



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 08 2014** OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
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 director's decision will be affirmed. The appeal will be dismissed.

The petitioner is a new and used car dealership. It seeks to employ the beneficiary as a chief executive officer (CEO) 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 two grounds: (1) the petitioner failed to establish that it had an employer-employee relationship with the beneficiary, as required to meet the definition of a U.S. employer, and (2) the petitioner failed to establish that the proffered position qualifies as a specialty occupation.

The record of proceeding contains: (1) the Form I-129 petition and supporting documentation; (2) two requests for evidence (RFEs) from the director and the petitioner's responses thereto; (3) the director's decision; and (4) Form I-290B, an appeal brief, and supporting materials. We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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) . . . .

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The 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).

### **Case history**

The H-1B petition was filed on May 15, 2012, accompanied by a letter to United States Citizenship and Immigration Services (USCIS) from the petitioner's vice president, [REDACTED] and supporting documents including the petitioner's [REDACTED] dated October 4, 2011, its Certificate of Status from the State of Florida, dated October 5, 2011, a letter from the Internal Revenue Service (IRS), dated October 12, 2011, assigning the petitioner an employer identification number (EIN), the petitioner's business plan, the minutes of Board of Directors meetings on November 23, 2011 and May 1, 2012, and a letter dated April 3, 2012 from the director of [REDACTED], a Russian company, stating that the beneficiary had been employed as its CEO since 2002. The business plan indicates that the petitioner is a start-up company, that the beneficiary is its sole investor as well as its acting manager and salesman, and that the beneficiary had been employed in the car industry in Russia for about 20 years as a salesman and sales manager. Mr. [REDACTED] in his letter dated May 10, 2012, stated that the petitioner intended to employ the beneficiary as its CEO for an initial three-year period to perform the following duties:

- Direct and plan policies, objectives of the company to ensuring (*sic*) continuing operations to maximize returns and investments and increase productivity;
- Negotiate contracts with suppliers, distributors, state agencies and other entities;
- Analyze operations to evaluate performance of the company and determine areas of potential cost reduction, program improvement or policy change;
- Direct the company's financial and budget activities to fund operations, maximize investments and increase efficiency.

According to Mr. [REDACTED] the complexity of the position as CEO of the car dealership requires the service of an individual with at least a master's degree in mathematics and two years of experience in the field. The beneficiary possesses these qualifications, Mr. [REDACTED] asserted, based on a diploma in applied mathematics he earned at the [REDACTED] in Russia after seven years of study from 1983 to 1990, and his subsequent experience as a CEO for various businesses in Russia.

In RFEs issued on October 16, 2012 and April 18, 2013, the director requested additional evidence to establish that a valid employer-employee relationship exists between the petitioner and the beneficiary, in particular the petitioner's right to control the beneficiary, and that the job offered qualifies as a specialty occupation. In response to the RFEs the petitioner submitted the



following pertinent documentation: a “Summary of Oral Employment Agreement” between the petitioner and the beneficiary, dated October 12, 2011, the petitioner’s Bylaws, adopted on October 4, 2011, a stock transfer ledger showing that the beneficiary was issued 100 shares of the petitioner’s stock on October 5, 2011, a Board of Directors resolution dated October 12, 2011, and the minutes of another meeting of the board of directors on April 6, 2013, as well as a more detailed description of the job duties of the CEO position and additional job postings for CEOs by other companies.

On July 23, 2013 the director issued a decision denying the petition. The director held that the petitioner failed to establish that it had an employer-employee relationship with the beneficiary, and also failed to establish that the job offered qualifies as a specialty occupation. With respect to the first ground for denial, the director’s decision reads, in pertinent part, as follows:

The [REDACTED] and the minutes submitted indicate that [the petitioner] is managed by a board of directors that consists of two individuals; the beneficiary and [REDACTED]. The [REDACTED] list the beneficiary as the Incorporator, the Initial Officer, and the Director of your company. The business plan that you submitted indicates that the beneficiary . . . has provided 100% of the funding for start-up costs; is the sole Owner, Sales Manager, and Primary Sales Staff; and is the sole investor, who will act as manager of the company.

