U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 08 144 51925 Office: CALIFORNIA SERVICE CENTER Date: **DEC 0 9 2009**

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS: This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting and developing company. It seeks to employ the beneficiary as a programmer analyst and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner does not qualify as a United States employer or agent; and (3) the petitioner did not provide sufficient documentation to determine whether the petitioner has submitted a valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form 1-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on April 7, 2008, the petitioner described itself as being engaged in the business of offering mission critical consulting solutions to businesses through cutting-edge technologies. The petitioner listed 8 employees in the Form I-129.[1] The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2008 through September 25, 2011 at an annual salary of $49,504.

The scope of the position is described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

> The Programmer Analyst will be working under a project manager and will be responsible for analyzing the data processing requirements of the client, in order to determine the client's functional and technical computer software needs. The Programmer Analyst will then be responsible for designing and developing a computer system using the software and hardware that will best suit the client's needs. The Programmer Analyst may also be responsible for implementing that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements.

In the support letter, the petitioner goes on to provide the following breakdown of job duties:

- Develop software systems programming, including documentation and testing (40%);

[1] It is noted that in the appeal brief, counsel for the petitioner states that the petitioner has twenty employees. However, because this evidence was provided for the first time on appeal and, presumably, was not the case when the petition was initially filed, the AAO will use the number of employees listed in the petition.

- Design software system, using design tools (20%);
- Consult with client to determine system requirements (15%);
- Analyze software requirements to determine design feasibility (10%);
- Consult with engineering staff to evaluate interface between hardware and software and performance requirements of the overall system (5%);
- Consult with client concerning maintenance of system (5%); and
- Coordinate installation of software system (5%).

The petitioner describes the minimum degree requirements for the proffered position as follows:

> The position requires an individual with analytical background and skill. Such a background can only be obtained through one of several limited means, which include a bachelor's degree in engineering, computer science, or business with a specialization in information systems. We have never placed an individual in the above position, who holds less than a bachelor's degree or its equivalent in one of the above disciplines, or a closely related field.
>
> This is a position that normally requires a minimum of a bachelor's degree, or its equivalent, for entry into the field.

The submitted [redacted] was filed for a programmer analyst to work in Troy, MI and covers the period requested by the petitioner. The LCA lists a prevailing wage of $49,504.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter states that she will work in Troy, MI. This location is also indicated on the Form I-129.

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, but the petitioner did not include an education evaluation.

On May 23, 2008, the director issued an RFE stating that the evidence of record is not sufficient to demonstrate whether the petitioner is the actual employer or acting as an agent, whether a specialty occupation exists, and whether there was a bona fide job offer at the time of filing. The petitioner was advised to submit an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that "providing evidence of work to be performed for other consultants or employment agencies who provide consulting or employment services to other companies may not be sufficient. The evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed." The director also requested documentation evidencing the petitioner's business.

Counsel for the petitioner responded to the RFE on August 15, 2008, asserting that the petitioner is the actual employer of the beneficiary and not an agent. With the RFE response, counsel included the following

documents:

- An offer of employment from the petitioner to the beneficiary dated March 20, 2008, stating, "you shall use your best energies and abilities on a full time basis to perform, at location designated by the Company and including customer offices, the employment duties assigned to you from time to time";
- A letter from the petitioner addressed to USCIS dated July 24, 2008 asserting that it will be the beneficiary's actual employer throughout the term of employment and that it will provide training and on-going technical support to her. The letter also states that it will place the beneficiary "on a contract with [redacted] This is within easy and normal commuting distance to the location indicated on the [redacted] (Troy, Michigan), submitted with the case. RSB Systems is not responsible for supervising or controlling the beneficiary, nor would they transfer her to another work location without the advance permission and consent of [the petitioner]";
- A signed itinerary from the petitioner, dated July 23, 2008, that states the beneficiary will be assigned as a [redacted] from October 6, 2008 to September 30, 2011, and that the petitioner does not intend to assign the beneficiary to another location, but, if it does become necessary to do so, the petitioner will obtain a new [redacted];
- A copy of a subcontract between the petitioner and [redacted], effective February 12, 2007, which includes the provisions that "a duly **authorized representative of RSB shall initial the timesheet at the close of each business week**, certifying agreement with the time charged" and that "**RSB will have a right to hire the subcontractor personnel working under this agreement** after the expiry of six months since such employee started so working. **In case of dispute between the SUBCONTRACTOR and their employee, if not satisfactorily resolved within 30 days, shall result in hiring of the consultant by RSB.**" (Emphasis added.);
- A copy of the subcontractor work order from RSB signed by the petitioner and RSB, which lists the beneficiary by name and provides that she will be assigned to [redacted] from October 1, 2008 to December 31, 2011;[2]
- A copy of a letter from the petitioner, dated June 24, 2008, regarding the training that the petitioner provides to its consultants before placing them at client sites;
- A copy of a letter from RSB, dated July 20, 2008, confirming that it signed an agreement with the petitioner to assign programmer analysts (among others) to [redacted] and that "a Bachelor's degree, or its equivalent, in computer science, engineering, business with a specialization in Information Systems or a related field and specific training is required for these positions. **RSB Systems is in charge of this development effort at Chrysler.**" (Emphasis added.) RSB goes on to say that the petitioner will remain the actual employer of its employees placed with RSB.

