



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

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

MATTER OF T- LLC

DATE: AUG. 10, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a “technology consulting, technology solutions, application services, management services, and product development” company, seeks to temporarily employ the Beneficiary as a “systems 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 of the California Service Center denied the petition, concluding that (1) the proffered position does not qualify as a specialty occupation, and (2) the Petitioner did not sufficiently establish that it qualifies as a United States employer with an employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts the proffered position qualifies as a specialty occupation, and the Petitioner qualifies as the employer.

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

I. 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). We have consistently interpreted the term “degree” 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).

II. PROFFERED POSITION

The Petitioner stated that the Beneficiary will serve as a systems analyst. According to the Petitioner, the Beneficiary will work offsite at the vender’s facility. The Petitioner provided the following information about the path of contractual succession:



In response to the Director’s request for evidence, the Petitioner provided the following job description for the Beneficiary:

| RESPONSIBILITY | % OF TIME ALLOCATED |
|---|---------------------|
| <ul style="list-style-type: none">Design, Develop, Implementation and testing of SOA solutions using ETL, EDI, XML technologies | 30% |

| | |
|---|-----|
| <ul style="list-style-type: none">• Improve business process through process re-engineering and automation as appropriate.• Implement ETL and database management process to provide integration between disparate systems. | 20% |
| <ul style="list-style-type: none">• Analyze business requirements and convert these requirements to technical specifications.• Build technical prototype as per the business requirements and technical specifications. | 20% |
| <ul style="list-style-type: none">• Document system issues, design flows, unit test results. | 10% |
| <ul style="list-style-type: none">• Adapt and implement software development standards and best practices.• Participate in system design and code reviews.• Troubleshoot and resolve data, system and performance issues. | 20% |
| Technical Environment: Java, ETL, JSP, Servlets, Struts, Spring, Hibernate, Web Services, EDI, Informatica, JMS, JDBC, SQL, DB2, ESB, Tivoli, SQL server, Linux, Unix, Solaris and Windows. | |

According to the Petitioner, the position requires “a Bachelor’s degree in relevant discipline such as computer science, engineering, computer information systems, or a related area, or the equivalent.”

III. 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.¹ Specifically, the record does not establish (1) the substantive nature of the proffered position, and (2) that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

A. Job Duties

On appeal, the Petitioner expanded the job description for the proffered position, adding 26 additional tasks. They are distinct. For example, on appeal, the Petitioner claims the Beneficiary will “provide application subject matter expertise and solution integrations management processes;” “distill essential core requirements;” “independently troubleshoot production, data and workflow issues and resolve issues;” and “develop function and stored procedures.” These tasks do not appear in the initial job description.

¹ 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.

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). We are unable to reconcile the Petitioner's statements given that it submitted two distinctly different job descriptions.

Nevertheless, assuming, for the sake of argument, that the proffered duties as described in the record would in fact be the duties to be performed by the Beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described qualifies as a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

B. 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.³

On the labor condition application (LCA)⁴ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts" corresponding to the Standard Occupational Classification code 15-1121 at a Level I wage.⁵

³ All of our references are to the 2016-2017 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 we regularly review 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.

⁴ The Petitioner is required to submit a certified LCA with the H-1B petition demonstrate that it will pay the worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

⁵ The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection 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. DOL, 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. A wage determination starts

The *Handbook's* subchapter entitled "How to Become a Computer Systems Analyst" states, in pertinent part, that a bachelor's degree is not always a requirement and that "[s]ome firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming."⁶ It also states: "Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere."⁷

According to the *Handbook*, a bachelor's degree is a directly related discipline not required for entry into the occupation. While the *Handbook* further reports that many analysts have technical degrees, it does not specify the degree level for these technical degrees (e.g., associate's degree). Further, the *Handbook* states that business and liberal arts degrees may be acceptable.⁸ Thus, the *Handbook* does not support the claim that the occupational category of "Computer Systems Analysts" is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