.....  
In response to USCIS’ request for other documentary evidence to establish who would supervise and assign work to the beneficiary, who would have the authority to hire, fire, pay, and change the beneficiary’s job duties, or otherwise control his or her work, you have cited *Aphrodite* [*infra*] and concluded that because the company is a separate legal identity from its owner, the company can supervise and assign work to the beneficiary with the authority to hire, fire, pay, and change the beneficiary’s job duties, or otherwise control the beneficiary’s work. You also referenced your companies [*sic*] bylaws, which indicate in Article IV that the CEO may be removed for cause by an affirmative vote of at least 50% of the members of the Board of Directors. As the Board of Directors consists of the beneficiary and the Vice President, it is your contention that the beneficiary could theoretically be removed by the Vice President at any time; thereby establishing an employee/employer relationship between the company and the beneficiary.

.....  
It appears the beneficiary will be a proprietor of this business and will not be an “employee” as outlined above. 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 or she will control the organization; he or she cannot feasibly be fired; he or she will report to no one; he or she will set the rules governing his or her own work; and he or she will share in all profits and losses. Therefore, based on the tests outlined above, you have not established that the beneficiary will have an employer-employee relationship.

With respect to the second ground for denial, the director analyzed the evidence of record and determined that it failed to establish that the job offered qualifies as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act. Specifically, the evidence did not show that the CEO



position meets any of the criteria of a specialty occupation as set forth in the applicable regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner filed a timely appeal on August 22, 2013, with a brief from counsel and supporting documentation, contesting both of the director's grounds for denial.

### **Analysis of the Issues**

For the reasons discussed hereinafter, we will affirm the director's findings that the evidence of record fails to establish an employer-employee relationship between the petitioner and the beneficiary, as required for the petitioner to meet the definition of a U.S. employer, and that the petitioner failed to establish that the job offered qualifies as a specialty occupation.

### **Employer-Employee Relationship:**

The first issue on appeal is 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 (it has engaged a person to work within the United States and it has an IRS tax identification number), 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).

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 former Immigration and Naturalization Service (INS) nor 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.* For purposes of the H-1B visa classification, therefore, these terms are undefined.

A. The Supreme Court Decisions: *Darden* and *Clackamas*

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. 440, 445 (2003) (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).

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).

#### B. No Congressional Intent to Expand Common Law Agency Definitions

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.<sup>1</sup>

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<sup>1</sup> 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).

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



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.<sup>2</sup>

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).<sup>3</sup>

### C. The Precedents Distinguished

In the past, the former Immigration and Naturalization Service (INS) (now USCIS) 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. 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

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her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

<sup>2</sup> 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 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))).

<sup>3</sup> 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).

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.

#### D. The Common-Law Standard of "Control"

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 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 sixteen 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. Not all or even a majority of the listed criteria need be met. 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 factor as it actually 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, and 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).

#### E. The Common Law Test Applied

Applying the *Darden* and *Clackamas* tests to the evidence of record in this case, we do not find that the petitioner has established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." The beneficiary is the sole owner of the petitioning company, having invested approximately \$250,000 to cover start-up costs. He received all of the 100 shares of issued stock. The beneficiary was initially the sole officer and director (see [REDACTED] dated October 4, 2011). He was joined by [REDACTED] the registered agent on the [REDACTED] who became the petitioner's second director and assumed the office of Vice-President (see corporate resolution of the Board of Directors and the Summary of Oral Employment Agreement, both dated October 12, 2011). The documentation of record establishes that the organization will have limited supervision over the beneficiary; the beneficiary will retain significant influence over the organization; and the beneficiary will share in the profits, losses, and liabilities of the organization. Considering all of the incidents of the relationship, the beneficiary's work will not be controlled by the petitioner. As such, the petitioner will not have an employer-employee relationship with the beneficiary.

In accordance with the foregoing analysis, the director's finding that the petitioner does not meet the definition of a United States employer due to its failure to establish an employer-employee relationship with the beneficiary is affirmed.



**Specialty Occupation:**

The second issue on appeal is whether the petitioner has established that the job offered qualifies as a specialty occupation, as defined in the Act and applicable regulations. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) provides that the position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position;  
or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such, and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Moreover, to ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, etc. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Regarding the first regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the director noted in her decision that the AAO recognizes the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> With respect to chief executive officers, which the *Handbook* categorizes as top executives, the *Handbook* has a subchapter entitled "How to Become a Top Executive" which states the following:

Although education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience.

#### **Education**

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal

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<sup>4</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.



arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

### **Work Experience in a Related Occupation**

Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

Chief executives typically need extensive managerial experience. Executives are also expected to have experience in the organization's area of specialty. Most general and operations managers hired from outside an organization need lower level supervisory or management experience in a related field.

