



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

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

MATTER OF C- INC

DATE: AUG. 30, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting firm, seeks to temporarily employ the Beneficiary as a "DWT/BI (data warehouse testing/business intelligence) test lead" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated: (1) that the proffered position qualifies as a specialty occupation position, (2) that the Beneficiary would work only in areas for which the labor condition application (LCA) is certified, or (3) that the Petitioner would exercise an employer-employee relationship with the Beneficiary such that the Petitioner could meet the definition of a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record satisfies all requirements.

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

I. SPECIALTY OCCUPATION

A. The Law

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (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).

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. Proffered Position

The Petitioner provided the following description of the duties of the proffered position with the H-1B petition:

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Requirements Analysis and Estimation:- 25%

Objective of Requirement Analysis activity is to establish a common understanding between the customer [REDACTED] and the software project of the customer's requirements that will be addressed by the software project.

Objective of Estimation activity is to establish agreed upon baselines for the requirements, Schedule and estimate the effort.

Tasks: Review and understanding requirements of the project, Planning and scheduling the effort to be spent on testing the requirements, Estimation of tests to be conducted, Delivering quality product without any defects/bugs.

Quality Management: - 25%

Objective of this activity is to ensure the deliverables meet the expectations of the customer [REDACTED]

Tasks: Test planning, Test Scenarios and Test case preparation and review with stake holders, Test execution, Defect tracking and closure, Documentation and knowledge sharing, Co-ordination and mentoring Off-shore team, Configuration management, Go-live activities.

Team Co-ordination and Stakeholder Management: -35%

Objective of this activity is to co-ordinate and manage the expectations and relationships with stake holders and relationships with all the internal and external stakeholders of the project.

Tasks: Reporting status and tracking, Co-ordination with stake holders for review, defect closure and status.

Customer Relationship Management -15%

Objective of this activity is to manage the expectations and relationships with the customer [REDACTED]

Tasks: Co-ordination and support, Completion of scheduled effort on-time, Reporting status on daily basis and tracking the same.

The Petitioner also stated that the proffered position requires a minimum of a bachelor's degree in electrical engineering, computer science, or a closely related field.

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C. Analysis

Upon review of the record in its totality and for the reasons set out below, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

On the LCA 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 15-1121.³ We will analyze the specialty occupation issue based on the assumption, made *arguendo*, that if the visa petition were approved, the Beneficiary would work in a position located within the computer systems analyst occupational category for [REDACTED] as asserted by the Petitioner, performing the duties described above.⁴

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.⁵

¹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

² 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.

³ 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 she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she 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.*

⁴ In fact, as will be developed below, the Petitioner has not established the location at which the Beneficiary would work; therefore, it has not established what duties, if any, the Beneficiary would perform if the visa petition were approved; and has not established that the proffered position is located within the computer systems analyst occupational category, as the Petitioner claims. As such, the Petitioner has not established that the proffered position is a specialty occupation position. That is, in itself, sufficient reason to deny the H-1B petition and dismiss the appeal. We emphasize that we are momentarily making the *arguendo* assumption that the Beneficiary would perform the duties described and that the proffered position is located within the computer systems analyst occupational category so as to address the Petitioner’s assertions regarding such positions. However, in the analysis of the other bases for the decision of denial, below, we will not make that same assumption.

⁵ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site

The *Handbook* states the following about the educational requirements of positions located within the “Computer Systems Analysts” occupational category:

Most computer systems analysts have a bachelor’s degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master’s degree in business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master’s degree in computer science may be more appropriate.

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.

U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Computer Systems Analysts,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Aug. 29, 2016).

The *Handbook* makes clear that positions located within the computer systems analyst occupational category do not, as a category, require a minimum of a bachelor’s degree in a specific specialty or its equivalent, as it indicates that many systems analysts have a liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis. It further reports that many analysts have technical degrees. The *Handbook* does not specify a degree level (e.g., associate’s, bachelor’s, etc.) for those technical degrees.

Even if the *Handbook* did support the claim that a position located within the computer systems analyst occupational category is one for which the normal minimum entry requirement is a bachelor’s degree in a specific specialty, or the equivalent, the record lacks sufficient evidence to support a finding that the particular position proffered here – an entry-level position – would normally have such a minimum, specialty degree requirement or its equivalent.

