



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

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

MATTER OF A-T-, INC.

DATE: SEPT. 19, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not established: (1) that the proffered position qualifies as a specialty occupation position; and (2) that it would exercise a valid employer-employee relationship with the Beneficiary.

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

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

## I. SPECIALTY OCCUPATION

### A. Legal Framework

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

#### B. The Proffered Position

On the H-1B petition, the Petitioner stated that the Beneficiary would work at the Petitioner’s location in [REDACTED] Michigan. Subsequently, the Petitioner stated that the [REDACTED] location was specified in error, and that the Beneficiary would work at the [REDACTED] Michigan location of [REDACTED]. In a letter submitted with the H-1B petition, Petitioner provided the following description of the duties of the proffered position:

**Systems Analysis** – Consult with client’s professional staff to study, evaluate and analyze client’s current business/technical systems; analyze current business and software systems including hardware, software, and operating systems; analyze the client’s data processing requirements and compute [sic] hardware to determine the software which will best serve the client’s needs; translate client’s needs into software requirement specifications; determine feasibility, cost, time requirements and compatibility of new functions or enhancements with current systems and computing capabilities; provide client with specific recommendations in order to address business and software system needs.

**Design/Development** – Design and develop computer systems which will best serve the client’s business and software needs; design, develop and integrate hardware and software which will process the client’s data in an efficient and timely manner; outline the steps necessary to develop new or modified programs/applications.

**Development of System Model** – Complete detailed systems specifications; design, develop and build database; code the front-end by creating forms, queries, menus and functions; design and develop reports queries and filters; create on-line help text.

**Testing/Debugging** – Set up test environment, perform tests on systems performance, and related issues; build test beds and create test data for various test cases; validate and test final design; do a matrix analysis and created [*sic*] test plans to ensure that requirements are met and measures are being followed; perform preliminary validation of software.

**Testing/Implementation** – Develop installation procedures, methodology and installation tools’ fine tune the system model by incorporation results from user testing; obtain user approval; prepare technical and operations documentation; prepare operations training courses and materials and provide training to users.

That letter further states: “The minimum educational requirement for this position is at least a bachelor’s degree (or equivalent of the same) in the occupational field of study.” It does not further describe any specific specialty in which the proffered position requires a degree.

An employment agreement executed by the Petitioner and the Beneficiary provides the following duty description:

- Conducting a study of the current application and customer specific business rules and practices, user requirements and functional analysis for the operating software systems application an determine feasibility, cost, time requirements and compatibility of new functions or enhancements with current systems
- Reporting and functional gaps in existing application and suggesting business process improvements
- Design, develop and build database; code the front-end by creating forms, queries, menus and functions; design and develop reports queries and filters; create on-line help text
- Architect test strategy for the project, including the proof of concept and evaluation of right tools required for conducting the testing specific and claim testing and validation of systems enhancements and implementation of changes.

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- Preparing project documents, software test planning, test phase execution, certifying quality of the product and responsible for ensure quality of the customer's information systems and verifying systems functionality and performance' and improving testing strategy.

That employment agreement reiterates: "The minimum educational requirement for [the proffered position] is at least a bachelor's degree (or equivalent of the same) in the occupational field of study." In a letter provided in response to a request for evidence (RFE), the Petitioner stated: "Due to the highly analytical job, they [*sic*] cannot be done without at least a related bachelor's degree or the equivalent in the occupational field of study." Again, the Petitioner did not further specify any specific specialty.

A letter from [REDACTED] states:

As a specialty worker, the beneficiary will define, design, implement, support and maintain system models. He will confer specific business requirements such as performance requirements, data handling requirements and output expectations. He will design technical requirements for new systems to improve production or work flow as required. Additionally, he will review and test the operational systems for their cost effectiveness, compliance to standards, and flexibility to meet future needs.

Specifically, the Beneficiary will analyze and evaluate the [REDACTED] product to process data through systems analysis, application integration, and implementation. He will achieve effective business solutions to meet [REDACTED] objectives. The beneficiary will formulate and define system objectives and prepares charts and diagrams to assist in performance analysis, and submit recommendations.

As to the educational requirements of the position, the letter from [REDACTED] states, "The above duties reflect a specialty occupation, requiring a minimum of a bachelor's degree, or equivalent of the same, in the occupational field of study, which the Beneficiary possesses." It does not further delineate any specific specialty in which the proffered position requires a degree.

### 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.<sup>1</sup> Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</sup>

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

<sup>2</sup> 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.

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Initially, we observe that the Petitioner has never effectively asserted that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The Petitioner stated that the proffered position requires a minimum of a bachelor's degree or the equivalent, "in the occupational field of study." However, the array of subjects that the Petitioner would include within the salient "occupational field of study" is unclear. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree 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. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Without more, the Petitioner's statement indicates that the proffered position is not in fact a specialty occupation. We further note that, as recognized by the court in *Defensor, supra*, 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 387-388. Here, the end-client, [REDACTED] also does not require a bachelor's degree in a specific specialty. The Director's decision must therefore be affirmed and the appeal dismissed on this basis alone. Nevertheless, we will continue our analysis of whether the proffered position qualifies as a specialty occupation for the purpose of performing a comprehensive analysis. We will next discuss the record of proceedings in relation to the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### 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.<sup>3</sup>

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Programmers"

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<sup>3</sup> 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 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.

corresponding to the Standard Occupational Classification code 15-1131. The *Handbook* describes the educational requirements of positions located within the computer programmer occupational category as follows:

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Sept. 16, 2016).