This documentation provided in response to the RFE evidencing that the beneficiary will be assigned to a third party client site through a subcontract between the petitioner and another company directly contradicts the information that the petitioner indicated in the Form I-129 and LCA, namely, that the petitioner would

[2] The subcontractor work order was signed by RSB on April 2, 2008, but the signature by the petitioner is not dated. Therefore, the AAO cannot determine when this work order was finalized.

employ the beneficiary at its offices in Troy, MI.

The AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

(*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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384,

387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director's determination that the record is devoid of documentary evidence with respect to the end-client firm, and therefore whether her services would actually be those of a programmer analyst.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

On appeal, counsel asserts that *Defensor* does not apply because *Defensor* is a Fifth Circuit case while this petition falls under the jurisdiction of the Sixth Circuit. However, counsel argues that even if *Defensor* does apply, the petitioner should still be considered the employer because it "will have continuing involvement in 'ensuring the beneficiary's work product, including supervising her, providing technical input to her, and training as necessary." Counsel further states that the job duties provided in the petitioner's letter with the initial submission as well as in the itinerary submitted with the response to the RFE were sufficient to demonstrate that the proffered position is a specialty occupation.

The problem with counsel's assertions is that no documentation was submitted with respect to the third party client that would have been probative in determining whether the proffered position justified the performance of duties normally associated with a specialty occupation. For example, such evidence might have included a copy of the contract between RSB and the third party client, a work order between RSB and the third party client, and a detailed description of the project to be performed for the third party client that explains why the proffered position is required at the third party client site. Without documentary evidence to support the

claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that although the petitioner is located in the jurisdiction of the sixth circuit court, case law from other circuit courts can be used as persuasive authorities in adjudicating an immigration application. As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy 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. 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. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary 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's 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.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third party client, the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO will address the issue of whether or not the petitioner qualifies as a United States employer. In the RFE response letter and in the appeal brief, counsel for the petitioner argues that the petitioner is the actual employer.

In support of its assertion that the petitioner will be the employer of the beneficiary and not a contractor or agent, counsel cites to *Matter of Smith*, 12 I&N Dec. 772 (Dist.Dir. 1968). *Smith* can be distinguished from this case. First, *Smith* involved a sixth preference immigrant petition and not an H-1B nonimmigrant petition. Second, the petitioner in *Smith*, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. (*Id.* at 773). Although these factors are relevant in determining the beneficiary's employer for the purpose of guaranteeing permanent employment in an immigrant petition context, in an H-1B context the petitioner has to establish that it is an employer that has or will have an employer-employee relationship with the beneficiary and that it is making a bona fide offer of employment to the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii)(definition of United States employer).

On appeal, counsel for the petitioner argues that "the Service incorrectly inferred that RSB Systems would sub-contract the beneficiary to [redacted] when in fact, RSB Systems is the actual end-client." This argument is not persuasive. In response to the RFE, the petitioner stated that the beneficiary would be assigned to work at [redacted] for approximately 3 years. No independent documentation, such as a copy of an agreement between [redacted] was provided evidencing that [redacted] has been contracted by [redacted] to perform a project for at least 3 years duration. Nevertheless, even assuming that [redacted] has contracted with RSB for a project that will last approximately 3 years, since the evidence does not indicate that the petitioner has any other confirmed assignments for the beneficiary, whether there is sufficient work in a specialty occupation for the beneficiary to perform for the entire length of the petition is entirely dependent on [redacted] Counsel states "the Service incorrectly surmised that the Beneficiary would be subcontracted from [redacted] to [redacted]. In fact, evidence was submitted in response to the request for additional evidence, that [redacted] would be managing a development effort at [redacted] However, no evidence was provided to indicate that RSB has ultimate control over whether or not it will perform projects at [redacted] Presumably, without evidence to the contrary, RSB does not independently decide to perform projects at [redacted] without [redacted] authorization. Therefore, as indicated above, [redacted] is likely the actual end-user entity that would generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis.

