U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

b2

[redacted]

Date: DEC 09 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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, with a fee of $630. 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 Director, California Service Center, 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 remain denied.

The petitioner states on the Form I-129, Petition for Nonimmigrant Worker, that it was established in 2002, engages in computer software consulting services, employs 13 personnel, and had earned a gross annual income of $2,100,000 when the petition was filed. It seeks to continue the employment of the beneficiary as a software engineer 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 grounds that: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to establish that it qualifies as a U.S. employer or agent; and (3) the petitioner failed to establish that the beneficiary maintained his H-1B status prior to the Form I-129 submitted on his behalf.

The record of proceeding before the AAO contains: (1) Form I-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, Notice of Appeal or Motion, with counsel's supplemental brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on June 19, 2009, the petitioner indicated that it wished to continue the employment of the beneficiary as a software engineer for three years, from June 30, 2009 until June 29, 2012 at an annual salary of $60,029. The petitioner noted that the beneficiary had been working for it in valid H-1B classification since October 2000. The petitioner further noted that an I-140, Immigrant Petition for Alien Worker, had been approved and that the beneficiary's Form I-485, Application to Adjust Status, was pending. The LCA accompanying the petition was certified for the beneficiary to work in Agoura Hills, California from June 30, 2009 until June 29, 2012.

In a June 15, 2009 letter submitted in support of the petition, the petitioner noted that it provides software services, specializing in the development of customized systems to meet the specific requirements of its clientele as well as offering customer support and training. The petitioner stated that the beneficiary, as a software engineer, would "continue to plan and design application software for LAN & WAN using NAT (Network Address Translation) coding" and under the supervision of its president the beneficiary would be responsible for the following job duties:

- Planning, designing, administering and supporting client's local and wide area in various network operating systems, protocol, servers, workstations, Communication devices, application software over network, messaging system, internet, intranet, extranet, Virtual private networks, PSTN line services, ISDN line services, T1 circuits, ATM, Frame relays, DSL circuits, Faculty switches, Data and Voice communications on network protocols.
- In addition, the position calls for fine-tuning of network applications for

optimal performance and programming registry values for various network bandwidths.

The petitioner did not indicate that the beneficiary would be involved in technical support for customers who had purchased the petitioner's licensed software or who had purchased the use of the petitioner's hosting facility. The petitioner stated, however, that in order to perform the above described duties the position required a bachelor's degree in engineering or its equivalent in computer science, management information systems (MIS) or related field and two years of related work experience. The petitioner noted the beneficiary's credentials had been evaluated to be equivalent to a U.S. bachelor's degree in business administration in management information systems awarded by an accredited university in the United States.

On September 11, 2009, the director issued an RFE requesting, in part, a detailed description of the project if the beneficiary would be working in-house and solely for the petitioner and if the beneficiary would be working in-house on a client project, copies of signed and valid contractual agreements between the petitioner and the authorized officials of the end-client companies including a detailed description of the beneficiary's duties. The director also requested additional evidence if the beneficiary would be working for the petitioner's clients on a contract basis.

In an October 20, 2009 response, the petitioner stated that it is a global software product development and technology series enterprise that specializes in serving complex manufacturing, asset-and service oriented industries including aerospace and defense, among others, as well as the independent software vendors that serve them. The petitioner noted that it had engaged in business partnerships and cooperative ventures with its customers since 1996 and that it is dedicated to helping its clients bring high quality products to market rapidly and improve topline and bottom-line business performance.

The petitioner also stated, in pertinent part, that it owned several intellectual properties in the form of software products and identified [redacted] as one such product for its aerospace customers. The petitioner stated that the beneficiary's services were required for implementing updates and changes to [redacted] which is then provided via internet to the petitioner's clients who had purchased the software. The petitioner stated that the beneficiary would be "responsible for maintaining our hosting center that hosts our client's licenses of [redacted] and assuring uninterrupted services by monitoring network efficiency" and would be "responsible for planning, designing, administrating and supporting the client's licensed software environment in our hosting center." The petitioner indicated that the beneficiary, on a monthly basis, would provide the petitioner's customers with network statistics and suggest ways to improve network/database performance. The petitioner noted that the beneficiary would not be responsible for any contract services and that his responsibility would be to ensure the software is viable and up-to-date.

The petitioner also claimed that the beneficiary is the petitioner's full-time employee. The petitioner explained, however, that effective July 1, 2007, it had engaged a third party company, Administaff Inc., to provide human resources and payroll services and that Administaff, Inc. delivered its personnel management services by entering into a co-employment relationship with

its client companies and their existing employees. Thus, the petitioner indicated Administaff paid all state and federal taxes regarding the employees and the petitioner used the employees for a monthly service fee under a lease agreement. The petitioner also provided an Administaff list identifying the petitioner as a client and listing 10 employees. The beneficiary was identified on the list of the 10 employees as operations support, while two other individuals were identified as software engineers.

The director denied the petition on November 16, 2009.

On appeal, the petitioner asserts that all of its employees are fully under its control and supervision and that the work scope of each employee and the hiring and firing decisions rest solely with the petitioner. The petitioner states that it is fully engaged in selling its proprietary software, [redacted] to aerospace maintenance, repair and overhaul customers and all its employees are used to provide the necessary software support and maintenance. The petitioner emphasizes that it licenses its proprietary software to business customers and only provides related consulting services to those licensees. The petitioner describes its proprietary software and notes the "[b]eneficiary's services are provided to support and troubleshoot implementation and glitches in the software installation and maintenance *via* the Internet and not necessarily at clients' physical premises all the time." The petitioner provides one maintenance and support agreement with a third party company wherein the petitioner will provide technical support for assorted licensed software. The petitioner also provides a December 7, 2009 letter from Administaff identifying the beneficiary as a worksite employee of both Administaff and the petitioner. Administaff indicates in its letter that it provides payroll, benefits and human resource services to its client companies. The petitioner further submits its employee handbook which indicates that Administaff handles the administrative responsibilities such as payroll processing, benefits and personnel issues while the petitioner "handles the day-to-day activities related to its core business." Counsel asserts that the director's conclusion that the petitioner is not a direct employer of the beneficiary led to an erroneous application of the standards for employment contractors and agents.

