



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

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

MATTER OF A-, INC.

DATE: SEPT. 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a petroleum services company, seeks to extend the Beneficiary's temporary employment as a "vice president, procurement and processing" 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record does not establish: (1) that the Petitioner will engage the Beneficiary in an employer-employee relationship; and (2) that the proffered position is a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and asserts that the Director erred in her findings.

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

I. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the evidence of record establishes that the Petitioner will be a "United States employer" having "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." 8 C.F.R. § 214.2(h)(4)(ii).

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).

The record is not persuasive in establishing that the Petitioner will have an employer-employee relationship with the Beneficiary.

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that a foreign national coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a 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 legacy 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 Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

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 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).

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.²

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

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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(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 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

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

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not sufficiently establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, we find that the record of proceedings does not contain sufficient, consistent, and credible documentation confirming and describing the Petitioner's corporate structure and business operations. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

First, the record of proceedings contains incomplete and inconsistent information regarding the Petitioner's ownership. In response to the Director's request for evidence (RFE), the Petitioner asserted that it is "owned by various corporate shareholders" and that the Beneficiary "holds no ownership interest in the company" (emphasis in original). The Petitioner submitted, *inter alia*: (1) its Certificate of Incorporation reflecting that the corporation is authorized to issue a total of 200 share of common stock; (2) a stock purchase agreement between the Petitioner and [REDACTED]

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██████████ for 49 shares of common stock; (3) a stock purchase agreement between the Petitioner and ██████████ for 48 shares of common stock; (4) a stock purchase agreement between the Petitioner and ██████████ for the purchase of three shares of common stock; and (5) the Petitioner's 2010-2014 federal tax returns listing ██████████ and ██████████ as 25% foreign shareholders, but also indicating that no foreign corporation or entity owns directly 20% or more, or 50% or more directly or indirectly, of the company's voting stock.

The submitted evidence does not depict the Petitioner's complete ownership structure. We note that the Petitioner's stock purchase agreement with ██████████ was not signed or accompanied by other proof of execution. In addition, while the Petitioner submitted the above stock purchase agreements – one of which was not executed – the Petitioner did not submit the actual stock certificates issued to these companies. Nor did the Petitioner submit its corporate stock ledger or another similarly comprehensive document listing all owners of stock, their ownership and voting interests, and any outstanding stock (if any).

Notably, the Petitioner stated in its business plan (submitted in response to the Director's RFE issued in January 2016) that "in the mid of 2015, the entire holding in the company was bought by ██████████ ██████████. But the Petitioner did not submit objective evidence of this claimed acquisition by ██████████ such as a stock purchase agreement, stock certificate, or stock ledger. Moreover, the Petitioner did not explain how its claimed acquisition by ██████████ is consistent with the Petitioner's other claim that it is "owned by various corporate shareholders." "[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. "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.

The Petitioner also has not sufficiently explained how its shareholder(s) are involved in the management of the Petitioner, e.g., the frequency and extent of interaction with the Petitioner's management. Without additional evidence as well as an explanation reconciling the inconsistencies regarding the Petitioner's claimed shareholder(s), we cannot accurately assess the Petitioner's ownership structure and whether or not it is sufficient to support an employer-employee relationship with the Beneficiary.

The record of proceedings also contains unresolved inconsistencies regarding the Petitioner's officers, which further precludes us from accurately assessing the employer-employee relationship. Here, the Petitioner acknowledges that the Beneficiary is an officer of the company, but repeatedly asserts that he, as the company's vice president, directly reports to the president, ██████████. Contrary to the Petitioner's claims, however, the Petitioner's federal tax returns reflect that the

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Beneficiary is the company's *sole* officer. More specifically, the Beneficiary is the sole officer listed in the Petitioner's Form 1125-E, Compensation of Officers.⁴ According to the Petitioner's tax returns, the company paid no employee salary/wages or officer compensation in 2010-2011, and in 2012-2015, the Petitioner paid no employee salary/wages and its total officer compensation equaled the Beneficiary's total earnings for those years.⁵ The Petitioner has not resolved this critical inconsistency and established that [REDACTED] is the company's president and the Beneficiary's supervisor, as claimed. Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record, and doubt cast on any aspect of the Petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.* at 591-92.

