



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

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

MATTER OF S- INC

DATE: SEPT. 27, 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 "computer 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, 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; 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 presented satisfies 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.

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

The Petitioner stated in the H-1B petition that the Beneficiary would serve as a “computer systems analyst.” In a letter submitted with the petition, the Petitioner provided the following job duties for the position (note: errors in the original text have not been changed):

- Responsible for end-to-end project management commencing from Project kick-off up to final deployment. **% of Time 15**
- Analysis and design for a web-based adaptable workflow system for use across the business to streamline endorsement procedure for administrative processes. **% of Time: 20**
- Define templates for product pages and customize reports using Hyperion Interactive Reporting tools. Define dashboards to track performance at user and trader levels. **% of Time 20**
- Created the Traceability Matrix (RTM), System Requirements Specification (SRS), Functional Specification, Technical Specification, High Level design (HLC) and test plans (including UAT). **% of Time 20**

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- Process Discovery by interacting with Users/Clients, Product owners to understand use cases, high level business requirements, process flows. **% of Time 15**
- Consulting on developing a sales force, a customer service department and a wide variety of other business related issues. **% of Time 10**

That letter stated that the minimum educational requirement for the proffered position is a Bachelor of Science in any discipline in engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience.

According to the Petitioner, the Beneficiary would perform his duties offsite for [REDACTED] (“end-client”) in [REDACTED] New Jersey. The labor condition application (LCA) was certified for employment at both the end-client’s New Jersey address as well as the Petitioner’s Illinois location. The Petitioner also named both addresses in a portion of one of its letters entitled “Location/Itinerary of Services.”

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.¹ Specifically, the record (1) does not describe the position’s duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

The record contains a document headed “Supplier Agreement,” which sets out the general terms pursuant to which the end-client might utilize workers provided by the Petitioner, as well as a document headed “Work Agreement” which indicates the parties have agreed that the Petitioner would provide the Beneficiary to work for the end-client. However, neither document describes the work the Beneficiary would perform. Nor does the additional “Work Agreement” provided on appeal describe the work the Beneficiary would perform. Although a letter from the end-client contains a description of the duties the Beneficiary has performed for it in the past, the end-client did not necessarily represent them as the ones he would perform in the future. These documents, therefore, provide little insight into whether the proffered position is a specialty occupation.

In addition, both “Work Agreement” documents were ratified after the H-1B petition was filed. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978).

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.

Consequently; the "Work Agreement" documents do not show that, when the Petitioner filed the instant H-1B petition, it had procured specialty occupation work to which it could assign the Beneficiary. As such, the Petitioner has not established the substantive nature of the work, if any, that the Beneficiary would perform if the H-1B petition were approved.

Further, as indicated, the documents executed by the Petitioner and the end-client do not describe the work the Beneficiary would perform if assigned to work at the end-client's location. As such, even if those documents predated the petition's filing date, they would still not constitute persuasive evidence of the work the Beneficiary would perform if assigned to work at the end-client's location. As such, the substantive nature of the work the Beneficiary would perform if the petition were approved has not been established. For both reasons, the documents ratified by the Petitioner and end-client are not persuasive evidence for the proposition that the proffered position qualifies as a specialty occupation position.

Although the Petitioner has asserted that the end-client has in-house projects to which the Beneficiary would contribute, it provided insufficient evidence to support its claim. For instance, the record does not identify, let alone describe, the project or any other projects that could be under development. Nor does the record contain sufficient indication that the end-client has previously developed and marketed its own proprietary software or developed, on its own premises, computer applications commissioned by other companies. The evidence is insufficient to show that the end-client has facilities at its own address for such work. Therefore, the Petitioner has not demonstrated that the end-client has developed, is developing, or will develop software at its own location. The Petitioner asserted that the Beneficiary would work at the end-client's location on in-house project or projects, but it has not shown that such projects exist. For this additional reason, the Petitioner has not established the substantive nature of the duties the Beneficiary would actually perform if this H-1B petition were approved.

Moreover, the employment agreement states that "[the Beneficiary] shall use [his] best energies and abilities on a full time basis to perform, at location [*sic*] designated by [the Petitioner] and including customer offices, the employment duties assigned to you from time to time." Thus, the Petitioner and the Beneficiary have agreed that the Beneficiary will do whatever duties are assigned to him, without regard to whether they conform to the duties the Petitioner and the end-client have described in submissions to USCIS. This is an additional reason to find that the Petitioner has not established the substantive nature of the duties the Beneficiary would perform if the H-1B petition were approved.

That the Petitioner has not established the substantive nature of the duties the Beneficiary would perform precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate

prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The H-1B petition must be denied 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.³

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 Systems Analysts" corresponding to the Standard Occupational Classification code 15-1121.⁴ The *Handbook* states the following about the educational requirements of computer systems analyst positions:

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.

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 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.

⁴ 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. 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.*

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 Sept. 26, 2016).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. This section of the narrative begins by stating that a bachelor's degree in a related field is not a requirement. The *Handbook* continues by stating that there is a wide-range of degrees that are acceptable for positions in this occupation, including general-purpose degrees such as business and liberal arts. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, it does not report that such a degree is normally a minimum requirement for entry.