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 [(1)] 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 [(2)] 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 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 at 387. 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), 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly

represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO notes that, 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. *Id.* at 387-388. 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.

In this matter, the petitioner provided a broad overview of the duties of the proffered position initially and in response to the director's RFE. On appeal, the petitioner asserts that there is a bona fide position for the beneficiary with the petitioner and the beneficiary is qualified to fill the position. The petitioner does not directly address the specific duties of the proffered position on appeal and does not resolve the inconsistency noted by the director regarding the petitioner's title of the proffered position. 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). Although a title does not suffice to establish a beneficiary's duties, the petitioner identifies two employees as software engineers and identifies the beneficiary as operations support, apparently distinguishing the nature of the positions. Upon review of the petitioner's explanation and discussion of the nature of its business and in particular its provision of support services for its proprietary software, as well as the broad description of the beneficiary's actual duties, it is not possible to discern from the information provided that the beneficiary's assignment and actual day-to-day duties entail primarily H-1B caliber work. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a software engineer in-house providing software support services to the petitioner's licensees and companies that use its hosting facility, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1]

The duties of a software engineer occupational category as broadly described is addressed in the chapter of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers."

---

[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http: www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

The *Handbook* describes computer programmers as follows:

> [C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.
>
> Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.
>
> As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .
>
> * * *
>
> [M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook* describes computer software engineers as follows:

> *Computer software engineers* design and develop software. They apply the theories and principles of computer science and mathematical analysis to create, test, and evaluate the software applications and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting changes in technology and new areas of specialization, as well as the changing practices of

employers. (A separate section on computer hardware engineers appears in the engineers section of the *Handbook.*)

Software engineers design and develop many types of software, including computer games, business applications, operating systems, network control systems, and middleware. They must be experts in the theory of computing systems, the structure of software, and the nature and limitations of hardware to ensure that the underlying systems will work properly.

Computer software engineers begin by analyzing users' needs, and then design, test, and develop software to meet those needs. During this process they create flowcharts, diagrams, and other documentation, and may also create the detailed sets of instructions, called algorithms, that actually tell the computer what to do. They also may be responsible for converting these instructions into a computer language, a process called programming or coding, but this usually is the responsibility of *computer programmers.*

* * *

Computer systems software engineers coordinate the construction, maintenance, and expansion of an organization's computer systems. Working with the organization, they coordinate each department's computer needs—ordering, inventory, billing, and payroll recordkeeping, for example—and make suggestions about its technical direction. They also might set up the organization's intranets—networks that link computers within the organization and ease communication among various departments. Often, they are also responsible for the design and implementation of system security and data assurance.

* * *

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

As evident in the excerpts above, the *Handbook's* information on educational requirements in the computer software engineering occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty may be preferred for certain positions and cites a variety of usual disciplines for the occupation; however, the *Handbook* does not set out a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials and focuses on technical knowledge of computer software and systems. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties here do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the *Handbook* indicates no specific degree requirement for employment as a software engineer, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not provided other evidence that a bachelor's degree in a specific specialty is an industry-wide standard.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other generic computer software positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner also fails to establish that it normally requires a bachelor's in a specific specialty. Although the petitioner previously employed the beneficiary in an H-1B classification, 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'r 1988). If any of the previous nonimmigrant petitions were approved based on the same descriptions and unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. 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 eligibility for the benefit sought. *See 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 petitioner has not provided documentary evidence sufficient to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of other information technology professionals not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 discusses whether the petitioner established that it will be the beneficiary's employer or agent. 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*"). 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)).[2]

Therefore, in considering whether or not one is an "employee" in an "employer-employee

---

[2] 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, 844-845 (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).

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 *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).[3]

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." Although the AAO acknowledges that the petitioner has sufficiently established that it does not provide the beneficiary's services to third party companies as part of a staffing or consulting arrangement, the record is insufficient to establish that the petitioner has maintained a "employer-employee relationship" with the beneficiary. 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.

---

[3] When examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

The petitioner in this matter does not provide the necessary probative information to establish that it will act as the beneficiary's sole employer. Although the petitioner provides a letter from Administaff, Inc. and its employee handbook, the record does not include the actual contract detailing the relationship between the petitioner and Administaff, Inc. as it relates to the control of the beneficiary's work and the petitioner's ability to hire and fire individuals. The petitioner's statement that it uses "leased employees" for a monthly service fee under a lease agreement undermines the petitioner's claim that it retains the ability to hire and fire the individual employees. The failure to provide the actual contract between the petitioner and Administaff, Inc. also precludes a determination that the petitioner controls the beneficiary's work. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 ('Reg. Comm'r 1972)).

In view of the above, the record is insufficient to establish that the beneficiary will be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer" represented by the petitioner in a documented agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or even that the termination of the beneficiary's employment is the ultimate decision of the petitioner. 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 the record lacks sufficient evidence establishing that the petitioner continues to be the actual employer of the beneficiary, the record also lacks sufficient evidence that the beneficiary maintained his H-1B status with the petitioner.

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 remains denied.