



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

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

MATTER OF SVS-T- LTD.

DATE: SEPT. 15, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services and software development company, seeks to temporarily employ the Beneficiary as a programmer analyst 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, concluding that the Petitioner did not sufficiently establish that (1) it qualifies as a United States employer with an employer-employee relationship with the Beneficiary; and, (2) the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and additional evidence and asserts that the Petitioner qualifies as the Beneficiary's employer, and the proffered position qualifies as a specialty occupation.

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 programmer analyst. In the support letter, the Petitioner provided the following job duties for the position:

In her capacity as a Programmer Analyst, Beneficiary will be involved in data gathering during the business analysis and planning phase of the project. She will develop UI using Angular JS, JSP, JavaScript, CSS and HTML. Beneficiary will design and develop service layer using spring with Dependency Injection. She will be involved in development of the application using Spring Web MVC, other components of the Spring and Hibernate frameworks. Beneficiary will implement Web Service in Apache Axis runtime environment using SOA protocol.

(b)(6)

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Beneficiary will develop store procedures and complex queries using tool called PL/SQL developer. She will use MAVEN automated build scripts to compile and package the application. Beneficiary will be responsible for analyzing, identifying, and documenting the status and architecture of the current systems. She will ensure business requirements are gathered interacting with enterprise architects and SME's through JAD sessions. Beneficiary will be analyzing and documenting the internal process of CMS and come up with the best possible solutions to modernize it. Beneficiary will be analyzing the consequences of the flaws in the current system along with enterprise architects and come up with new strategies and architecture for CMS.

Beneficiary will be documenting and presenting the CMS system after eliminating the batch process. She will prepare the Vision and scope documents for the project and work closely with the Project Manager and enterprise architects in planning, scheduling, coordinating and implementing methodology. Beneficiary will be responsible for designing business model diagrams, conceptual diagrams, and logical diagrams for the current existing system and future systems. Beneficiary will assist in developing Architecture Diagrams, Context Diagrams and detailed Structured and Flow Charts. She will create Use Case Diagrams, Activity Diagrams, Sequence Diagrams, and ER Diagrams in MS Visio. Beneficiary will prepare BRD and FRD taking the current system and future system into consideration. She will be responsible for creating and maintaining documentation related to the project including defect status report, risk analysis document, mitigation plans, supplementary requirements specification document, and impact analysis document.

The Petitioner did not state any educational requirements for the proffered position.

According to the documentation submitted by the Petitioner, the Beneficiary will be working onsite at [redacted] (end-client) who has a subcontractor agreement with [redacted] (mid-vendor). The Petitioner has a subcontractor agreement with the mid-vendor to provide independent contractors.

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:

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.¹

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,

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 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).

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 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).

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).

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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

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." Specifically, the Petitioner has not credibly substantiated the manner in which the Beneficiary's supervisor actually oversees, directs, and otherwise controls the Beneficiary's off-site work.

For example, the Petitioner provided inconsistent information regarding who supervises the Beneficiary. In response to the request for evidence (RFE), the Petitioner submitted a letter from the mid-vendor that stated the Beneficiary will report to [REDACTED] a supervisor for the mid-vendor. However, the Petitioner indicated in its response to the RFE that [REDACTED] is a supervisor at another entity, [REDACTED]. In the same letter, the Petitioner stated that the Beneficiary reports to her supervisor at a different entity, [REDACTED] but did not explain the discrepancies.

Further, the Petitioner submitted individual status reports prepared by the Beneficiary that are addressed to multiple individuals. For example, one of the status reports is addressed to an individual named [REDACTED] but lists a different individual as the project manager, [REDACTED]. The Petitioner's organizational chart does not indicate employees named [REDACTED] or [REDACTED]. However, the statement of work (SOW) in the record of proceedings identifies [REDACTED] as the end-client's employee that will supervise the Beneficiary. On appeal, the Petitioner submitted more individual status reports that are addressed to the Petitioner's President and CEO, and list [REDACTED] as the project manager. It is not clear why both sets of status reports are addressed to different recipients and project managers. Further, it is not clear why the report will go to the

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Petitioner's President and CEO rather than the Beneficiary's direct supervisor as listed on the organizational chart, [REDACTED] project and business development manager. The Petitioner has not credibly identified the Beneficiary's supervisor. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Furthermore, even if the record had identified a supervisor that the Beneficiary reports to, it does not appear that the Petitioner is supervising the Beneficiary's daily work. In the individual status reports, the Beneficiary reports what she "accomplished this week" and "key decisions made" and what is "planned for next week." In other words, the Beneficiary is the one providing updates to the Petitioner about her current and new assignments, as opposed to the other way around, suggesting that the Petitioner does not exercise regular oversight of the Beneficiary's day-to-day work. Further, the work order between the end-client and mid-vendor indicates that "after the necessary information is inputted into the [REDACTED] and the timesheet is approved by both [the end-client] project manager and [mid-vendor], the [REDACTED] will generate an invoice that will be electronically submitted by [the end-client]." Thus, it appears that the Beneficiary's work when at the client site will be approved by the end-client and the mid-vendor, and not by the Petitioner.

