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U.S. Citizenship  
and Immigration  
Services

DATE: **JUL 10 2014** OFFICE: CALIFORNIA 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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Provider of innovative engineering services and solutions to clients in a variety of industrial and technical fields." In order to employ the beneficiary in what it designates as a project engineer position, the petitioner seeks 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

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).

The decision of denial was based on the director's finding that the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) defines specialty occupation as follows:

*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 which [(2)] 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 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former 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 384. 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.

### III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Project Engineer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 17-2141, Mechanical Engineers from the Occupational Information Network (O\*NET).

The visa petition states:

[The petitioner] will have the right to control [the beneficiary's] employment, including hiring, firing, salary, management of its employment relationship, promotions, *as well as assigning him to new projects as required for the entire H-1B employment period.*

[Emphasis supplied.]

With the visa petition, counsel submitted evidence that the beneficiary received a "Bachelor of Engineering (Mechanical Branch)" degree from [REDACTED] and a Master's Degree in Mechanical Engineering from the [REDACTED]

Counsel also submitted: (1) a "Sub-Vendor Services Agreement, dated May 19, 2011; (2) a letter, dated March 18, 2013, on [REDACTED] letterhead; (3) a letter, dated March 25, 2013, on [REDACTED] letterhead; (4) a copy of an employment contract dated October 1, 2013; and (5) a document headed "Organizational Chart."

The Sub-Vendor Services Agreement was executed by an official of [REDACTED] and an official of the petitioner and sets out the terms pursuant to which the petitioner may provide workers to [REDACTED] for [REDACTED] to provide to other companies. That agreement also lists [REDACTED] address as [REDACTED]. We observe that is also the petitioner's address. Exhibit A attached to that agreement lists eight employees the petitioner is to provide to [REDACTED], including the beneficiary.

The March 18, 2013 letter from [REDACTED] is signed by [REDACTED] who identified herself as [REDACTED] – Human Resources." That letter indicates that the beneficiary is being provided to [REDACTED] by the petitioner, through [REDACTED]. The letter further states that [REDACTED] has executed an agreement with [REDACTED] for the "provision of certain technical and/or engineering related services," and that the beneficiary has been assigned to perform related services pursuant to the agreement between [REDACTED]. It does not otherwise describe the duties the beneficiary would perform.

The March 25, 2013 letter from [REDACTED] was signed by [REDACTED] who identified himself as [REDACTED] Senior Account Manager, and states the following as the duties the beneficiary would perform in the proffered position:

- Create full vehicle crash finite models using ANSA;
- Conduct analyses using LS-DYNA software to assess vehicle crashworthiness based on regulatory and third-party assessment criteria.
- Utilize the results of the analyses to develop design solutions that meet vehicle safety requirements.
- Prepare reports to various engineering organizations providing analyses results.

That letter also states: "The [proffered position] is a professional position that requires a Bachelor's degree." It does not state that the requisite degree must be in any specific specialty, or in any range of specialties.

The employment contract outlines the terms of the beneficiary's proposed employment. It states: [The beneficiary] will render [the duties of the proffered position] at locations designated by [the petitioner], including, but not limited to the offices of [the petitioner's] clients." It does not otherwise describe the duties the beneficiary will perform or limit the locations where the beneficiary might perform them.

The organizational chart indicates that the beneficiary would work at the [REDACTED] Michigan location of [REDACTED] and would be supervised by [REDACTED] who would work in [REDACTED] Michigan, and who is identified as a Program Manager.

On April 30, 2013, the service center issued an RFE in this matter, requesting evidence pertinent to the relationship between the petitioner and the beneficiary. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation and the employer-employee requirements.

In response, counsel submitted: (1) a Staffing Company Agreement, dated March 30, 2012, executed by [REDACTED]; (2) a document headed, Amendment #1 to the Staffing Company Agreement; (3) a letter, dated September 11, 2012, from [REDACTED] who identified himself as [REDACTED] Controller – Strategic Sales & Operations; (4) a letter, dated June 14, 2013, on



letterhead; (5) a letter, dated July 16, 2013, from [REDACTED], who identified himself as the petitioner's program manager; and (6) a letter, dated July 18, 2013, from [REDACTED] who identified herself as the petitioner's immigration specialist.

The March 30, 2012 Staffing Company Agreement was executed by representatives of [REDACTED] and [REDACTED] and sets out terms pursuant to which [REDACTED] may provide workers to [REDACTED] for [REDACTED] to provide, in turn, to [REDACTED]. The Amendment #1 to the Staffing Company Agreement changes some of those terms. That amendment states:

[REDACTED] agrees to cause [REDACTED] Customer to provide management and supervision of the temporary employees that [REDACTED] is providing to [REDACTED] Customer at a facility or in an environment controlled by [REDACTED] Customer.

