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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

D2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 08 2010

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: Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 computer software consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify him 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; and (2) the petitioner does not qualify as a United States employer or agent.

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, counsel's 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 February 12, 2009, the petitioner stated that it wished to continue to employ the beneficiary as a programmer analyst from May 1, 2009 to February 29, 2012 at the Center for Disease Control and Prevention in Atlanta, GA at an annual salary of $60,000.

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 beneficiary's] professional services are sought for continued performance of highly technical programmer/analyst duties involving design, development, maintenance and testing of customer specific software in client server and internet/intranet environment. [The beneficiary] will continue working for *our* key Atlanta region client Center for Disease Control and Prevention [(CDC)].
>
> [The beneficiary's] *assignment to the aforementioned client is expected to extend for the entirety of the requested three year period.* We have been providing consulting services for several years, *and are confident of our continuing retention by this organization.*
>
> Our imposition of a degree requirement is consistent with industry standards nationwide and is mandated by the theoretical complexity of the computer systems design methodologies required for performance of the position for which H-1 classification is requested. . . .
>
> [The beneficiary] will continue working in a highly complex computing environmen[t] in our client's MIS Departments, which provide a broad range of financial, administrative and statistical data processing solutions. The [petitioner's] personnel with whom [the beneficiary] will be working, *all possess bachelor's or higher degrees in computer*

science, finance, economics or related disciplines.

(Emphasis added.)

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Atlanta, GA and covers the period requested by the petitioner. The LCA lists a prevailing wage of $58,656.

The beneficiary's education documents, indicating that he has a foreign degree, were submitted with the petition along with an education evaluation stating that the beneficiary's education is equivalent to a bachelor of science degree in computer science from an accredited U.S. college or university.

On March 16, 2009, the director issued an RFE stating that the evidence of record is not sufficient to demonstrate that the proffered position is a specialty occupation. The petitioner was advised to submit documentation clarifying the petitioner's employer-employee relationship with the beneficiary, including copies of any contracts between the petitioner and beneficiary, an itinerary of services, copies of signed and valid contractual agreements between the petitioner and end-client companies, and copies of signed and valid work orders and other documentation between the petitioner and the ultimate end-client companies where the work will actually be performed. The RFE specifically noted that:

> The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

Counsel for the petitioner responded to the RFE on April 15, 2009, asserting that the petitioner and beneficiary maintain an employer-employee relationship, even though the beneficiary has been providing services to the CDC under supervision of a Project Manager at CDC, through its vendor, Business Computer Applications, Inc. (BCA). Counsel also argues that the proffered position is a specialty occupation.

With the RFE response, counsel included the following documents:

- A copy of the beneficiary's temporary identity verification card, to access entry to the CDC, which lists him as being affiliated with Northrop Grumman and expires on December 5, 2009.
- An offer of employment from the petitioner to the beneficiary dated April 11, 2006, which states that the beneficiary will earn $60,000 per year to work as a programmer analyst "[r]esponsible for providing software consultancy services to our clients. . . ."
- Copies of the beneficiary's paystubs, which indicate that the beneficiary first received a pay stub at his address in Atlanta, GA for a period of time beginning January 19, 2009. Prior to this, the pay stubs are addressed to the beneficiary in Trenton, NJ.
- A copy of a letter from BCA along with a copy of a consulting contract between BCA and the petitioner. The term of this agreement is from December 1, 2008 to December 1, 2009. Attached to the agreement is

a description of services, which states the beneficiary will provide support to the CDC by performing the following duties: create, debug, and test reports; work with CDC staff as well as state and local health departments; write SAS code to produce reports and develop/perform functional and content testing. This document states that a bachelor's degree in any field *or three to five years of experience in lieu of a degree* is required. Additionally, the description of services provides that the beneficiary will perform his duties at the CDC in Atlanta, GA and that the deadline for completion of the project is February 15, 2012.

Other than the identification badge, no contracts or other evidence were provided either from Northrop Grumman or the CDC in response to the RFE.

The petition was denied on June 2, 2009.

On appeal, counsel provides an Indefinite Delivery/Indefinite Quantity Subcontract between Northrop Grumman and BCA along with a letter from BCA dated June 19, 2009.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.[1]

[1] However, even if the AAO were to consider the documentation provided on appeal as part of the record, this evidence does not demonstrate that the proffered position is a specialty occupation or that the petitioner is a United States employer or agent. The Subcontract covers a period of October 7, 2003 to June 30, 2004 and states that Northrup Grumman can unilaterally decide to extend the period of performance, not to exceed 84 months. The Subcontract states that the work will be performed pursuant to a Work Order. The petitioner, beneficiary, and the CDC project are not mentioned in the Subcontract.

