



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

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

MATTER OF S-T- INC

DATE: JAN. 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a "software engineer" 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, California Service Center, denied the petition. The Director concluded that the record does not demonstrate that (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner meets the definition of an United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record satisfies all evidentiary requirements.

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

I. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the Petitioner qualifies as the Beneficiary's "employer" as that term is defined at 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), the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. 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)).¹

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)).

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.

¹ 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).

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. 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).

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. 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).

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).

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

We find that the Petitioner has not submitted sufficient evidence establishing that it qualifies as the Beneficiary's employer having an employer-employee relationship with him.

In the instant case, the Petitioner, which is in Texas, indicated that it will assign the Beneficiary to work for the end-client, [REDACTED] (end-client), in Wisconsin, for the duration of the validity period requested. The Beneficiary's assignment is arranged through the mid-vendor, [REDACTED] (mid-vendor).

Although the Beneficiary will work in a remote location on another company's project, the Petitioner has asserted that it will supervise the Beneficiary and control his work. The Petitioner stated that the Beneficiary "will be supervised by [the Petitioner], will take directions from [the Petitioner's] Project Leads, and [the Petitioner] will control his work at . . . [the] Wisconsin client site." Likewise, the mid-vendor stated that "[a]ll employment decisions will be made by [the Petitioner], to whom [the Beneficiary] will report and will have the right to control." However, the evidence of record does not meaningfully demonstrate *how* the Petitioner will provide such claimed supervision and control in this situation.

For instance, the Petitioner has not identified who the above-referenced "project leads" are, to whom the Beneficiary will purportedly report. Additionally, there is no documentation in the record confirming the assignment of the Petitioner's other employees to serve on the same end-client project in the capacity of "project leads." A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l

Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

The Petitioner also has not sufficiently identified who the Beneficiary's direct supervisor will be, if different from the "project leads." Although the Petitioner submitted an organizational chart, we must question whether this organizational chart accurately depicts the proffered position. This chart depicts the Beneficiary's position as that of a "programmer analyst," and further indicates that he reports to a superior whose position is identified as that of a "software engineer," which is the same position the Petitioner asserts will be held by the Beneficiary. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. We also note the absence of additional information or evidence about this superior's employment with the Petitioner.

According to the master supplier services agreement between the Petitioner and the mid-vendor, the Petitioner "will deal directly and exclusively with [mid-vendor] with respect to [the Petitioner's] services hereunder and with respect to [the Petitioner's] Personnel." This agreement further states that "[i]n no event will [the Petitioner or Petitioner's] Personnel act in such a way as to disrupt or impair [mid-vendor's] relationship with Client [end-client]." These provisions which prohibit direct interaction between the Petitioner and the end-client raise questions as to the actual role and authority of the Petitioner's claimed "project leads" with respect to the Beneficiary's day-to-day work on the end-client's project. They also raise questions as to the role and authority of the mid-vendor's personnel over the Beneficiary.

In addition, we refer to the following language in the end-client's letter:

During [the Beneficiary's] contract and at all times, neither [the end-client], nor [the mid-vendor] have any right of control over his employment activities. While [the end-client] may communicate with him and give him instructions at the work site, [the Petitioner] is his employer and has ultimate employment control over him.

Accordingly, the end-client acknowledges that it may communicate with the Beneficiary and "give him instructions at the work site." Neither the end-client, nor the Petitioner, has further explained the nature of the "instructions" the Beneficiary receives from the end-client. Thus, while all parties involved maintain that the Petitioner has the ultimate "right of control" the Beneficiary's employment, these conclusory assertions, without more, are insufficient to demonstrate that the Petitioner exercises *actual* control over the Beneficiary's daily activities. As discussed above, we must examine who has *actual* control over, not just the *right to* control, the Beneficiary's work. *See Darden*, 503 U.S. at 323.

Moreover, the Petitioner has not provided additional, relevant information about the nature of its relationship with the Beneficiary. For example, the record does not contain detailed information about the manner and frequency with which the Petitioner communicates with the Beneficiary regarding his daily work. We note the Petitioner's statements that it will conduct performance evaluations and, from time to time, may ask the Beneficiary "to work from the [Petitioner's] office in [REDACTED] Texas to attend meetings, receive training, and provide progress reports." However, the record does not contain evidence confirming that the Beneficiary, who has worked for the Petitioner on the end-client project since May 2015, has in fact regularly communicated with the Petitioner for substantive work matters, reported to the Petitioner's Texas office, received training, and/or received progress reports and other evaluations from the Petitioner. Again, a petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. See *Matter of Soffici*, 22 I&N Dec. at 165.