[REDACTED] September 11, 2012 letter, in addition to stating that he is [REDACTED] Controller Strategic Sales & Operations, states that the sub-vendor agreement between the petitioner and [REDACTED] continuously renews until one party acts to terminate it. He stated that the agreement continued, on the date of that letter, to be in effect and that, "the expectation is that the Agreement would continue to automatically renew until such a time as [the petitioner] had a direct agreement with [REDACTED] and the Agreement was no longer needed."

Other than its date, the June 14, 2013 letter from [REDACTED] is identical to the March 18, 2013 letter previously provided from [REDACTED] Human Resources.

In his July 16, 2013 letter [REDACTED], in addition to identifying himself as the petitioner's program manager, stated:

As [the beneficiary's] direct supervisor, I actively monitor his work progress via weekly telephone calls and emails as well as monthly quality interviews and reports. I am responsible for ensuring that [the beneficiary] is meeting our expectations pursuant to our contract with [REDACTED] as well as his own professional goals as [the petitioner's] employee. I also conduct onsite visits approximately two times per month to ensure project requirements and deliverables are being met and to meet with [the petitioner's] employees and [REDACTED] representatives. I also serve as [the beneficiary's] point of contact for questions regarding his hours, salary, and employee benefits as well as other related issues that may arise.

In her July 18, 2013 letter, [REDACTED], in addition to identifying herself as the petitioner's immigration specialist, identified [REDACTED] as the petitioner's parent company. She acknowledged that the petitioner does not exercise control over all of the work the beneficiary would perform in the proffered position, and that the petitioner's client agreements and the beneficiary's employment agreement do not reveal the work he would perform in the proffered position. She referred to the letters from [REDACTED] and Mr. [REDACTED] for a description of those duties.



Ms. [REDACTED] observed that the letter from [REDACTED] of [REDACTED] indicates that the agreement between the petitioner and its parent company will continue for an indefinite period and stated that the petitioner expects the beneficiary's employment at [REDACTED] to continue through the end of the period of requested employment. However, she provided no other specific basis for that expectation.

Ms. [REDACTED] provided a diagram which "reflects the relationship of the vendors" and "demonstrates that satisfactory evidence of the contractual relationships has been provided[.]" The diagram indicates the following chain:

[REDACTED] the petitioner].

She stated:

Because of confidentiality reasons, we are unable to provide copies of contracts between [REDACTED] given that [REDACTED] [the petitioner] is [sic] not a party to those specific contracts.

Finally, Ms. [REDACTED] stated, "As [the beneficiary's] employer, [the petitioner] reserves the right to assign [the beneficiary] to different work assignments."

The director denied the petition on August 2, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

On appeal, (1) a letter, dated August 12, 2013, from [REDACTED] (2) a print-out of an e-mail dated August 22, 2013; (3) a statement, dated August 29, 2013, from [REDACTED], the petitioner's immigration specialist; and (4) a brief.

In her August 12, 2013 letter, dated, [REDACTED] Human Resources reiterated the duty description provided in the March 25, 2013 [REDACTED]. That is, she stated that, in the proffered position, the beneficiary would:

- Create full vehicle crash finite models using ANSA;
- Conduct analyses using LS-DYNA software to assess vehicle crashworthiness based on regulatory and third-party assessment criteria.
- Utilize the results of the analyses to develop design solutions that meet vehicle safety requirements.
- Prepare reports to various engineering organizations providing analyses results.

She further stated that the beneficiary's position is Project Engineer and that the beneficiary would work at [REDACTED] location in [REDACTED] Michigan. She did not state how long the beneficiary's work at that location would continue.

The August 22, 2013 e-mail was sent by [REDACTED] whose e-mail address is in the [REDACTED] domain, and who presumably, therefore, works for [REDACTED] in some capacity. His position with [REDACTED], however, is not specified in the record. The letter was sent to [REDACTED] who, as was observed above, works for [REDACTED]. That e-mail reads, in its entirety:

Subject: RE: [REDACTED]-NEED A FAVOR

Here you go

FEA-CAE Engineer

Safety

CAE Engineer responsibilities include creating full vehicle crash finite element models using ANSA and Will perform analyses using LS-DYNA software to assess vehicle crashworthiness based on regulatory and third party assessment criteria. The candidate will also use analyses results to develop design solutions to meet vehicle safety requirements and will communicate and present analyses results to various engineering organizations

Position Requirements:

Experience with Ansa or some other FEA pre-processing tool

LSDyn and/or Madymo

Hyperview, META Post, Primer, ETA

Bachelor's Degree as a minimum requirement, Masters and/or PhD is typical

BSME, Structural Engineering, Naval Architecture and Aerospace Engineering

Automotive experience is required, OEM experience is preferred but will accept Supplier experience.

