



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

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

MATTER OF G-I-, INC.

DATE: FEB. 14, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development and services company, seeks to temporarily employ the Beneficiary as a "software developer" 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, Vermont Service Center, denied the petition. The Director concluded the Petitioner did not establish that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition.

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

**I. PROFFERED POSITION**

In support of the petition, the Petitioner provided evidence reflecting that the Beneficiary would provide software development services as an "Informatica ETL Developer" for an end-client, [REDACTED] at its location in [REDACTED] New York, through a contract it had in place with [REDACTED] a mid-vendor. A submitted work order for this engagement indicated that the work would conclude in May 2016; however, a letter from [REDACTED] specified that "the duration of the project is ongoing, long term and will be extended year by year."<sup>1</sup>

In response to the Director's request for evidence (RFE), the Petitioner stated that it had specified two work locations for the Beneficiary in the labor condition application (LCA), the above referenced end-client location in [REDACTED] New York, and the Petitioner's worksite in [REDACTED] New Jersey. Further, the Petitioner indicated that the Beneficiary's assignment to [REDACTED] had ended

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<sup>1</sup> We note that the requested period of employment in the instant petition is October 1, 2016, to September 6, 2019.

(b)(6)

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and that he would now be assigned to an "in-house project" at the Petitioner's location in [REDACTED] New Jersey. The Petitioner explained that the Beneficiary would be working for its direct client [REDACTED]. In a letter, [REDACTED] explained the Beneficiary's duties as follows:

- Gather Systems requirements, perform systems Analysis, feasibility study, and understand technology paradigms.
- Installations, Configurations, upgrade on software in heterogeneous platforms
- Design, Develop, Implement virtualization to software, change control policy and provide support. Develop custom software, scripts and utilities, also develop software for data transfers, automatic scheduling, data validation, alerts and reports
- Design, Develop and implement back and recovery. Also implement high availability.
- Provide Software maintenance, enhancements as per changed requirements, bug fixing, performance tuning, develop scripts to monitor software performance.
- Perform Software Testing to ensure developed software is performing as desired. Also responsible for systems and software installation, configurations etc.

According to the Petitioner and [REDACTED] the position requires a bachelor's degree in computer science, engineering, or a related field.

## II. 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;

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- (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” 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 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. Analysis

Upon review of the record in its totality and for the reasons set forth below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the Beneficiary for the entire period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor’s degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, although the Petitioner indicated that the Beneficiary would be employed at its worksite providing services to [REDACTED] the record does not sufficiently support that this work will continue through the entire requested period. As noted, in the Form I-129, the Petitioner specified that the requested period of employment was from October 1, 2016, to September 6, 2019. However, a submitted letter from [REDACTED] indicates that the duration of the work is 18 months and later in the same letter indicates that the project will commence “[October] 1st 2016 and is expected to continue into the foreseeable future.” As such, this evidence does not demonstrate that the Beneficiary’s proffered work will continue for the entire requested period. Otherwise, the Petitioner provides no other corroborating evidence to support that the Beneficiary’s work will continue for the entire requested period, such as agreements, statements of work, work orders, or other such supporting documentation. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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Further, certain discrepancies on the record leave question as to the Petitioner's assertion that the Beneficiary will be assigned at its worksite working for its end client [REDACTED]. For instance, on appeal, the Petitioner submits a letter stating that it will control and supervise the Beneficiary while performing work "at [the] [REDACTED] site." In addition, the Petitioner provides a "Subcontractor Agreement" between it and [REDACTED] which makes regular reference to a third party "customer" of [REDACTED]. The agreement also indicates that this customer will approve the Beneficiary's timesheets and that the work will be completed on the customer's Internet and email systems. Furthermore, it is also noteworthy that the Petitioner submitted substantial evidence related to the Beneficiary's engagement with its mid-vendor [REDACTED] and the end-client [REDACTED] both in support of the petition and in response to the RFE, an engagement set to expire in August 2016, prior to the period of requested employment. Indeed, the Petitioner continues to reference this engagement on appeal. This leaves question as to the Beneficiary's assignment to [REDACTED] at its location, and suggests that he will continue to work on the [REDACTED] project at this client's worksite in [REDACTED] New York. The Petitioner provides no explanation for why it would submit evidence and assertions related to a project for which it stated will expire prior to the requested period of employment. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the record of proceedings is absent sufficient information from the end-client regarding the specific job duties to be performed by the Beneficiary. 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. *Defensor*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service (INS) 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. Here, [REDACTED] stated in a letter that the duties of the position could only be performed by an individual holding a "bachelor's degree or higher in computer science, engineering or a related field."

