. We

⁹ All of our references are to the 2016-17 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

¹⁰ We will consider the Petitioner's classification of the proffered position at a Level I wage (the lowest of four assignable wage levels) in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.*

¹¹ 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/computer-programmers.htm#tab-4> (last visited Sept. 13, 2016).

disagree. Upon review, it appears that the Petitioner misinterprets *Residential* and confuses the issue of a beneficiary's qualifications with the issue of a proffered position's qualifications as a specialty occupation.¹² For the aforementioned reasons, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Finance* or *Raj*.¹³ We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.*

Finally, with regard to the unpublished decision referred to by the Petitioner, we find that the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The Petitioner has not provided sufficient documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

2. Second Criterion

The second criterion presents two, alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong contemplates common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

¹² The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. Thus, whether or not the Beneficiary in this case has completed a specialized course of study directly related to the proffered position is irrelevant to the issue of whether the proffered position qualifies as a specialty occupation, i.e., whether the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. Section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

¹³ In *Residential Finance*, the district judge's decision in that case appears to have been based largely on the many factual errors made by the Director in the decision denying the petition. We further note that the Director's decision was not appealed to us. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

a. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

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

As discussed above, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty or its equivalent. We incorporate our previous discussion on the matter. Also, the Petitioner did not submit evidence from the industry’s professional association.

In support of the petition, the Petitioner provided a few job postings and letters from two of the posting companies. However, the Petitioner has not adequately demonstrated that these advertisements, or the positions referenced in the letters, are for parallel positions. The job titles for the positions include “software engineers,” “android mobile development engineer,” “CIS managers,” “database administrators,” “mobile apps developer,” and “HR [human resources] specialists.” The job descriptions do not focus on the incumbent performing in-house development or programming work; rather, many of the advertisements are for positions in which the incumbent will be assigned to unspecified clients at their worksites, and will perform job duties beyond those specified for the proffered position. Some of the advertisements also state requirements beyond those for the proffered position which is designed as an entry-level position (through the Level I wage rate on the LCA), such as the posting for a position requiring a minimum of 7 years of software development experience.

Further, the advertisements and letters do not support the conclusion that a bachelor’s degree in a specific specialty, or its equivalent, is required. Most of the advertisements, and one of the two letters, indicate that a general bachelor’s degree is acceptable.¹⁴ Therefore, based upon a complete

¹⁴ A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a general degree, without further specification, does not establish the position as a specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (a general-purpose bachelor’s degree may be a legitimate prerequisite for a particular position, but requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation). Cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility.”).

review of the record, we conclude that the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).¹⁵

b. Second Prong

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

Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

Moreover, the general descriptions of the proffered duties do not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Rather, the duties the Petitioner ascribed to the proffered position indicate a need for a range of technical knowledge in the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty (or its equivalent) as minimally necessary to attain such knowledge.

Further, the LCA submitted by the Petitioner indicates that the proffered position is a Level I (entry) wage, which, as noted above, is the lowest of four assignable wage levels.¹⁶ Without additional evidence, the record of proceedings does not indicate that the proffered position is so complex or unique, as such a position would likely be classified at a higher-level, which requires a significantly higher prevailing wage. For all of the above reasons, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹⁵ As the advertisements and letters are deficient for the above-stated reasons, we will not address each of the advertisements and letters in detail.

¹⁶ The Petitioner's designation of this position as a Level I, entry-level position indicates that it is a comparatively low-level position compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

(b)(6)

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3. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The Petitioner states that it was established in 2004, and currently employs over 30 IT professionals. The Petitioner claims that it has “had 26 current and previous employees serving in the same or similar position of Computer Programmer Analyst.” The Petitioner further claims that “5 employees are designated to work on developing [REDACTED] and they gained H-1B status since 2014.” The Petitioner asserts that all of these employees have “at least a Bachelor's degree (or foreign equivalent) in relevant fields.”

However, the Petitioner has not submitted sufficient evidence to corroborate its claims regarding these individuals' educational credentials. While the Petitioner submitted copies of these individuals' diplomas, more than half of them were foreign diplomas without accompanying U.S. equivalency evaluations. Without more, the record does not demonstrate that the Petitioner normally requires a U.S. bachelor's degree in a specific specialty, or its equivalent, for the proffered position. “[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. at 165.

We acknowledge the submitted evidence of these individuals' H-1B visa status. However, if the respective nonimmigrant petitions were approved without sufficient evidence of the beneficiaries' educational qualifications, then the approvals would constitute material and gross error on the part of the Director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See *Matter of Church Scientology Int'l*, 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 Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Further, prior approvals do 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.¹⁷ Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214).

¹⁷ While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “specialty occupation”).

(b)(6)

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The evidence of record, as presently constituted, is insufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

4. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner does not establish how the duties of its computer programmer elevate the proffered position to a specialty occupation. We again refer to our comments regarding the insufficient evidence of the Beneficiary's job duties and assignment, as well as to the implications of the Petitioner's designation of the proffered position at a Level I (entry) wage level. The evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Because the Petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not established that the proffered position qualifies as a specialty occupation.¹⁸

IV. BENEFICIARY QUALIFICATIONS

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation.

¹⁸ The Petitioner noted that USCIS approved other petitions that had been previously filed on behalf of five other employees for its [redacted] project. The Director's decision does not indicate whether the prior approvals of the other nonimmigrant petitions were reviewed. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the Director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 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 Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

Again, 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. *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

In other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, in any event, the Petitioner did not submit an evaluation of the Beneficiary's foreign degree or sufficient evidence to establish that his degree is equivalent to a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

V. CONCLUSION

The petition will be denied and the appeal 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-, Inc*, ID# 18193 (AAO Sept. 14, 2016)