



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF SSG-T- INC.

DATE: APR. 26, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a software company, seeks to temporarily employ the Beneficiary as a “validation analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that it will have a valid employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and contends that the petition should be approved.

Upon *de novo* review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

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

[S]ubject 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* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

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 individual 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). 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). Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 U.S. Citizenship and Immigration Services (USCIS) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. 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."

*Id.*; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323) . 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 Am.*, 390 U.S. 254, 258 (1968)).

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 "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

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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).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

“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 318-19.<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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *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 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.

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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 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (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 individuals).

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 448-49; EEOC Compl. Man. 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 323-24. 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).

## II. ANALYSIS

Upon application of the *Darden* and *Clackamas* tests, we find that 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 Petitioner states that the Beneficiary would perform his duties at an offsite location for [REDACTED] (end-client) pursuant to contracts executed between the Petitioner and [REDACTED] (vendor), and between the vendor and the end-client. The contractual path of succession therefore appears to be as follows: Petitioner → Vendor → End-client.

We find that the Petitioner has not established definitive, non-speculative employment for the Beneficiary. Specifically, we observe that the record of proceeding does not contain copies of any contracts executed between the vendor and the end-client. Nor are there any copies of the types of documents commonly executed pursuant to such contracts, such as work orders, statements of work, invoices, receipts, or similar evidence. In other words, there is insufficient evidence of binding obligation on the part of the end-client to provide any work for the Beneficiary. While the May 2016 letter written by the vendor to the end-client is acknowledged, we find that it does not fill this gap because: (1) the letter is a proposal and therefore on its own binds neither party; (2) though the H-1B petition was filed for a 35-month term, this letter proposes only a 25-week term (just over six months); and (3) the letter was executed after the H-1B petition was filed, which limits its evidentiary weight.<sup>4</sup> Absent a foundational showing that there will be work for the Beneficiary to

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<sup>4</sup> The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future

perform, we cannot determine whether such work would entail the Petitioner engaging in an employer-employee relationship with the Beneficiary.<sup>5</sup>

However, even if we set that issue aside we still would find insufficient evidence of an employer-employee relationship. In other words, even if we assume that the Petitioner had secured work for the Beneficiary to perform, and would assign the Beneficiary to work for the end-client at a remote location as claimed, we would find that the terms of that employment – and thus the existence of an employer-employee relationship – had not been demonstrated. Specifically, the Petitioner has not established that it would exercise supervision and control over the Beneficiary's work.

In its engagement letter, the Petitioner informed the Beneficiary that it is "the only party that can control what duties and project you are assigned to, where you are to perform your job duties, when you are to perform your job duties and how you are to complete your duties." Similar assertions are made throughout the record. Though we acknowledge these claims, we must weigh them against contradictory evidence and assertions. For example, the contract executed between the Petitioner

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date after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

The vendor wrote this letter several weeks after the Petitioner filed the H-1B petition. Its proposals would not have become effective until the vendor received the end-client's purchase order which, assuming it was sent, would have been even later.

<sup>5</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

In other words, it is not clear that a position actually exists for the Beneficiary. Absent that initial showing, it cannot be determined that the position is a specialty occupation. As the Petitioner has not overcome the Director's ground for denying the petition we will not address the specialty-occupation issue further, except to note that the Petitioner should be prepared to address it in any future filings.

and the vendor specifically grants the vendor and any potential end-client authority to remove the Beneficiary from a project site “whose performance is not satisfactory to [the vendor] and [the end-client].” Further, in the aforementioned May 2016 letter from the vendor, the vendor stated that the Beneficiary “will work under the direct supervision of [an end-client’s] representative.” Finally, an email correspondence from a representative of the end-client references “[t]he projects that I assigned” to the Beneficiary, suggesting that it is the end-client that assigns projects to the Beneficiary. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We have also considered the Petitioner’s claims that it will evaluate the Beneficiary’s work performance. However, we find that they do not establish that the Petitioner would engage the Beneficiary in an employer-employee relationship, either. Given that the record does not indicate the Petitioner would send a supervisor to direct the Beneficiary’s work at the client site,<sup>6</sup> it appears as though the performance review process would be based largely upon the “weekly status reports” described in the Petitioner’s engagement letter. According to that letter, these weekly reports would describe “what you have done for the week.” In other words, the Beneficiary’s performance evaluation process would be guided by weekly reports that (1) are generated by the Beneficiary, and (2) contain only after-action content. The performance evaluation process as described in the record, therefore, reflects no role for the Petitioner in directing, or even influencing, the Beneficiary’s work as it unfolds on a day-to-day basis at the end-client’s worksite.