Some general managers advance to higher level managerial or executive positions. Company training programs, executive development programs, and certification can often benefit managers or executives hoping to advance. Chief executive officers often become a member of the board of directors.

U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 20014-25 ed., Top Executives, on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm> (accessed July 25, 2014).

Thus, the *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. As the foregoing passages from the *Handbook* indicate, top executives (including chief executive officers), may have degrees and academic backgrounds in a variety of fields. Moreover, many top executives achieve their positions based primarily on relevant work experience with a large managerial component. Significantly, the *Handbook* indicates that no college degree at all may be required for top executives in some industries such as retail trade or transportation. The car dealership in the instant case would appear to fall within these industry categories.

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.



On appeal the petitioner asserts that more than 30 universities or colleges offer four-year baccalaureate degrees for CEOs, and claims that this fact is sufficient to establish that a baccalaureate or higher degree or the equivalent is normally the minimum requirement for entry into a CEO position. We are not persuaded. The petitioner does not claim that a baccalaureate degree in any specific specialty is the minimum educational requirement for entry into a CEO position, which is required to meet the statutory definition of a specialty occupation at section 214(i)(1)(B) of the Act. Moreover, the petitioner ignores the fact that individuals in some industries may attain CEO positions by virtue of their work and managerial experience without any baccalaureate degree. In this connection, the petitioner has not shown that the car dealership industry, in particular, is one in which CEOs must have at least a baccalaureate or higher degree, or that any such degree be in a specific specialty.

Thus, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or any other independent, authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Accordingly, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the first regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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)).

On appeal the petitioner has submitted 12 online job postings for CEOs by other organizations. Three of the job postings are from hospitals in [REDACTED], Ohio; [REDACTED] Tennessee; and [REDACTED] Kansas. The educational requirement for the CEO in [REDACTED] is a bachelor's degree in healthcare administration, business administration, finance, or a clinical specialty, and a master's degree in healthcare administration, business, or a related field. Thus, while this position does require at least a baccalaureate degree, it does not require that the degree be in a specific specialty. The other two hospital CEO positions require a four-year baccalaureate without any specification as to a specific field of study. Five other postings appear to be from headhunter companies in [REDACTED] Pennsylvania; [REDACTED] Arizona; [REDACTED] Texas; [REDACTED] Florida; and [REDACTED] seeking applicants for CEO positions in the pharmaceutical, consumer products, manufacturing, and "general business" fields. Their minimum educational requirements are a bachelor's degree with no further specifications. Three job postings are from social service organizations – [REDACTED] California; [REDACTED]

[REDACTED] Florida; and an unidentified charitable organization in northeastern Ohio. The first does not advertise any educational requirement, the second requires a bachelor's degree without further specification, and the third requires a doctorate without further specification. The final job posting is from [REDACTED] in Albuquerque, which requires a bachelor's degree without further specification. None of the foregoing job postings state that a bachelor's degree in a specific specialty is the minimum educational requirement to qualify for the CEO position. Moreover, none of the job postings is from a company in the same line of business as the petitioner. Furthermore, it does not appear from the job postings that any of the companies is comparable to the petitioner in size or scale of operations. Thus, the record does not show that the petitioner's CEO position is parallel in any way to the jobs advertised in the online postings. Therefore, the job postings do not show that a bachelor's degree requirement is common to the petitioner's industry in parallel positions among similar organizations, as required to satisfy the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not submitted any other documentary evidence of an industry standard among car dealerships to require a CEO to have at least a baccalaureate degree in a specific specialty. Accordingly, the evidence of record fails to establish that the proffered position qualifies as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

On appeal the petitioner asserts that the complexity of its CEO position is demonstrated in the detailed description of the job duties that was initially submitted in response to the director's second RFE. The job duties are reiterated in the appeal, and read as follows:

- **Direct and plan policies, objectives of the company to ensuring (*sic*) continuing operations to maximize returns and investments and increase productivity – 30%.**

The Beneficiary is to develop strategy and create vision, make decisions where the company is heading and how to keep it profitable, to help the corporation to differentiate itself from the competition and create unique line of services to stay ahead on (*sic*) the competitors; to set and develop the corporation's business models, budgets and goals as requested.