Furthermore, the Petitioner has not provided pertinent information about [REDACTED] such as where he is physically located, what company he works for, the nature of the Petitioner's compensation to him, what duties he performs, and how he monitors and supervises the Beneficiary's work. Thus, even if [REDACTED] were the Petitioner's president in title, the Petitioner still has not sufficiently substantiated its assertions regarding his supervision and control over the Beneficiary.

The Petitioner also claims to have other directors in addition to [REDACTED] (whom the Petitioner claims is the company's founder and chairman of the board of directors). But similarly, the Petitioner has not adequately described what roles and duties the other directors perform, the nature of the Petitioner's compensation to them, and whether (and if so, how) they monitor and control the Beneficiary's work. Without additional reliable evidence corroborating the Petitioner's assertions about [REDACTED] and the other directors, we cannot sufficiently assess the nature of the Petitioner's employment relationship with the Beneficiary. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Despite the Petitioner's assertions that it has submitted its employment agreement with the Beneficiary, this document has not been submitted for the record. We also point out that, although the Petitioner has purportedly employed the Beneficiary in H-1B status since December 2009, at least two of the Beneficiary's past W-2 statements were issued by different companies. In particular, [REDACTED] issued his 2013 W-2 form, and [REDACTED] issued his 2011 W-2 form.⁶

⁴ The current instructions for the Form 1125-E, Compensation of Officers, available at IRS's website at <https://www.irs.gov/pub/irs-pdf/i1125e.pdf> (last visited Sep. 20, 2016), instruct filers to complete information for "all officers" of the company.

⁵ While the Petitioner did not provide its 2015 federal tax return, it provided its 2015 quarterly wage and tax reports as well as the Beneficiary's past W-2 Wage and Tax Statements. All of these documents show that the Beneficiary's earnings equaled the company's total officer compensation paid from 2010-2015. For instance, the Beneficiary's W-2 showed that he earned \$95,199 in 2012, \$97,691 in 2013, \$101,542 in 2014, and \$99,792 in 2015. The Petitioner's tax returns and 2015 quarterly reports show that the company paid total officer compensation in the same amounts in those years (no employee salaries or wages were paid).

⁶ The Petitioner did not submit the Beneficiary's W-2 forms for 2010, 2012, and 2014.

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In this respect, the Petitioner explained that “[i]n past year, [the Petitioner’s] payroll was performed by payroll servicing companies.” However, we find that the Petitioner’s explanation is not credible. The Beneficiary’s W-2 forms clearly identify these other companies – which have different employer identification numbers than the Petitioner – as the Beneficiary’s “employer” and not as payroll service providers. And as previously discussed, the Petitioner’s tax returns reflect that the company has not paid any employee wages/salary, and that the only form of paid compensation has been to the Beneficiary as the company’s sole officer. Thus, while the record demonstrates that the Beneficiary has been providing his services to the Petitioner, the record does not demonstrate that he has been doing so as an *employee*. We therefore find that other important elements of the employee-employer relationship, such as the Petitioner’s payment of the Beneficiary’s salary, provision of employee benefits, and his tax treatment, have not been sufficiently established.

Finally, we recall the Petitioner’s assertion on the Form I-129 that it has eight employees. The Petitioner also asserts on appeal that it has “offices in India, [REDACTED] and Delaware” and that “it leases several offices for its Louisiana-based employees – including [the Beneficiary].” Nevertheless, the evidence in the record – including the Petitioner’s tax returns reflecting no payments of employee salary or wages – does not substantiate the Petitioner’s assertions about either its other employees or office space.⁷ These inconsistencies regarding the Petitioner’s business operations raise additional questions regarding the Petitioner’s overall credibility.

