



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

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

MATTER OF U-C- INC.

DATE: AUG. 31, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a healthcare services pool, seeks to temporarily employ the Beneficiary as a “physical therapist” 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 evidence in the record did not establish that the proffered position qualifies as a specialty occupation.

In its appeal, the Petitioner submits additional evidence and asserts that it has satisfied all evidentiary requirements.

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

I. SPECIALTY OCCUPATION

A. Legal Framework

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered 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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. Proffered Position

The Petitioner stated that it is engaged in the recruitment and placement of healthcare professionals, including physical therapists. The Petitioner also indicated that it assigns individuals to an affiliated company with common ownership, U-G-H-C-S-, which it characterized as the end-client. The Petitioner explained that the Beneficiary would be assigned to U-G-H-C-S- as a physical therapist to “provid[e] services to patients in their homes” in Florida. The Petitioner, and its affiliated service provider, described the Beneficiary’s duties as follows:

The duties of the [Beneficiary] assigned to [U-G-H-C-S-] include but are not limited to evaluating, developing a plan and providing appropriate therapeutic treatment of patients, inpatient and outpatient; will perform accurate evaluation; plan and implement appropriate treatments and follow-up of patients effectively and efficiently; will perform initial assessments, reassessments and record discharge notes in permanent chart of patients; and will complete daily reports of patients within specific time frame and communicate with physicians regarding treatment goals and discharge plans.

The Petitioner indicated in support of the petition that the individual filling the position “needs to be a graduate of Bachelor of Science in Physical Therapy.”

C. Analysis

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation. Specifically, the record does not demonstrate that there would be sufficient specialty occupation work available for the Beneficiary for the entire validity period requested.¹

We note that, as recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *Defensor*, 201 F.3d at 387-88. 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.* 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.

As noted, the Petitioner states that the Beneficiary would be assigned through its affiliated service provider U-G-H-C-S- to provide physical therapy services to patients in their homes in Florida. However, the Petitioner also provides evidence indicating that these services may be provided through or to "various other clients including [REDACTED] and [REDACTED]." For instance, the evidence submitted on appeal includes invoices and checks reflecting that the Petitioner is paid for its services by [REDACTED] and [REDACTED]. The Petitioner has not sufficiently explained and documented its relationship with these entities involved in the provision of services, including how the Petitioner and its affiliated service provider receive orders for physical therapy services from the referenced third party "clients." Nor does the Petitioner provide contractual documentation to support these relationships, including master service agreements, work orders, statements of work, or other such documentation between its company and these third party clients. As presently constituted, the record is insufficient to demonstrate the Beneficiary's proposed specialty occupation work for the entire requested period.

Further, the Petitioner provides conflicting evidence that leaves question as to whether the Beneficiary would be exclusively assigned to patients' homes, as claimed. According to the Petitioner's employment agreement with the Beneficiary, he would be engaged as a "travel therapist." The Petitioner's marketing material specifically describes its travel program as providing its personnel "the unique opportunity to travel across the country and be exposed to different work settings in our 13 weeks or 26 weeks assignments," and lists the company's "clients" as various healthcare or rehabilitation centers within the United States. The Petitioner's job announcement for "physical therapists travel needs" likewise lists job opportunities in various rehabilitation departments within the United States. Even the Petitioner's staffing agreement with U-G-H-C-S- states that the Petitioner "provides healthcare workers for placement in CLIENTs; Hospitals,

¹ The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

Nursing Homes and Rehab Clinics throughout the United States.” Without more, these documents do not corroborate the Petitioner’s repeated claim that the Beneficiary would only be assigned to patients’ homes through the claimed end-client, U-G-H-C-S-.

Therefore, we find that the Petitioner has not established non-speculative work for the Beneficiary at the time of the petition’s filing for the entire period requested. U.S. Citizenship and Immigration Services (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’l Comm’r 1978).²

Therefore, the Petitioner has not established that there would be specialty occupation work available for the Beneficiary for the entire requested period of employment. For this reason, the appeal must be dismissed.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We also find that the Petitioner has not demonstrated that it would have an employer-employee relationship with the Beneficiary during the entire requested period of employment.

A. Legal Framework

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

² 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 change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

[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 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 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)).

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.³

³ 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

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 318-19.⁴

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).⁵

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, we 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

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).

⁴ 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))).

⁵ 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).

said test was based on the *Darden* decision); *Defensor*, 201 F.3d at 384, 388 (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. 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, we 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).

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not sufficiently establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, we find that the record of proceedings does not contain sufficient, consistent, and credible documentation substantiating and describing who exercises control over the Beneficiary.