- **Negotiate contracts with suppliers, distributors, state agencies and other entities – 20%**

The beneficiary will represent the corporation in negotiations with outside organizations, partners, officials, agencies, media, etc. He is to set directions for multiple goals and lead the corporation in an ever-changing market, choose the most cost effective deals and the best prices for the goods bought and sold.



■ **Analyze operations to evaluate performance of the company and determine areas of potential cost reduction, program improvement or policy change – 20%**

The Beneficiary will manage progress of every initiative, product and services (*sic*) the corporation will offer, and report the progress to the Board of Directors. He will maintain a high public visibility, performing as a representative of the corporation on-site and at external events in order to improve public relations, granting interviews for industry publications and attending industry events.

■ **Direct the company's financial and budget activities to fund operations, maximize investments and increase efficiency – 30%**

The Beneficiary will plan, develop, implement and evaluate the corporation's fiscal functions and performance by providing financial expertise, work with underwriters, attorneys and customers concerning the corporation's portfolio, maintain a broad knowledge of industry laws and statutory and operational regulations, remain current with new competitors' programs. The Beneficiary is to prepare and administer a large and complex budget, allocate limited resources in a cost-effective manner. Determine budgetary priorities, direct all investment and fund raising efforts.

In the *Handbook, 2014-15 Edition*, the typical duties of top executives (including CEOs) are described in the subchapter "What Top Executives Do" as follows:

Top executives devise strategies and policies to ensure that an organization meets its goals. They plan, direct, and coordinate operational activities of companies and organizations.

**Duties**

Top Executive typically do the following:

- Establish and carry out departmental or organizational goals, policies, and procedures
- Direct and oversee an organization's financial and budgetary activities
- Manage general activities related to making products and providing services
- Consult with other executives, staff, and board members about general operations
- Negotiate or approve contracts and agreements
- Appoint department heads and managers
- Analyze financial statements, sales reports, and other performance indicators
- Identify places to cut costs and to improve performance, policies, and programs

The responsibilities of top executives largely depend on an organization's size. For example, an owner or manager of a small organization, such as an independent retail store, often is responsible for purchasing, hiring, training,



quality control, and day-to-day supervisory duties. In large organizations, however, top executives typically focus more on formulating policies and strategic planning, while general and operations managers direct day-to-day operations.

The following are examples of types of top executives:

**Chief executive officers (CEOs)** . . . provide overall direction for companies and organizations. CEOs manage company operations, formulate policies, and ensure goals are met. They collaborate with and direct the work of other top executives and typically report to a board of directors.

<http://www.bls.gov/ooh/management/top-executives.htm> (accessed July 28, 2014).

The job duties described in the *Handbook*, especially with respect to CEOs in charge of small organizations, are closely aligned with the job duties of the proffered position as described in response to the second RFE and reiterated on appeal. In short, the duties of the petitioner's CEO are not unique, and do not appear to be any more complex than those of a typical CEO in a smaller enterprise like the petitioner. For a position of that nature, as the *Handbook* makes clear, a bachelor's degree in a specific specialty is not a minimum requirement.

The petitioner has not shown that its particular position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty, as required to satisfy the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Accordingly, the petitioner has not established that the proffered position qualifies as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) requires an employer to demonstrate that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

In this case, the petitioner is a start-up company and has not previously employed a CEO. Thus, the petitioner has not established a prior history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty, or its equivalent, for the position of CEO. Accordingly, the record does not establish that the proffered position qualifies as a specialty position under the third regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner claims that its CEO position meets this criterion based on the specific duties of the job and other DOL materials submitted earlier in this proceeding which indicated that a four-year bachelor's degree was "at times, a minimum educational requirement for the proffered position." In its claim, however, the petitioner acknowledges that a four-year bachelor's degree is sometimes not required for CEO positions, and even if it is required, the degree need not be in the specific specialty related to the job offered. As previously discussed, the job duties described for the CEO position at issue in this proceeding are within the scope of the job duties described in the *Handbook* for top executives generally. There is nothing in the record that distinguishes the nature of the proffered position's duties from those of other CEOs in smaller enterprises like the petitioner's. The evidence of record does not demonstrate that the specific duties of the proffered position are so specialized and complex in their nature that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty.

Thus, the petitioner has not established that the proffered position qualifies as a specialty occupation under the fourth regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

#### Conclusion

For the reasons discussed above, the petitioner has failed to establish that it meets the definition of a United States employer due to its failure to establish an employer-employee relationship with the beneficiary, and that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the record does not establish that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

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