Therefore, when we consider all the inconsistencies and deficiencies in the record, and without full disclosure of all relevant facts, we cannot find that the Petitioner has met its burden of establishing that it has an employer-employee relationship with the Beneficiary. Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record, and doubt cast on any aspect of the Petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. In addition, an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also *id.* § 103.2(b)(1).

Based on the tests outlined above, the Petitioner has not sufficiently established that it has and will continue to 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).

II. SPECIALTY OCCUPATION

The second issue before us is whether the evidence of record demonstrates by a preponderance of the evidence that the Petitioner will employ the Beneficiary in a specialty occupation position.

⁷ The Petitioner indicated on the Form I-129 that its office is located in Louisiana, and submitted a certified LCA only for that location.

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). 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. Proffered Position

The Petitioner submitted the following duties for the proffered position:

- Explore, negotiate, and finalize purchases of carbon black feedstock oil (regular feedstock) and fuel oil from major U.S. refineries;

- Explore and negotiate purchases of alternative feedstock to blend with regular feedstock to improve quality and reduce procurement costs;
- Arrange finances for purchases of both regular and alternative feedstocks and fuel oil and act as liaison with banks;
- Manage commodity hedging mechanism to limit price fluctuation losses in purchasing feedstock;
- Develop sales market for the feedstock with the carbon black manufacturing industry in the U.S., with the ultimate goal of expanding the market to India, Thailand, Egypt, and Europe;
- Develop sales market for fuel oil with the bunker and utility consumers both in the United States, Singapore and other Far East countries[;]
- Manage accounting and statutory filings through consultants and accounting firms;
- Collect market information on feedstock and fuel oil trades to formulate effective purchasing strategies and minimize procurement costs;
- Manage the logistics for movement of the feedstock to storage facilities and to customers in efficient and cost effective manner;
- Direct the operations of storage facilities to maintain the properties of the stored feedstock and fuel oil;
- Supervise the blending of the different specifications of feedstock and fuel oil that are purchased to homogenize that final product;
- Supervise quality tests at laboratories for the feedstock and fuel oil;
- Monitor and ensure regulatory compliance throughout the procurement and storage processes;
- Develop export sales market for US petroleum coke in India and China with the major cement manufacturers and other industries;
- Develop export sales market for granular sulfur in China with major metal producers and fertilizer manufacturers[.]

The Petitioner stated that “[t]his is a highly complex position which requires an understanding of operational and financial management that only comes with someone who has studied either business management, business administration, financial management, economics, or accounting.”

C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies 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.

Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.⁹

1. First Criterion

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.¹⁰

On the LCA submitted to support the petition, the Petitioner designated the proffered position under the occupational category "General and Operations Managers" corresponding to Standard Occupational Classification code 11-1021, at a Level I wage.¹¹

This occupational classification is addressed in the *Handbook* chapter on "Top Executives," which states the following about the educational requirements of such positions: "Although education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience."¹² The *Handbook* further emphasizes the importance of work experience for top executives, stating, for instance, that "in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company."¹³

⁹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

¹⁰ All of our references are to the 2016-17 edition of the *Handbook*, available at <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.

¹¹ 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.*

¹² For additional information regarding the occupational category "Top Executives," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Top Executives," available at <http://www.bls.gov/ooh/management/print/top-executives.htm> (last visited Sep. 20, 2016).

¹³ *Id.*

The *Handbook* does not support the assertion that at least a bachelor's degree in a *specific specialty*, or its equivalent, is normally the minimum requirement for entry into a general and operations manager position. Rather, the *Handbook* reports that education and training requirements vary widely by position and industry, and although many top executives have at least a bachelor's degree, the *Handbook* does not report that the degree must be in any specific specialty. The *Handbook* further emphasizes the importance of work experience, and does not specify the amount of work experience needed. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent; instead, it indicates that there are a number of viable paths, in addition to a general bachelor's degree, to becoming a general and operations manager.