However, the duties provided by [REDACTED] are vague and convey only general tasks and not the specific work and assignments to be completed by the Beneficiary. For example, the largely identical letters from [REDACTED] and the Petitioner set forth several non-specific duties that do not convey the Beneficiary's actual day-to-day tasks, including "gather[ing] systems requirements," completing "installations, configurations, [and] upgrade[s] on software," "design[ing], develop[ing], and implement[ing] virtualization to software," "provid[ing] software maintenance [and] enhancements," and "perform[ing] software testing." The Petitioner states on appeal that the Beneficiary will work on the "[REDACTED] project, but it does not provide an explanation on the nature and details of this project. Likewise, an itinerary provided by the Petitioner reflects the Beneficiary's projected work on "Informatica Admin activities," "Data Transformation and Data Cleansing activities," "transferring the data from the external source system into Data mart," "Creat[ing] test scenarios on Sandbox environment," "creating Unix Scripts/Autosys Job," amongst

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other more technically specific details, but it does not explain the nature of these applications or the specific work to be performed by the Beneficiary. The letter from the Petitioner further references the Beneficiary's interaction with "the Informatica premium tech support team on a regular basis," but again does not explain the Informatica premium technical support team or the nature of his interaction of this team.

As such, the record of proceedings, including the letter from its client [REDACTED] does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis, nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., the nature of the "Informatica Admin activities," data transformation and cleansing, "Sandbox environment," or "Unix Scripts/Autosys Jobs," and what body of knowledge is required to perform these duties). In fact, as we have noted, the evidence of record leaves question as to whether the Beneficiary will indeed be assigned to the [REDACTED] project at the Petitioner's worksite, since the record elsewhere indicates that this engagement will take place at [REDACTED] location, while other evidence reflects that the work may be for a third party customer of [REDACTED]. Further still, the evidence also suggests that the Beneficiary will work on its supposedly concluded project with [REDACTED].

Overall, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary. We are therefore precluded from finding that the proffered position satisfies 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 entry into 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.

As the Petitioner has not established that it satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Therefore, the appeal must be dismissed and the petition denied for this reason.

### III. EMPLOYER-EMPLOYEE RELATIONSHIP

Beyond the decision of the Director, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

A. 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 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 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)).

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>2</sup>

<sup>2</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



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.<sup>3</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>4</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

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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).

<sup>3</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>4</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).



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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*, 201 F.3d at 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, 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).

## 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 confirming and describing who exercises control over the Beneficiary.

As noted, the Petitioner states that the Beneficiary will work for its client [REDACTED] at the Petitioner's work-site in [REDACTED] New Jersey. In its appeal, the Petitioner points to the letter submitted from [REDACTED] stating that the Beneficiary will not be its employee, that he will remain under the Petitioner's "control and supervision," and that the Petitioner "will be responsible for paying all wages and for maintenance of his personnel file." The Petitioner also references a letter from the mid-vendor [REDACTED] relevant to its project with [REDACTED] a project it states has concluded prior

to the requested period of employment, and contends that this shows it maintains control over the Beneficiary.