In support of the petition, the Petitioner references DOL's Occupational Information Network (O*NET) summary report for "Computer Systems Analysts." The summary report provides general information regarding the occupation; however, it does not support the Petitioner's assertion regarding the educational requirements for these positions. For example, the Specialized Vocational Preparation (SVP) rating cited within O*NET's Job Zone designates this occupation as 7 < 8. An SVP rating of 7 to less than ("<") 8 indicates that the occupation requires "over 2 years up to and including 4 years" of training. While the SVP rating indicates the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.⁹

Further, the summary report provides the educational requirements of "respondents." Notably, the total percentage of respondents does not equal 100%. The report indicates that 36% of the respondents possess a bachelor's or higher degree, and all of the other individuals have less than a baccalaureate. The respondents' positions within the occupation are not distinguished by career level (e.g., entry-level, mid-level, senior-level). Moreover, the graph in the summary report does not indicate that the "education level" for the respondents must be in a specific specialty.

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.*

⁶ Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (2016-17 ed.).

⁷ *Id.*

⁸ As discussed *supra*, we interpret the term "degree" to mean a degree *in a specific specialty* that is directly related to the proposed position. Since there must be a close correlation between the required specialized studies and the position, the acceptance of general and wide-ranging degrees (such as business and liberal arts degrees) strongly suggests that such positions are not specialty occupations. See *Royal Siam Corp.*, 484 F.3d at 147. Cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

⁹ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

The Petitioner also submitted a letter from [REDACTED]. In his letter, [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position; (2) lists the duties proposed for the Beneficiary; (3) states that the duties require at least a bachelor's degree in computer science, engineering, or computer information systems; and (4) claims that these qualifications represent a common standard for parallel positions among similar organizations. We carefully evaluated [REDACTED] assertions in support of the instant petition but, for the following reasons, determined his opinions lent little probative value.

To begin, we note that [REDACTED] expertise, regarding current industry degree requirements for computer systems analysts, is not established in the record. His curriculum vitae indicates that most of his experience (since 1985 to the present) has been in the academic setting. He references his experience prior to teaching, but does not state how the industry has evolved in the past 30+ years. [REDACTED] states that he has published several journal articles in the areas of information technology and business; however, his curriculum vitae indicates that his last journal publications were in the late 1990's and did not relate to the issue here. His curriculum vitae shows that he last presented at a meeting in 2005, over a decade before the instant petition was filed and, again, the issue was unrelated to the matter in the present case. [REDACTED] did not provide further information regarding his qualifications to opine on the degree requirements for computer systems analysts.

Moreover, [REDACTED] has not provided sufficient information to establish his expertise on the practices of organizations seeking to hire computer systems analysts. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise regarding the current recruiting and hiring practices of an enterprise engaged in computer consulting or similar organizations for computer systems analysts (or parallel positions). [REDACTED] states that companies come to the university campus where he works to recruit students. In addition, on appeal, Petitioner submits a revised letter from [REDACTED] that states he routinely mentors and writes letters of recommendations for students seeking placement in the workforce. [REDACTED] acknowledges that he has not worked in the industry for some time. Nevertheless, he claims to be aware of students looking for this type of job and the industry standard. However, without more, this is insufficient to demonstrate a degree requirement for entry into the occupation as this may simply indicate a preference by some companies to hire individuals with a degree.

Additionally, [REDACTED] provides a brief, general description of the Petitioner's business activities. However, the information he provides varies significantly from the information that the Petitioner submitted to USCIS regarding its business operations. The record lacks an explanation for this inconsistency. Thus, we must question whether the information provided by [REDACTED] is correctly attributed to this particular Petitioner and position. [REDACTED] does not demonstrate in-depth knowledge of the Petitioner's operations or how the duties of the position would actually be performed in the context of its business enterprise.

Further, [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has conducted any research or studies pertinent to the educational requirements for such positions (or

parallel positions) in the Petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. His curriculum vitae does not reflect that he has published any works on the academic/experience requirements for computer systems analysts (or related issues).