Moreover, the *Handbook* states that “[m]any top executives have a bachelor's or master's degree in business administration.”¹⁴ The Petitioner also accepts a business administration degree for entry into its proffered position. Although a requirement of a general-purpose bachelor's degree in business administration may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (recognizing a business administration degree as a “general-purpose” degree). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study, or its equivalent. 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. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty*, or its equivalent, is not normally the minimum requirement for entry into this occupation.

We acknowledge the Petitioner's assertion that the proffered position “is so specialized that it could not be pigeonholed into one specific LCA category.” The Petitioner further states on appeal that a “Finance Manager” or “Account Manager” occupational classification “would not have been totally accurate.” But, the Petitioner has not offered further analysis of which occupational categories relate to the proffered position and why, under those categories, the proffered position qualifies under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (or any other criteria). We again note that “going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *Matter of Soffici*, 22 I&N Dec. at 165.

The Petitioner has not provided 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)(1).

¹⁴ *Id.*

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 the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

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 previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry’s professional association, or letters or affidavits from similar firms or individuals in the Petitioner’s industry. The Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

We reviewed the Petitioner’s statements regarding the proffered position; however, despite its repetitive claims that the position is “complex,” the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. That is, the Petitioner has not demonstrated how the proffered duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor’s or higher degree in a specific specialty, or its equivalent, is required to perform them. 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 claims are so complex and unique. While the Petitioner has stated that the position requires “an understanding of operational and financial management” and “a sound understanding of both the petrochemical industry, economics, and business management,” the Petitioner has not sufficiently explained this required knowledge within the context of an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent. Thus, the Petitioner has not adequately satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

To merit approval of the petition under this criterion, the record must establish that a petitioner’s imposition of a degree requirement is not a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing the 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 Petitioner created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner’s past recruiting and hiring practices, as well as information regarding employees who previously held the position.

The Petitioner does not assert eligibility under this criterion. Further, the record of proceedings does not demonstrate that the Petitioner normally hires individuals with a bachelor’s degree in a specific specialty for the proffered position. We again highlight the Petitioner’s tax returns demonstrating that the Beneficiary is, and has been, the Petitioner’s only compensated individual within the company. Without more, the Petitioner has not provided sufficient evidence to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 support of this criterion, the Petitioner provided a description of the duties of the proffered position and information regarding its business operations. The Petitioner claims that the position is

“a highly complex position in a very specialized market.” The Petitioner continues to state that the skills required for the proffered position are attained through university-level education.

The evidence does not, however, sufficiently support the Petitioner’s assertion. Contrary to the Petitioner’s assertion that the duties of this position are “highly complex” as opposed to an entry-level position, the Petitioner designated the proffered position on the LCA as a Level I wage level. As discussed earlier, this designation indicates that the proffered position is a low-level, entry position relative to others within this occupational category.¹⁵

While the Petitioner may believe that the proffered position meets this criterion of the regulations, it has not sufficiently demonstrated how the position as described requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor’s or higher degree in a specific specialty, or its equivalent. Again, 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 tasks. The evidence in the record does not refute the *Handbook’s* information to the effect that a general degree is sufficient for entry into the occupation. Without more, the record lacks sufficiently detailed information to distinguish the level of knowledge and judgment necessary to perform the duties as specialized and complex.

In addition, the Petitioner claims that the Beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor’s degree in a specific specialty, or its equivalent.¹⁶ The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

¹⁵ Compare, for example, with a Level IV (fully competent) position, which is designated by DOL for employees who “use advanced skills and diversified knowledge to solve unusual and complex problems” and requires a significantly higher wage. For additional information regarding wage levels as defined by DOL, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex 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.

¹⁶ The Petitioner asserts that the Beneficiary possess “a Bachelor’s degree in accounting verified in his U.S. Credentials Evaluation.” However, the Petitioner did not submit a copy of the Beneficiary’s degree or credentials evaluation, as claimed. Nevertheless, as the Petitioner has not demonstrated that the proffered position constitutes a specialty occupation, we will not further discuss the Beneficiary’s qualifications.

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

III. 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 A-, Inc.*, ID# 8632 (AAO Sept. 21, 2016)