First, it is not clear how the circumstances of a claimed prior assignment, that of [REDACTED] is relevant to demonstrating the Petitioner's control over the Beneficiary while assigned to the [REDACTED] project. Indeed, the Petitioner's submittal of evidence related to the [REDACTED] project, and particularly its reference to it on appeal, leaves question as to his claimed current assignment. In addition, it is noteworthy that the evidence provided specific to the Beneficiary's previous assignment strongly indicates that the Petitioner did not maintain control over the Beneficiary while he was assigned to [REDACTED]. The Petitioner provides emails which reflect the Beneficiary referring to a contact from [REDACTED] as his "manager" and showing this manager's approval of his weekly timesheets. Further, the Petitioner provides evidence that while the Beneficiary was assigned to the [REDACTED] project he submitted weekly timesheets in an end-client system. Otherwise, the Petitioner did not submit evidence clearly delineating how the Petitioner maintained control over the Beneficiary during this project. For instance, the evidence did not demonstrate who supervised the Beneficiary, how they supervised him, and how often. Although we acknowledge that the Beneficiary's supposedly concluded project is not direct evidence of who will exact control over him while working on the [REDACTED] project, it is probative in reflecting the Petitioner's typical operations and the level of control it maintains over its employees while they are assigned to customer projects.

In fact, we find similar evidence, or a lack thereof, present with respect to the Beneficiary's proposed work for [REDACTED]. The Petitioner provides a letter on appeal suggesting that the Beneficiary's work for [REDACTED] will indeed take place at the client's location. Further, as we previously noted, the Petitioner's agreement with [REDACTED] appears to indicate that its work for this client is likely for customers of [REDACTED] and section 14 of the agreement states that the work is performed on the "Customer's e-mail and internet systems." As such, these discrepancies leave question as to the very nature of the Beneficiary's work and for whom he will be working, thereby leaving unclear who maintains control over him while assigned to [REDACTED].

Regardless, even if we are to accept that the Beneficiary will be assigned to its worksite in [REDACTED] working for [REDACTED] it has submitted little supporting documentation to corroborate who will have daily control over the Beneficiary while working for this client. The Petitioner has not articulated or documented who will supervise the Beneficiary, how often, or how they will maintain control over his work with the client. For instance, the Petitioner submits an organizational chart reflecting that he reports to a "project manager-[REDACTED]" who in turn is supervised by a chief technical officer-[REDACTED]. However, it is not clear whether this chart reflects the Beneficiary's supervisory situation at all times, or his supervision specific to the [REDACTED] or [REDACTED] projects. Further, there is no evidence or details to support this supervision by the Petitioner while assigned to client projects. To illustrate, the Petitioner submits a performance review document, but it is only a general, non-completed form with no specific relation to the Beneficiary.

In fact, to the extent the Petitioner submits evidence specific to the [REDACTED] project, this evidence suggests that the Beneficiary will work directly for the client as an outsourced employee taking

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direction from the client. Similar to the Beneficiary's assignment to [REDACTED] the agreement between the Petitioner and [REDACTED] reflects that the Beneficiary will submit regular timesheets for approval by the "customer." As noted, the agreement stated in section 14 that the work will be performed on the "customer's email and internet systems," suggesting both that the unidentified end-client will direct the work and that it is providing the instrumentalities and tools for the work. Further, the Petitioner submitted marketing documentation referencing "staff augmentation" services, which the above referenced evidence strongly suggests is the Beneficiary's proposed assignment. As such, even if the work of the Beneficiary is performed at the Petitioner's location, the evidence submitted indicates that its clients are directing the course of his work on a daily basis and it has not otherwise provided objective evidence to refute this suggestion.

Although the Beneficiary is likely being paid and his benefits administered by the Petitioner, the evidence appears to indicate that the Beneficiary is primarily under the control of the Petitioner's end-clients. While payroll, tax withholdings, and other employment benefits are 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. Here, we find that the preponderance of the evidence demonstrates that the Beneficiary will be primarily under the control of the client.

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) and the petition is not approvable for this additional reason.

#### IV. CONCLUSION

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of G-I, Inc.*, ID# 210670 (AAO Feb. 14, 2017)