The letter from BCA explains that Northrop Grumman has been a long time partner of the CDC as the prime contractor and that BCA is a subcontractor to Northrop Grumman. Therefore, the beneficiary has been contracted by the petitioner to BCA, which in turn has subcontracted the beneficiary to Northrop Grumman, which in turn has subcontracted the beneficiary to a project with the CDC in Atlanta, GA.

Counsel also includes a copy of an SOW, which does not mention the beneficiary, issued pursuant to a contract between the CDC and Northrop Grumman. The period of performance in the SOW does not extend beyond October 6, 2010. Moreover, the SOW lists the requirements of the candidates to complete the project,

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 fields 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

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but does not indicate that a bachelor's degree or the equivalent is required, let alone a bachelor's degree or the equivalent in a specific specialty.

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 his 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 U.S. 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.

The evidence submitted directly contradicts the petitioner's assertion that the beneficiary will be assigned to the CDC in Atlanta, GA for the duration of the petition to work on a project that requires at least a bachelor's degree or the equivalent. First, the petitioner's offer letter states that the beneficiary will provide services to "our clients" and not just to the CDC. Second, even though the petitioner indicated on the Form I-129 that the beneficiary's employment would continue without change, the beneficiary had been paid by the petitioner while living in Trenton, NJ up until shortly before the petition was filed, even though the petition was filed for the beneficiary to work in Atlanta, GA. Third, the description of services attached to the contract between the petitioner and BCA indicated that either a bachelor's degree or three to five years of experience is required. However, three to five years of experience is not equivalent to a bachelor's degree under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). Fourth, the petitioner stated that its personnel with whom the beneficiary will be working all possess bachelor's or higher degrees in computer science, finance, economics or related disciplines, however the petitioner provided no evidence of this and, moreover, the degrees in a wide range of

fields allegedly held by the petitioner's other personnel with whom the beneficiary would work are not in a specific specialty. Going 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the petitioner has failed to establish that the beneficiary will work for the project at the CDC for the duration of the petition in a position that requires at least a bachelor's degree or the equivalent in a specific specialty. Since the employment offer letter and pay stubs demonstrate that the petitioner has assigned the beneficiary to other client sites in the past and may assign the beneficiary to other client sites in the future, and since the documentation provided does not support the petitioner and BCA's assertions that the beneficiary will work for the CDC in Atlanta, GA for the duration of the petition, the AAO finds it is more likely than not that the beneficiary will be subcontracted to work at other locations and for other end-clients than those indicated by the petitioner.

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 covering the duration of the petition 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. Additionally, the documentation submitted indicates that any work the beneficiary would allegedly perform on the temporary project for the CDC does not require at least a bachelor's degree or the equivalent in a specific specialty. 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.[2]

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[2] The AAO further notes that even if the petitioner could demonstrate that the beneficiary would work as a programmer analyst for the duration of the petition, the *Handbook*'s (2010-11 online edition) information on educational requirements in the programmer-analyst occupation indicates that a bachelor's or higher degree,

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 sufficient 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. Moreover, the documentation that was submitted regarding the project with the CDC does not establish that the beneficiary will work on that project for the duration of the petition and that at least a bachelor's degree or the equivalent in a specific specialty is required to perform the proffered duties.

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. Counsel for the petitioner argues that the petitioner is the actual 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 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*").

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or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials. The evidence submitted by the petitioner, which indicates that the proffered position requires a wide range of credentials rather than at least a bachelor's degree or the equivalent in a specific specialty, does not refute the information provided in the *Handbook*.

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]

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)).

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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 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).

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 *Darden* and *Clackamas* 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. The determination must be based on all of the 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, under *Defensor*, 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. *See Defensor v. Meissner*, 201 F.3d at 388.

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 discussed previously, counsel states in the response to the RFE that the beneficiary would be supervised by a project manager at the CDC. The evidence does not establish that the beneficiary reports to anyone employed by the petitioner. Additionally, the beneficiary's identification badge lists his affiliation as being with Northrop Grumman, rather than the petitioner. No evidence was submitted to indicate that the CDC and Northrop Grumman are even aware of the petitioner's existence, even though the petitioner refers to the CDC as its client in the support letter.

Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. 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. Therefore, the AAO has no choice but to conclude that Northrop Grumman or the CDC 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 the third party client will ultimately control the beneficiary's employment. Moreover, given that the assignment to the CDC through Northrop Grumman and BCA 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 the CDC and Northrop Grumman. 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.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.