Crash, Safety, Occupant protection are key experience areas.

We observe that the e-mail appears to indicate that the proffered position requires a minimum of a bachelor's degree in mechanical engineering, structural engineering, naval architecture, or aerospace engineering. It does not state, however, how long the beneficiary's services would be utilized at the [REDACTED] location in the position described.

In her August 29, 2013 statement, [REDACTED] stated that [REDACTED] previously declined to provide any description of the duties the beneficiary would perform but, in view of the denial of the visa petition, had provided evidence of the beneficiary's duties and [REDACTED]; minimum educational requirement for the performance of those duties.

#### IV. ANALYSIS

Although the issue was not raised in the decision of denial, we find, as a preliminary matter, that the petitioner has failed to establish that, if the visa petition were approved, it would have an employer-employee relationship with the beneficiary.

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.* 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. 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)).

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.<sup>1</sup>

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

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

"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>

Accordingly, 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>

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*

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<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).



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).

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; 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).

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, and not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, 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, . . . the answer to whether [an individual] 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."

The evidence of record suggests that the petitioner intends to assign the beneficiary to [REDACTED] which would assign him to [REDACTED] which would assign him to [REDACTED] which would assign him to work on a project at the [REDACTED] location. This attenuated employment relationship, in itself, suggests that the petitioner would not assign the beneficiary's duties and supervise his employment.

To address this issue, the petitioner provided various documents suggesting that it would supervise the beneficiary. The organizational chart provided identifies [REDACTED], an employee of the petitioner who works in [REDACTED] Michigan, as the beneficiary's supervisor. In his July 16, 2013 letter, [REDACTED] identified himself as the beneficiary's "direct supervisor." Documents pertinent to the employee evaluation process were also provided.



However, as was noted above, Amendment #1 to the Staffing Company Agreement executed by [REDACTED] states that [REDACTED] will cause its customer to provide management and supervision to the beneficiary at remote locations, such as [REDACTED] location. This makes clear that some of the companies that are parties to the assignment of the beneficiary to work at the [REDACTED] location contemplate that someone at that location will supervise and manage the beneficiary. One company that expressed that expectation is [REDACTED] whom [REDACTED] the petitioner's immigration specialist, identified as the petitioner's parent company. This, especially when combined with the attenuated nature of the beneficiary's off-site employment, strongly suggests that either an employee of [REDACTED] or an employee of [REDACTED], depending upon which entity is in charge of the project upon which the beneficiary will work, will assign the beneficiary's tasks and supervise his performance. Further, in her July 18, 2013 letter, [REDACTED] the petitioner's immigration specialist, conceded that the petitioner will not exercise actual control over all of the beneficiary's job functions.

The evidence, considered in sum, indicates that the petitioner would not assign the beneficiary's tasks and supervise his employment. Although the evidence shows that the petitioner would pay the beneficiary's salary, it would, nevertheless, assign the beneficiary, through intermediaries, to work for another company, and would not have an employer-employee relationship with the beneficiary within the meaning of the salient statute, regulation, and case law. The petitioner has not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective employer. The visa petition must be denied on this basis alone.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work for the beneficiary to perform throughout the requested period of employment.

Various documents in the record indicate that the beneficiary would not work at the [REDACTED] location throughout the period of requested employment. The beneficiary's employment agreement indicates that he will work wherever the petitioner's sends him including, but not limited to, customer locations. An addendum to the visa petition states that the petitioner would assign the beneficiary to other projects as required. In her July 18, 2013 letter, [REDACTED] the petitioner's immigration specialist, states that the petitioner reserves the right to reassign the beneficiary.

No evidence from [REDACTED] indicates that it will require the beneficiary's services through September 17, 2016, the end of the period of requested employment. [REDACTED] has not revealed how long the beneficiary would work at its location.

There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary at the [REDACTED] location, or anywhere else, for the entirety of the requested period of employment. Consequently, what the beneficiary would do and where the beneficiary would work are unknown. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary

becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner has not established that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested, or for any defined portion of it. The visa petition may not be approved for any period during which the petitioner has failed to show that it would have specialty occupation employment at which to employ the beneficiary. In this case, the petitioner has not shown that it has specialty occupation employment to which it would assign the beneficiary during any definite period.

In failing to demonstrate that it has any specialty occupation employment to which to assign the beneficiary for any definite portion of the period of requested employment, the petitioner has also failed to establish the substantive nature of the work the beneficiary would perform. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

## V. CONCLUSION

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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