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to

<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.

provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook*'s support on the issue. In such cases, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

However, the record of proceedings does not contain sufficient persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the computer systems analyst occupational category establishes the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Further, we find that, to the extent that they are described in the record of proceedings, the numerous duties that the Petitioner ascribes to the proffered position indicate a need for a range of knowledge in the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

For the reasons discussed above, the Petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

2. Second Criterion

The second criterion presents two, alternative prongs: "The degree requirement is common to the industry in parallel positions among similar organizations *or, in the alternative*, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong contemplates common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

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)).

Here and as already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, we incorporate by reference the 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." Nor is there any other evidence for our consideration under this prong. Thus, 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.

The Petitioner has not credibly demonstrated that the duties the Beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Even when considering the Petitioner's descriptions of the proffered position's duties, the evidence of record does not establish why a few related courses or industry experience alone would be insufficient preparation for the proffered position.

While a few related courses may be beneficial, or even required, in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record therefore lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. As noted above, the Petitioner attested on the submitted LCA that the wage level for the proffered position is a Level I (entry-level) wage. The Petitioner's assignment of such a wage level for a position which only requires a basic understanding of the occupation, the performance of routine tasks requiring limited (if any) exercise of judgment, is closely supervised, monitored, and reviewed for accuracy, and in which the worker receives specific instructions on required tasks and

expected results, appears contrary to its assertions regarding the position's claimed complex duties.⁶ Instead, such a wage-level designation is only appropriate for a position for an employee who has only basic understanding of the occupation. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the Petitioner would be obliged to demonstrate that other wage Level I positions within the computer systems analyst occupational category, entry-level positions requiring only a basic understanding of systems analysis, require a minimum of a bachelor's degree in a specific specialty or its equivalent, the proposition of which is not supported by the *Handbook*.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the Petitioner did not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the Petitioner has 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.

On the H-1B petition, the Petitioner stated that it was established in 2011 and has 62 employees. The Petitioner provided an employee list naming those employees and identifying 12 of them as "Analyst[s]."

However, the Petitioner did not state the educational backgrounds of those twelve employees, or of any other systems analysts it may have employed, or of any of its employees, let alone provide evidence to support any such assertion. The record contains insufficient evidence to demonstrate that the Petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent, for

⁶ 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, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an 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 consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

the proffered position. The Petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

4. Fourth Criterion

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

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The duties of the proffered position, such as establishing an understanding of a customer's requirements, testing software developed for the customer, reporting project status, etc., contain insufficient indication of a nature so specialized and complex that they require knowledge usually associated with attainment of a minimum of 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 position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the same occupational category.⁷

For all of these reasons, 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).

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. The appeal will be dismissed for this reason.

II. CORRESPONDING LCA – LOCATION

A. The Law

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

⁷ Again, 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*.

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While the DOL is the agency that certifies LCAs before they are submitted to USCIS, DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

(Emphasis added.)

B. Analysis

The period of intended employment extends from September 4, 2015, to September 3, 2018. Although the Petitioner is located in [REDACTED] North Carolina, it stated in the H-1B petition that the Beneficiary would work at [REDACTED] in [REDACTED] California. Other evidence in the record shows this to be a location of [REDACTED]. The LCA provided is certified for employment in [REDACTED] California and at the Petitioner's location in [REDACTED] North Carolina. It is valid for employment in and near [REDACTED] and [REDACTED] and nowhere else.

A chart indicates that the Beneficiary's assignment would be arranged through intermediary contractors. It states that the Petitioner will provide the Beneficiary to [REDACTED] which will provide the Beneficiary to [REDACTED].

In support of the assertion that the Beneficiary would work at [REDACTED] location on its project, the Petitioner provided a letter, dated September 27, 2015, from [REDACTED] of [REDACTED] Mississippi. It states:

[The Beneficiary] will be working on this Project at our client [REDACTED] located at [REDACTED] [REDACTED] CA. This is for a long term contract, and we anticipate the need of her for a long term services. [sic] For emphasis, we note here again, this statement is merely an expression of intent and is not a contractually or equitably binding document.

Thus, [REDACTED] asserts that while it intends to assign the Beneficiary to work on a [REDACTED] project for an unspecified period of time, [REDACTED] has not agreed to such an assignment, for any period of time.