The Petitioner’s statement in the engagement letter that it could call or visit the Beneficiary at the end-client site has been reviewed. However, it does not establish that the Petitioner would engage the Beneficiary in an employer-employee relationship. This statement was made in connection with the weekly status reports just discussed, and the Petitioner indicates that any such calls or visits would be made only after reviewing those reports. As such, it appears as though any such calls or visits would only be made on the basis of reports of after-action content prepared by the Beneficiary and, again, would reflect little role for the Petitioner in directing the Beneficiary’s work as it unfolds on a day-to-day basis at the end-client’s worksite.

The record contains a printout from the Beneficiary’s profile contained in the end-client’s email system, as well as copies of emails sent by the Beneficiary from that account. We find that this evidence also weighs against the Petitioner’s claim of an employer-employee relationship with the Beneficiary. First, in its “My Organization Chart” section, the profile lists the Beneficiary as located below an employee of the end-client. With regard to the emails, we observe: (1) the apparent lack of any inclusion of the Petitioner in this correspondence; (2) the Beneficiary’s use of the end-client’s domain name in his email address; and (3) the lack of any indication in the Beneficiary’s email

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<sup>6</sup> The Petitioner is located in [REDACTED] New Jersey, and it states in the H-1B petition states that the Beneficiary will work for the end-client in [REDACTED] New York. Publicly-available online mapping tools indicate this to be a distance of approximately 185 miles.

signature that he is linked to or affiliated with the Petitioner in any way. These details do not indicate that the Petitioner exercises control or supervision over the Beneficiary at the end-client site.

Returning once more to the May 2016 letter written by the vendor to the end-client, we observe another issue contained therein which undermines the Petitioner's claims of control. Specifically, we note that although this letter identifies the Beneficiary by name, the Petitioner is nowhere mentioned. This omission indicates that the end-client – the actual user of the Beneficiary's services – likely views the Beneficiary as a vendor-provided asset. In a similar fashion, the email from the end-client the Petitioner references on appeal makes no reference to the Petitioner; is not clear that the sender is aware of the company from whom the Beneficiary was sent. Though not dispositive, these factors also weigh against the Petitioner's claims of control.

We have reviewed the information contained in the record regarding the project upon which the Beneficiary would work for the end-client, at the end-client's site, and on the end-client's own systems. None of these materials make any reference to the Petitioner or any ongoing role for the Petitioner on that project. If the Petitioner has little to no role to play on the project, then it is unclear how it could direct the Beneficiary's day-to-day duties as they relate to this project. To the contrary, the Petitioner's role appears limited to provision of the Beneficiary's services with little room for actual direction of his activities.

The record does indicate that the Petitioner would handle the administrative and personnel functions related to keeping the Beneficiary on its payroll. However, our review of the four corners of this H-1B petition leads us to conclude that the Petitioner would not operate as the Beneficiary's employer in the common law sense, but that it would instead act as a supplier of personnel to temporarily supplement the staff of organizations such as the end-client who would control the content, means, and methods of those individuals' work. In this regard, we observe that it appears that not only would the end-client determine and assign the Beneficiary's day-to-day work, but that it would also control the Beneficiary's access to the systems without which his work could not be done.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Based on the tests outlined above, we find that the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).



### III. CONCLUSION

We find that 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.”<sup>7</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of SSG-T- Inc.*, ID# 260143 (AAO Apr. 26, 2017)

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<sup>7</sup> Because this issue precludes approval of the petition we will not address any of the additional issues we have observed in our *de novo* review of this matter.