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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

U.S. Citizenship
and Immigration
Services

[redacted]

D2

Date: JUL 0 5 2012 Office: VERMONT 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]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of investment analyst as an H-1B nonimmigrant 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 petitioner is a corporation organized under the laws of the State of Florida. The Form I-129 visa petition describes the petitioner as an investment management company with three employees.

The director denied the petition, finding that the petitioner failed to establish that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Applying a common-law test provided by the Supreme Court of the United States, the director concluded that the record does not establish that the petitioner will have an "employer-employee relationship" with respect to the beneficiary. As the beneficiary is the petitioner's president, its sole director, and sole owner, the director concluded that he will not be an "employee" as required by 8 C.F.R. § 214.2(h)(4)(ii)(2). To the contrary, the director indicated that the beneficiary will be a proprietor and that he "will control the organization; [he] cannot be fired; [he] will report to no one; [he] will set the rules governing [his] own work; and [he] will share in all profits and losses." Accordingly, the director concluded that the petitioner had not established that the petitioner and the beneficiary would have an employer-employee relationship.

On appeal, counsel contended that the director's findings are erroneous. Counsel emphasized that the petitioner pays the beneficiary as an employee and makes the appropriate deductions from his wages. Counsel also observed that the beneficiary is not the petitioner's sole employee, but also employs the beneficiary's wife and another person. Counsel cited *Matter of M-*, 8 I&N Dec. 24, 53 (BIA 1958), *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm. 1979), *Matter of Aphrodite Investments Ltd.*, 17 I&N 530, and other cases for the proposition that a corporation may petition for its owner.

In the appeal, counsel cited eight cases. She cited four of those cases for the proposition that "right to control" is not determinative of the issue of whether a majority shareholder may qualify as an employee of a petitioning corporation.

Matter of M-, 8 I&N Dec. 24 (BIA 1958); *Matter of Allan Gee, Inc.*, 17 I&N 296 (Reg. Comm. 1979); and *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Reg. Comm. 1980) do, in fact, stand for the proposition that a petitioner is a separate and distinct legal entity from its owners and stockholders. Such a separate entity may, of course, petition for an employee under various visa classifications. Whether the visa petition will be approvable, of course, depends on the statutes and regulations pertinent to the visa classification, and the facts of the case. The AAO agrees that, as counsel observed, ownership of the petitioner is not determinative. The decisions in the cases cited by counsel, however, are limited to the facts of those cases. None of them stand for the proposition

that a corporation like the petitioner, wholly owned by the beneficiary, has an employer-employee relationship with the beneficiary, who is the petitioner's president and sole director.

Matter of Tong, 16 I&N Dec. 593 (BIA 1978) stated that, in the context of accepting unauthorized employment within the meaning of section 245 of the Act, self-employment is included in the term "employment," notwithstanding that one does not actually "employ" oneself in any precise sense. Counsel provided no evidence or argument that employment in the context contemplated in this case has the identical meaning and statutory history as it does in the context of prohibited employment within the meaning of section 245 of the Act. The AAO does not perceive that the decision in that case has any relevance to the instant case.

The four other cases cited by counsel were for the proposition that a company without the "right to control" may nevertheless be found to qualify as an employer.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided secretaries to its third-party clients. The district director, noting that the petitioning staffing service would directly pay the beneficiary's salary, provide benefits, and make the various contributions required of employers (social security, worker's compensation, and unemployment insurance), determined that the staffing service, rather than its client, was the beneficiary's actual employer.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to place H-1B aeronautical engineers with third-party clients pursuant to one-year contracts. The Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple assignments.

In Matter of *Artee Corporation*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to employ machinists who were to be placed with third-party clients. The commissioner again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

Again, none of those cases confronted the central issue in the instant case, which is whether the petitioner, which is wholly owned by the beneficiary, has an employer-employee relationship with the beneficiary, who is also the petitioner's president and sole director.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the

> [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) *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*; and
>
> (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

This case hinges on whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). More specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question is whether the petitioner has established that it will have "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." 8 C.F.R. § 214.2(h)(4)(ii).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner as the petitioner's president, its sole director, and sole owner.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United

States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (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)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

- Whether and, if so, to what extent the organization supervises the individual's work.

- Whether the individual reports to someone higher in the organization.

- Whether and, if so, to what extent the individual is able to influence the organization.

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

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. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[1]

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[1] 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.), *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).

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a *tax identification number, to engage a person to work within 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" or* "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[2]

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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the $750 or $1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

[2] To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "'plainly

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" 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).[3]

In the past, the legacy INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter. None of those decisions, including those cited by counsel, hinged upon whether a petitioner had demonstrated that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), in that it has established that it will have "an employer-employee relationship" with respect to its owner/beneficiary.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." *See id*; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." *See Clackamas*, 538 U.S. at 440. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

Therefore, in considering whether or not one will be 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) (defining a "United States employer" as one who "has an employer-employee

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erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

[3] That 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 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.)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *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 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining 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).

Moreover, and as detailed above, in addition to the factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

It is important to note, however, 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 relevant to control 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; rather, 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).

Furthermore, 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.

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not

determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests 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." As explained above, the petitioner purports to be a corporation which is solely owned, by the beneficiary, and of which the beneficiary is the president and sole director.

The petitioner did not submit an employment contract describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and 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 beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. 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).

Accordingly, the petitioner and the beneficiary are not eligible for the benefit sought, and the appeal must be dismissed and the petition denied for this reason.

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.