The Petitioner provided a Task Order, dated September 8, 2015, which purports to have been signed by representatives of the Petitioner and [REDACTED]. However, because the information in the signature field for the [REDACTED] representative has been redacted, is unclear whether [REDACTED]

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ratified it. In any event, it indicates that the Beneficiary was to be assigned to work at the [REDACTED] location of [REDACTED] from September 21, 2015, to October 25, 2015, which covers less than two months of the three-year period of requested employment.

The Petitioner also provided a Purchase Order dated October 9, 2015, signed by representatives of [REDACTED] and the Petitioner. It states that they had agreed that the Beneficiary would work for [REDACTED] for an expected duration of six months beginning on October 14, 2015. Thus, this purchase order covers only six months of the three-year period of intended employment, some of which was covered by the previous Purchase Order.

In response to a request for evidence issued in this matter, the Petitioner provided a letter, dated November 12, 2015, from [REDACTED]. It states, "The duration [of the Beneficiary's assignment to the [REDACTED] project] is ongoing and it's for a very long term duration with a possibilities [sic] of extensions." It provides no other estimate of the duration of the Beneficiary's assignment to that project.

The Petitioner provided a series of emails in which [REDACTED] asserted that [REDACTED] will not confirm the Beneficiary's assignment to the [REDACTED] project as evidence that [REDACTED] and [REDACTED] have agreed that the Beneficiary will be assigned to that project.

The evidence described is insufficient to demonstrate, by a preponderance of the evidence, that [REDACTED] or even [REDACTED] has agreed that the Beneficiary would be assigned to the [REDACTED] project. It is insufficient, therefore, to show that the Beneficiary would be assigned to work in or near [REDACTED] the only area for which the LCA submitted is certified. The evidence does not demonstrate that the Beneficiary would work exclusively, or at all, in the area for which the LCA is certified, and the appeal will be dismissed for this additional reason.⁸

III. EMPLOYER-EMPLOYEE RELATIONSHIP

A. The Law

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:

"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

⁸ We also note that even if the Task Order and Purchase Order provided were taken as sufficient to show that [REDACTED] and [REDACTED] had agreed to the Beneficiary's assignment to the [REDACTED] project or projects, the H-1B petition would still not demonstrate the existence of any work for the Beneficiary to perform beyond November 12, 2015.

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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)).

B. Analysis

As noted above, the evidence is insufficient to show that the Beneficiary would work at the [REDACTED] location throughout the period of intended employment, or at all. As such, where the Beneficiary would work if the H-1B petition were approved, and the terms and conditions of that employment, have not been established. The Petitioner provided "Status Sheets" showing that the Petitioner claims to have performed a review of the Beneficiary's performance in the past. However, given that the location to which the Petitioner would assign the Beneficiary has not been established, who would assign the Beneficiary's duties and supervise her performance of them, for instance, is unclear.

In fact, even if the Petitioner had established that it would assign the Beneficiary, through [REDACTED] and [REDACTED] to [REDACTED] to work on [REDACTED] project or projects, the evidence submitted would be insufficient to demonstrate who would supervise the Beneficiary at that location. We observe that the Petitioner is located in [REDACTED] North Carolina; the [REDACTED] project is ostensibly being developed in [REDACTED] California; and the evidence in the record is insufficient to indicate whether the Petitioner is in charge of developing that project, plays a meaningful role in charting its development, or even that it is assigning one of its employees to that project to supervise the Beneficiary. As such, the location at which the evaluator works is unclear, as is the basis of his or her asserted knowledge of the quality of the Beneficiary's performance.

Although 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, the Director would be unable to properly assess whether the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. Therefore, the appeal will be dismissed for this additional reason.

IV. BENEFICIARY QUALIFICATIONS

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, that the Beneficiary would work in a location for which the LCA is certified, or that Petitioner would exercise an employer-employee relationship with the Beneficiary as required by the salient statutes and regulations, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.⁹

Specifically, the record does not currently demonstrate that the Beneficiary's combined education and work experience is the equivalent of a U.S. bachelor's degree in a specific specialty. While the claimed equivalency is based in part on experience, the record does not establish (1) that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university with a program for granting such credit,¹⁰ or (2) that the Beneficiary's expertise in the specialty is recognized through progressively responsible positions directly related to the specialty. See 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(4) and (D)(1).

V. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of C- Inc*, ID# 17683 (AAO Aug. 30, 2016)

⁹ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

¹⁰ Although the evaluator claims to possess that authority, the record contains no evidence to corroborate the claim.