First, the Petitioner has provided little direct evidence to substantiate that the Beneficiary would be under the supervision and control of the Petitioner. The Petitioner submitted a few different organizational charts on the record. One organizational chart was applicable to the Petitioner's affiliated service provider and indicated that the Beneficiary would be overseen by a number of administrators including a "scheduling clerk," an "intake clerk," and a "managed care coordinator." Another organizational chart provided on appeal and relevant to the Petitioner's organization reflected that the Beneficiary would be supervised by a "Director OF PT & OT Services"; similarly, the Petitioner stated in its request for evidence (RFE) response that the Beneficiary would directly report "to the Director of PT Services who reports directly to the CEO." Meanwhile, another

organizational chart submitted in response to the RFE showed that the Beneficiary would be overseen by a “senior physical therapist” who reports directly to an individual other than the Petitioner’s CEO. Therefore, the Petitioner has provided conflicting evidence regarding the Beneficiary’s supervision. Further, the Petitioner does not indicate how and in what form the Beneficiary would be supervised while providing home physical therapy services at patient homes or other facilities, and while coordinating with third party patient care providers. Absent supporting evidence, the Petitioner has not substantiated that the Beneficiary is likely to be supervised on a daily basis by employees of the Petitioner.

In addition, the Petitioner provides further conflicting evidence that leaves question as to whether it actually controls the Beneficiary’s work on a daily basis. As previously noted, the Petitioner provided purchase order documents and evidence of payments relevant to U-G-H-C-S- originating from other healthcare service providers. Other documentation in the record, including the Petitioner’s marketing material and employment agreement with the Beneficiary, indicates that the Beneficiary’s position as a “travel therapist” would require him to travel to various healthcare facilities for weeks at a time. Overall, this documentation indicates that the Beneficiary would likely be placed at patient locations through various third party providers, rather than being directly assigned to patients’ homes through U-G-H-C-S-. However, as discussed, the Petitioner does not explain the nature of these relationships, or the matter of interaction the Beneficiary would have with these entities in the course of performing his duties.

In addition, the Petitioner provides substantial evidence suggesting that its physical therapists act as independent contractors, leaving question as to whether they would be considered employees of the Petitioner. For instance, the 2015 IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for both the Petitioner, and its commonly owned affiliate U-G-H-C-S-, reflect that neither paid any wages and salaries during that fiscal year, despite both earning substantial revenues. Instead, both companies’ 2015 IRS Forms 1120S show an “Other Deductions” line item indicating that the Petitioner and U-G-H-C-S- incurred substantial expenses in payments to “leased employees.” In the case of the Petitioner, its payments to “leased employee[s]” amounted to \$2,406,666, and in the case of U-G-H-C-S- (the Petitioner’s affiliate to which the Beneficiary would purportedly be assigned), payments to “leased employees” amounted to \$509,328. The Petitioner and U-G-H-C-S- designating their assigned medical professionals as “leased employees” in its tax documentation leaves serious question as to whether they can be considered employees of these entities.

We again refer to the marketing documentation provided by the Petitioner. These documents describe the Petitioner’s staffing services, and stress to prospective candidates the independence of its physical therapists. In particular, the Petitioner’s “travel program” (consisting of short-term placements of 13 weeks or 26 weeks to “travel clients”) is described as offering “unparalleled freedom and flexibility.” The Petitioner’s brochure describes the company as also offering a “per diem/local contracts program” and a “permanent placement program” for placements at “the finest facilities in the country.” These other programs also stress workers’ independence of the Petitioner’s control. For instance, the “per diem/local contracts program” is described as having “the best pool of specialized nurses and allied healthcare workers” which allows workers to “work at [their] own pace,” “select [their] shift,” and “choose where [they] would like to work.” This language strongly

suggests that the physical therapists the Petitioner engages – particularly the traveling physical therapists - act mostly independent of the Petitioner’s managerial control and is consistent with the Petitioner’s documented treatment of its staff as independent contractors. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, we point to language in the Petitioner’s staffing agreement with U-G-H-C-S- that is concerning. More specifically, the staffing agreement specifies that the client, U-G-H-C-S-, shall provide “appropriate supervision” of the Petitioner’s physical therapists. U-G-H-C-S- will also be responsible for such duties as assigning a preceptor to the Petitioner’s physical therapists, providing orientation, and providing the Petitioner “with a weekly schedule of actual hours worked by [the Petitioner’s physical therapists].” Elsewhere, the staffing agreement indicates that the Petitioner’s “direct responsibilities” over its physical therapists would mainly consist of such duties as recruiting, transporting, and paying their salaries.

In sum, the evidence indicates that the Beneficiary would more likely than not be assigned to act independently at patient locations. While payroll, tax withholdings, and other employment benefits are relevant factors in determining who will control the Beneficiary, other aspects 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 for H-1B purposes. Here, we find that the preponderance of the evidence demonstrates that the Beneficiary would not be primarily under the control of the Petitioner.

Based on the above, the Petitioner has not established that it qualifies as a “United States employer” as defined at 8 C.F.R. § 214.2(h)(4)(ii).

III. CONCLUSION

The record does not establish that there would be sufficient specialty occupation work available for the Beneficiary for the entire requested period of employment or that the Petitioner would have an employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of U-C- Inc.*, ID# 384311 (AAO Aug. 31, 2017)