By not submitting any documentation justifying the assignment of the beneficiary to the third party client site in a specialty occupation, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary or that it has sufficient control over the beneficiary to establish an employer-employee relationship based on the evidence of record.

Counsel also argues that the petitioner is an employer under the test of *Nationwide Mutual Ins. Co. v. Darden (Darden)*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"). The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the

term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. 318 at 322-323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

Darden, 503 U.S. at 323-324; *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). 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 America*, 390 U.S. 254, 258 (1968)).[3]

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[3] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

Factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in [redacted] are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.[4] The determination must be based on all of the

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do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

[4] It is noted that in analyzing *Matter of Smith* within the context of *Darden* and *Clackamas*, 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 an alien 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 alien 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.

circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Applying the *Darden* test to this matter, 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." First, as referenced above in the discussion of whether the proffered position constitutes a specialty occupation, under *Defensor*, which came after *Darden* and does not contradict the findings of *Darden*, it was determined that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. As mentioned above, the subcontract agreement between the petitioner and [redacted] states that [redacted] shall initial the timesheet at the close of business and that RSB has the right to hire the beneficiary after six months. The subcontract also states that, in the event of a dispute between the petitioner and the beneficiary, [redacted] shall hire the beneficiary. Even if the petitioner will directly pay the salary and benefits to the beneficiary, [redacted] will control and supervise the work of the beneficiary, provide the space and tools necessary to perform the duties, terminate her work on a project, ultimately pay the beneficiary's salary and benefits, albeit indirectly through the petitioner, and even has the right to hire the beneficiary after six months. In the event of a dispute, [redacted] also has the right to hire the beneficiary. This does not indicate that the petitioner has a controlling interest in the beneficiary's employment. To the contrary, RSB, under the contract, has the right to terminate the beneficiary's employment with the petitioner by hiring her after six months or in case of a dispute.

Other than training the beneficiary and putting the beneficiary on its payroll for the first six months of the beneficiary's employment, it is unclear what role the petitioner has in the beneficiary's assignment. Moreover, other than [redacted] and the petitioner's assertions, no evidence was provided to demonstrate that RSB has a contract for work with [redacted] However, assuming that [redacted] does have a project on which RSB will work and to which [redacted] intends to assign the beneficiary, no independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work. It was never stated by the petitioner whom the beneficiary would directly report to and the location of the person to whom she would report. Moreover, the timesheets slips are initialed by RSB. RSB even states in its letter of July 20, 2008, "RSB Systems is in charge of this development effort at [redacted] Therefore, the AAO has no choice but to conclude that RSB would oversee any work the beneficiary performs.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. To the contrary, it appears that RSB and, assuming that it has a project for the beneficiary to work on, the third party client will ultimately control the beneficiary's employment. Moreover, given that the

assignment to Chrysler through RSB is the only one listed by the petitioner, whether there is any work to be performed by the beneficiary as well as the nature of that work is controlled completely by RSB and Chrysler. Therefore, 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).

The AAO therefore affirms the director's finding that the petitioner does not qualify as a United States employer as it also failed to establish that it has sufficient work and resources for the beneficiary. Moreover, the petitioner has not provided sufficient documentation to establish that it is the entity with ultimate control over the beneficiary's work.

With respect to counsel's assertion that the petitioner is an agent as well as an employer, without sufficient evidence as described above, including documentation regarding the project allegedly contracted between [redacted] as well as the beneficiary's role in such work, it is impossible to verify the condition and scope of the beneficiary's services, much less the proffered position. Therefore, the petitioner has not established that it is an agent under 8 C.F.R. § 214.2(h)(2)(i)(F).

Moreover, beyond the decision of the director, the AAO concludes that the petitioner's evidence provided in response to the RFE with respect to work to be performed at the third party client site, including the itinerary, which is dated July 23, 2008 (over 3 months after the petition was submitted), constitutes a material change to the petition. The [redacted] and Form I-129, which list the proffered position's location as being at the petitioner's offices in Troy, MI, do not correspond with the documentation provided by the petitioner in response to the RFE that the beneficiary will be subcontracted through another company to a third party client site. The fact that the new worksite location provided in response to the RFE is within normal commuting distance of the initial worksite provided is irrelevant because the issue here is not whether the beneficiary will be paid the prevailing wage, but rather, that the beneficiary will work in a different location on a project not described in the initial petition. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *See generally Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this additional reason, the petition cannot be approved.

With respect to the [redacted], the AAO agrees with the director that without contracts or other documentation from an end-client firm verifying that there is a project that requires the beneficiary to perform duties in a specialty occupation at that worksite, the USCIS is unable to determine whether the petitioner has submitted a valid [redacted]

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further. However, the AAO notes that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.