According to the *Handbook*, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. For example, the *Handbook* states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* also reports that employers value computer programmers who possess experience, which can be obtained through internships.

When reviewing the *Handbook*, it also must be noted that the Petitioner designated the proffered position as a Level II position on the LCA. This indicates that the proffered position is for a computer programmer who performs moderately complex tasks that require limited judgment. 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). The classification of the proffered position as a Level II position does not support the assertion that a minimum of a bachelor's degree in a specific specialty or its equivalent is normally required for entry into this particular position, especially as the *Handbook* indicates that some computer programmer positions do not require such a specialized degree or equivalent.

Further, we find that to the extent that they are described in the record of proceedings, the 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.

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

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## 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 casts its gaze upon 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)).

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.”

The Petitioner did provide three vacancy announcements placed by other firms. However, upon review of the advertisements, we find that they do not provide sufficient information about the advertising organizations to establish that they are similar to the Petitioner.<sup>4</sup> Without such evidence, these advertisements are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner. Moreover, the descriptions of responsibilities in the advertisements are generally perfunctory and do not provide sufficient information to determine the role the successful applicant will play in the advertising organization or the level of responsibility that will be required of the successful applicant.

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<sup>4</sup> One of the vacancy announcements was posted by [REDACTED] whose name suggests that it is involved in the production or sale of pallets. The industries in which the companies that posted the other two vacancy announcements operate are unknown.

Further still, one of the vacancy announcements states a requirement for a bachelor's degree and, further, that a degree in computer, mathematics, or a related field is preferred. A preference for a degree in a specific specialty is not a requirement of a degree in a specific specialty. That vacancy announcement does not state a requirement for a minimum of a bachelor's degree in a specific specialty or its equivalent for the position it announces. Moreover, some of the advertised positions appear to be more senior positions. Specifically, one posting states a requirement of five years' experience and the other states a requirement of seven years' experience. As mentioned, the proffered position is a wage level II position that involves moderately complex tasks that require limited judgement.

Finally, even if all of the vacancy announcements advertised parallel positions with organizations similar to the Petitioner and in the Petitioner's industry and stated a requirement for a minimum of a bachelor's degree in a specific specialty or its equivalent, we would still find that the Petitioner has not demonstrated what statistically valid inferences, if any, could be drawn from so few announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>5</sup> See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to parallel positions with organizations that are in the Petitioner's industry and otherwise similar to the Petitioner. The Petitioner has not, therefore, satisfied the criterion of 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.

A review of the record of proceedings finds that 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 general descriptions of the proffered position's duties, the evidence of record does not establish why a few related courses or industry experience alone would

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<sup>5</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the Petitioner has not established the relevance of the job advertisements submitted to the position proffered in this case.

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 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.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level II programmer, an indication that the proffered position is for an employee who performs moderately complex tasks that require limited judgment. This wage-level designation does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, notwithstanding that the *Handbook* suggests that some programmer positions do not require such a degree.<sup>6</sup>

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. To this end, we usually review a petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

The Petitioner has not expressly asserted eligibility nor submitted evidence under this criterion. Further, the H-1B petition states that at the time of its filing, the Petitioner had no employees. Further still, in a letter submitted in response to the RFE, the Petitioner stated that it employs no one

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<sup>6</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

else in the proffered position and is a startup company. The Petitioner appears never to have employed anyone else in the proffered position.

While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>7</sup>

#### 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. Defining, designing, implementing, supporting, and maintaining system models, for instance, has not been shown to be so specialized and complex a duty that it is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, notwithstanding that the *Handbook* indicates that some positions in the computer programmer occupational category do not.

Additionally, we again refer to our earlier comments and findings with regard to the implication of the Petitioner's designation of the proffered position in the LCA as a Level II position, a position requiring performance of moderately complex tasks that require limited judgment. This does not support the proposition that the duties of the position are so specialized and complex that their performance is associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, closely related to programming, notwithstanding that some programming positions require no such specialized degree or equivalent.<sup>8</sup>

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<sup>7</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>8</sup> The Petitioner's designation of this position as a Level II position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level II wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-

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. EMPLOYER-EMPLOYEE RELATIONSHIP

We will briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. 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 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,

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designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II 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.

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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.

In this case, the Petitioner indicated that the Beneficiary would work at [REDACTED]. On appeal, a letter from [REDACTED] indicates that the Beneficiary will work on a project called [REDACTED] from January 1, 2016 to September 11, 2018. However, there is no other documentary evidence to substantiate the project such as a detailed timeline, budget, list of resources or labor needed for the project. Further, the letter does not describe the particular duties the Beneficiary would perform but lists duties in general and vague terms that do not appear to be specifically tied to [REDACTED] project. Moreover, while the Petitioner indicates that its vice president would supervise the Beneficiary, given that the Petitioner reports having no employees, it is unclear how it would supervise the Beneficiary's performance on a day-to-day basis from a remote location. Without full disclosure of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. Therefore, the Director's decision is affirmed, and the appeal is dismissed for this additional reason.

### III. 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 A-T, Inc.*, ID# 18135 (AAO Sept. 19, 2016)