According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. It further reports that many analysts have technical degrees, but does not specify a requisite degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, it specifically states that such a degree is not always a requirement. Thus, the *Handbook* does not support the claim that the occupational category of computer systems analyst is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

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 technical 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 explained above, the Petitioner has not satisfied 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

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." Nor does the record contain any other evidence for our consideration under this criterion.

Thus, 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 its duties can only be performed by a person possessing 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 provide insufficient preparation for the proffered position.

For example, 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.

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. Such a wage level is for a position which only requires a basic understanding of the occupation; the performance of routine tasks that require limited, if any, exercise of judgment; close supervision and work closely monitored and reviewed for accuracy; and the receipt of specific instructions on required tasks and expected results.⁵ It is, instead, appropriate for a position in which the employee would have only a 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 computer systems analyst positions, entry-level positions requiring only a basic understanding of computer 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*.

For all of these reasons, 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

⁵ The issue here is that 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.

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.

The Petitioner provided vacancy announcements it placed for systems analysts, software engineers, and system administrator/database administrator positions. Each of those vacancy announcements states, "All the positions require US equivalent master or bachelor degree with/without experience. In lieu of Master degree, we will accept Bachelor degree with five years' experience." The vacancy announcements therefore do not appear to relate to the proffered position which, by virtue of the LCA's wage-level designation, is an entry-level position.

The Petitioner stated in the H-1B petition that is a 49-employee information technology firm established in 2003. It did not indicate how many computer systems analysts it employs or has employed in the past, and it did not provide any information regarding the educational qualifications of any such individuals.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

The Petitioner has submitted insufficient evidence to show that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position, and 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.

The duties of the proffered position, such as project management and analysis and design of a web-based adaptable workflow system, do not appear any more specialized and complex than those of lower-level systems analyst positions that do not require 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.⁶ This is yet further reason to find that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

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.

Finally, we note that the period of requested employment extends from October 1, 2015 to August 31, 2018. As noted, the Petitioner provided two "Work Agreements" it executed with the end-client in support its claim of having work for the Beneficiary to perform throughout that period. The first of those agreements states that the Beneficiary would work for the end-client from January 3, 2016, to June 30, 2017. Although it indicated that the agreement might be extended, it also indicated that this would only occur in the event that "the original estimates for project completion require adjustment." On appeal, the Petitioner provided another such agreement for the period from May 2, 2016, to December 31, 2016. The record contains insufficient evidence of any subsequent extensions of either of those agreements.⁷ The record also contains no other such agreements.

The evidence of record is insufficient to show that, when the H-1B petition was filed, the end-client had work that it had agreed the Beneficiary would perform throughout the period of requested employment. This is an additional reason that the Petitioner has not demonstrated that the work the Beneficiary would perform, if any, would constitute specialty occupation employment throughout the qualifying period.⁸

⁶ 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*.

⁷ In fact, the second agreement indicates that the period of time during which the end-client would utilize the Beneficiary's services was reduced.

⁸ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

II. EMPLOYER-EMPLOYEE

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 *Cmty. 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)).

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor’s degree. See section 214(i) of the Immigration and Nationality Act (the “Act”). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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.

As we have found, the evidence of record is insufficient to demonstrate the substantive nature of the work the Beneficiary would perform if the H-1B petition were approved. It is consequently also insufficient to demonstrate that the work he would perform in the event of H-1B approval would be assigned and supervised by the Petitioner. For this reason alone, the Petitioner has not demonstrated that, if the H-1B petition were approved, the Petitioner would exercise an employer-employee relationship with the Beneficiary.

Further, the Petitioner has also not indicated whether it would assign the Beneficiary's tasks and supervise his performance of them if the Beneficiary were assigned to the end-client's New Jersey location as claimed. Given the Petitioner's statements regarding the nature of the job made as part of the LCA certification process – including the attestations that the Beneficiary would be closely supervised and his work closely monitored and reviewed for accuracy, and that he would receive specific instructions on required tasks and expected results – and its claims that the end-client would not provide such supervision, it is unclear how the Petitioner could conduct this level of supervision via weekly phone calls alone. With the Beneficiary working in a remote location, on another company's projects, which the Petitioner does not appear to be developing, it is unclear how the Petitioner would assign the Beneficiary's work and critique his performance as it claims. Instead, it appears as though Beneficiary's supervisor at the end-client would be directly involved in the development of the project, as he or she would otherwise be unable to assess the suitability of the Beneficiary's contributions to that larger project. Assigning tasks and supervising performance are central to an employer-employee relationship.

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 Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The evidence of record prior to adjudication did not establish that the Petitioner would act as the Beneficiary's employer in that it would control the work of the Beneficiary.

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).

III. ADDITIONAL BASIS

As the Petitioner did not demonstrate that the proffered position is a specialty occupation or that it will engage the Beneficiary in an employer-employee relationship, 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, 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).

IV. 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 S- Inc*, ID# 123120 (AAO Sept. 27, 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.").