Even assuming [REDACTED] was an authority on degree requirements for computer systems analysts, his testimony does not substantiate his conclusions, such that we can conclude that the Petitioner has shouldered its burden of proof.¹⁰

First, in his initial submission, [REDACTED] did not reference, cite, or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete his evaluation. On appeal, the Petitioner submits a revised opinion letter from [REDACTED] that references the *Handbook* and O*NET. We addressed these resources earlier in the decision and will not repeat the analysis here other than to note that they do not support [REDACTED] conclusions. [REDACTED] also references various websites and provided the uniform resource locator (URL) for Internet pages that he says he reviewed. [REDACTED] did not, however, submit printouts of the information.

We are not required to conduct additional research on the Internet or to access websites as there may be a number of concerns with these sites (*e.g.*, the links may have expired or the postings may have been removed; there may be malware, security concerns or viruses associated with these links; the links may be restricted). 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Any suggestion that we must access and review websites, while being impractical and inefficient, would also be a shift in the evidentiary burden from the Petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

Second, [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion without discussion. There is no indication that he has any knowledge of the Petitioner's proffered position beyond this job description, *e.g.*, visited the Petitioner's business, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that these workers apply on the job. The level of familiarity with the actual job duties as they would be performed in the context of the Petitioner's business has therefore not been substantiated.

¹⁰ The term "recognized authority" means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

On appeal, the Petitioner submits a revised opinion letter from [REDACTED] that expanded the job duties from nine duties (as noted in the initial letter) to 36 job duties. The expanded job duties include duties that are more senior and were never mentioned in the prior opinion letter, such as the Beneficiary will be “acting as a liaison between the functional business team and the technical team”; “designing, developing and maintaining solutions”; and, “providing subject matter expertise in applications and solution integration management processes.” In [REDACTED] revised opinion letter, he states that the Beneficiary’s position is complex since the Beneficiary will “act as a direct liaison between the various teams working on these projects, whereas the typical Computer Systems Analyst communicates with management in this respect too, rather than serve as a direct liaison to the other teams.” However, [REDACTED] comes to this conclusion based on a job duty not mentioned in any of the prior job descriptions submitted by the Petitioner, and instead from a completely new job description the Petitioner submits on appeal.

[REDACTED] stated in his letter that “the duties described above are not those of a lower level employee.”¹¹ However, the record does not indicate whether [REDACTED] was aware that, as indicated by the Level I wage on the LCA, the Petitioner considered the proffered position to be an entry-level position.¹² It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the position and appropriately determine parallel positions based upon the job duties and responsibilities.

For the reasons discussed, we find that the opinion letter lend little probative value to the matter here. *Matter of Caron Int’l*, 19 I&N Dec. 791, 795 (Comm’r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is “not in accord with other information or is in any way questionable.”).

The Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

C. 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.

¹¹ If the proffered position is a senior position, the Petitioner should have designated the position at a higher wage on the LCA. Since the Petitioner designated the position as a level I wage, the LCA does not correspond with the information in [REDACTED] letter.

¹² As discussed previously, a Level I wage suggests that the position is a relatively low-level position compared to others within the occupational category.

1. 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 we often consider 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 by reference our previous discussion on the matter. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry attesting that such firms routinely employ and recruit only degreed individuals.

In support of this criterion, the Petitioner submitted several job announcements placed by other employers. However, the Petitioner’s reliance on the job announcements is misplaced. First, we note that some of the job postings do not appear to involve organizations similar to the Petitioner. For example, the Petitioner is an information technology solutions provider, whereas the advertising organizations include:

- [REDACTED] – “one of the largest and most comprehensive integrated U.S. health care systems;”
- [REDACTED] – government transportation;
- [REDACTED] – higher education;
- [REDACTED] – a staffing company that is hiring for [REDACTED] a company in the financial industry;
- [REDACTED] – management consultants for government operations;
- [REDACTED] – the company indicated that “our client is one of the most respected grocery chains in the State of Florida;”
- [REDACTED] – healthcare industry;
- [REDACTED] – a clinical-stage biotechnology company;
- [REDACTED] – a leading provider of recruiting and staffing solutions; and,
- [REDACTED] – a staffing and recruiting company.