In response to the RFE, the Petitioner provided a copy of its performance review document, which includes a general description of its performance review processing, along rating scale. Although the Petitioner provided a general overview of its performance review process, this document lacks information regarding the establishment of work and performance standards, the methods for assessing and evaluating the employees' performance, and the specific criteria for determining bonuses and salary adjustments. It is not clear exactly how the Petitioner is evaluating the Beneficiary's work when she is at the client site.

For H-1B classification, the Petitioner is required to submit written contracts between the Petitioner and the Beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the Beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The Petitioner submitted a summary of terms of agreement under which Beneficiary will be employed that was signed by the Petitioner but not by the Beneficiary. The agreement states that the Beneficiary will hold the position of programmer analyst and will work at the end-client's location in [REDACTED] Indiana. The agreement also states that the "Employer shall have the right to control and direct the Employee in the performance of the duties of the position for the duration of employment."

However, while an employment agreement may provide some insights into the relationship of a Petitioner and a Beneficiary, it must be noted again 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).

Here, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated. “[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)).

In addition, the Petitioner has not credibly established that the Beneficiary would be employed for the three-year period requested from October 1, 2015, to August 28, 2018. The Petitioner submitted a SOW with the mid-vendor. The SOW commencement date is May 4, 2015, and the initial length of assignment is only until December 1, 2015. The Petitioner also submitted a printout from the end-client that indicates that the Beneficiary’s start date is May 11, 2015, and end date is June 25, 2016. The Petitioner provided some other documentation that stated that assignment will last through 2018, but has not explained discrepancies in the record. “[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 inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. Further, the SOW did not list the duties the Beneficiary will perform for the mid-vendor or the end-client. The SOW stated that the Beneficiary’s “role will be as a Subcontractor performing computer programming and information systems technical services or other specialized services as an independent contractor to [the mid-vendor] at [the end-client].” Without sufficient information regarding the Beneficiary’s duties and duration of the project, this document does not establish availability of continued, non-speculative employment for the Beneficiary for the entire H-1B validity period.⁴

⁴ 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). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

In the RFE, the Director also asked the Petitioner to provide information regarding the beneficiary's role in hiring and paying assistants. The Petitioner elected not to address this issue or provide any information in response to this material request for evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

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 Beneficiary is the Petitioner's employee and that the Petitioner exercises control over the Beneficiary, without sufficient, corroborating evidence to support the claim, does not establish eligibility in this matter. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

III. SPECIALTY OCCUPATION

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) 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. Analysis

The Petitioner has not established that the proffered position qualifies for classification as a specialty occupation. As recognized in *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000), it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. 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.*

Here, the record of proceedings does not provide sufficient information from the end-client regarding the specific job duties to be performed by the Beneficiary for that company. The Petitioner submitted a letter from the end-client, confirming that the Beneficiary is a contractor working there as a programmer analyst. The end-client letter describes the Beneficiary’s job duties in brief, generalized terms that do not convey the substantive nature of the proffered position and its constituent duties. For example, the end-client letter lists duties such as “[i]nvolved in Analysis, Design, Coding and Development of IEDSS”; “design and implements technical solution using java framework like FAST4J, Next Gen”; and, “under general direction, performs difficult and specialized IT work.” The record of proceedings does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis (e.g., what is meant by “performs different and specialized IT work”). Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the

performance of these duties (e.g., explain what specific systems and applications are involved, and what body of knowledge is required to perform the duties).⁵ In addition, the end-client states that the Beneficiary will work on the “Indiana eligibility determination services and system” project but not specifically explain the project and the Beneficiary’s specific role for this project.

In addition, the Beneficiary’s job duties as listed by the end-client appear different from those job duties listed by the Petitioner.⁶ For example, the job duties provided by the Petitioner has the Beneficiary utilizing certain tools and computer programs that are never mentioned in the end-client letter. For example, the Petitioner stated the Beneficiary will “develop store procedures and complex queries using tool called PL/SQL developer”; will use “MAVEN automated build scripts” and “analyze the documenting the internal process of CMS and come up with the best possible solutions to modernize it.” At no time does the Petitioner mention the project at the end-client as discussed above. The Petitioner has not explained how its stated job duties are consistent with those listed by the end-client. Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. at 591.

Accordingly, upon review of the totality of the record, the Petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the Beneficiary would be performing services primarily as a programmer analyst for the duration of the requested employment period. As the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, it therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation. For this additional reason, the appeal will be dismissed.

⁵ While the end-client letters state the educational requirements for this position (i.e., a bachelor’s degree or equivalent in engineering), this general statement regarding the minimum educational requirement is insufficient to explain what body of knowledge is required to perform each of the listed job duties. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.

⁶ To clarify, we are not relying upon the Petitioner’s descriptions as evidence of the Beneficiary’s actual job duties for the end-client. In general, petitioner-provided job duties are not relevant to determining a beneficiary’s specific duties for an end-client. Rather, we are considering the Petitioner’s job descriptions here for the more limited purpose of highlighting the differences between the job descriptions.

IV. CONCLUSION

As set forth above, we find that the evidence of record does not establish an employer-employee relationship between the Petitioner and the Beneficiary. The evidence of record also does not demonstrate that the proffered position qualifies as a specialty occupation.

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 SVS-T- Ltd.*, ID# 17912 (AAO Sept. 15, 2016)