When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization,

and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Furthermore, some of the postings do not appear to be for parallel positions. That is, some of the postings do not appear to have similar job duties. Moreover, some of the advertisements appear to be more senior positions. For instance, the job postings include the following positions:

- [REDACTED] - requires a degree and over 6 years of financial services experience;
- [REDACTED] - requires a degree and over 4 years of professional experience;
- [REDACTED] - requires a degree and 7 years of directly related work experience. The advertisement also stated that an additional 4 years of experience in computer or architectures, systems analysis, or management of IT projects can substitute for a degree;
- [REDACTED] - requires a degree and a minimum of 3 years of experience;
- [REDACTED] - requires a degree and several years of experience in multiple areas, and 3-5 years of relevant systems analysis experience;
- [REDACTED] - requires a degree and 10 to 14 years of experience; and,
- [REDACTED] - requires a degree and 5 or more years of experience.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹³ That is, not every deficit of every job posting has been addressed.

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. The Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)

2. 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

¹³ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers. Moreover, not all of the postings are for parallel positions.

performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted a description of the proffered position and information regarding its business operations. While the Petitioner may believe that the position meets this prong of the regulations, we note, however, the record lacks evidence supporting the Petitioner's claim. For example, the Petitioner designated the proffered position as an entry-level position within the occupational category by selecting a Level I wage.¹⁴ This designation, when read in combination with the evidence presented and the *Handbook's* account of the requirements for this occupation, suggests that the particular position is not so complex or unique that the duties can only be performed by an individual with bachelor's degree or higher in a specific specialty, or its equivalent.¹⁵

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. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

D. 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 did not provide any information or evidence of other individuals employed in this position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

¹⁴ The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique 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.

¹⁵ The evidence of record does not establish that this position is significantly different from other positions within the occupational category such that it refutes the *Handbook's* information to the effect that some courses are advantageous to obtaining such a position, but not specifying that the degree must be in a specific specialty.

E. 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.

The job description submitted by the Petitioner does not establish that the duties are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (of the lowest of four assignable wage-levels) relative to others within the occupational category.

Without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position within this occupational category would likely be classified at a higher-level, requiring a substantially higher prevailing wage.¹⁶

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

IV. EMPLOYER-EMPLOYEE RELATIONSHIP

As the appeal will be dismissed for the reasons discussed above, we will only briefly address the Director's additional basis for denying the petition.

We reviewed the record of proceeding in its entirety. Specifically, we find that the Petitioner has not established that it meets the regulatory definition of a United States employer. *See* 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the Petitioner has not established that it will have "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." *Id.*

The United States Supreme Court 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:

¹⁶ For example, a Level IV (fully competent) position 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.

“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)).

As such, 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.

The record of proceedings lacks sufficient documentation evidencing exactly what the Beneficiary would do for the period of time requested. For example, the Petitioner submitted a letter from the end-client indicating that it has a contract with the vendor, but it did not state that the Beneficiary is working on this project, or list specific duties to be performed by the Beneficiary. In addition, the contracts and the letter from the vendor indicate that the project will end on June 30, 2018. However, the Petitioner requested an employment period that will end in September 2019. Therefore, it is not clear if the Petitioner will have work for the Beneficiary for the entire period.¹⁷

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.

¹⁷ The agency made clear long ago that speculative employment is not permitted in the H-1B program. See, e.g., 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

Based on the tests outlined above, the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.” 8 C.F.R. § 214.2(h)(4)(ii).

V. CONCLUSION

The Petitioner has not demonstrated that it has sufficient, specialty occupation work available for the Beneficiary, and that the Petitioner did not sufficiently establish that it qualifies as a United States employer with an employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of T- LLC*, ID# 541384 (AAO Aug. 10, 2017)