We acknowledge the copies of the Beneficiary's work badge, time cards, photographs of him at the end-client office, and emails exchanged between him and the end-client. These documents do demonstrate that the Beneficiary has been assigned to the end-client worksite. These documents do not, however, further illuminate the nature of the Beneficiary's work relationship with the Petitioner. They do not answer the question of who oversees, directs, assigns, reviews, affects, or otherwise supervises the Beneficiary's day-to-day work. Therefore, the key element in this matter, which is who exercises actual control over the Beneficiary, has not been substantiated. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

We therefore find that the Petitioner has not demonstrated that the Petitioner will exercise an employer-employee relationship with the Beneficiary as his U.S. employer. 8 C.F.R. § 214.2(h)(4)(ii).

II. SPECIALTY OCCUPATION

We will now address the Director's other basis for denial, i.e., that the record does not demonstrate that the proffered position qualifies as a 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). U.S. Citizenship and Immigration Services (USCIS) has 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*, 201 F.3d at 387.

As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.* It is the duties described by the end-client that control in this situation.

B. Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “software engineer,” a position which it stated requires at least a bachelor’s degree in computer science, engineering, or a related field. The Petitioner provided the following description of the duties of the position (verbatim):

- Followed the Agile methodology iterative process for each of the module in the project.
- Migrated the applications from struts to spring MVC.

- Extensively used Core Spring Framework for Dependency Injections of components.
- Used Spring framework to autowire/inject components and all configure the batch jobs.
- Developed Rest architecture based webservices to facilitate communication between client and servers
- Worked on the Anthillpro tool for deploying the applications.
- Developed API using Mybasis to interact with Sybase and Oracle database.
- Worked on SQL and created views, triggers, function and stored procedures.
- Used Maven tool for building and deploying the application.
- Created Junit test case design logic and implemented throughout application.
- The Log4j package is used for debugging.
- Used Eclipse as an IDE for developing the application.
- The project was implemented in Weblogic Application Server for the deployment and connect through the datasource using JNDI name.
- Used Subversion for software version control.
- Participated in regular code reviews and design meetings.
- Helping team members in technical issues related with design and development.

The Petitioner additionally provided a letter from the mid-vendor, which referred to the proffered position as a “systems architect,” and reiterated the same job duties and requirements as stated by the Petitioner.

In a letter dated August 1, 2016, the end-client provided the following duty description for the position:

- Developing applications and tools as required for the project.
- Promote and support team efforts to accomplish all the aspects of the project life cycle.
- Reporting for the project to show progress on outstanding milestones, status, deliverables, issues, risks, and dependencies.
- Unit testing, verifying and validating logic with actual data.

The end-client identified the proffered position as a “software engineer” position, and stated that it requires a minimum of a bachelor’s degree in computer science, IT, engineering, or equivalent.

C. Analysis

As stated above, because it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed, it is the end-client’s position description that controls in this situation. *Defensor*, 201 F.3d at 387-88.

In essence, the end-client has stated that the Beneficiary will (1) develop applications and tools; (2) support team efforts in all aspects of the project life cycle; (3) produce reports pertinent to the project's development; and (4) test the applications developed. The duties that the end-client attributes to the proffered position are vague and generic to many computer-related positions. They are insufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks, as described by the end-client, do not communicate (1) the actual work that the Beneficiary will perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

For example, the end-client states that the Beneficiary will "[p]romote and support team efforts to accomplish all the aspects of the project life cycle." There is no further explanation of how exactly the Beneficiary will "promote" and "support" the team, i.e., his specific tasks and duties within the project team. Furthermore, the end-client does not explain how the stated job duties are specific to the [REDACTED] project which involves the migration of application and database servers. Thus, while the end-client states that the position requires a minimum of a bachelor's degree in a computer-related field, the end-client has not sufficiently explained its degree requirements within the specific context of the job duties.

Unlike the end-client's brief job descriptions, the Petitioner provided a lengthier list of job duties for the Beneficiary. However, because the job duties provided by the end-client are vague, we cannot determine whether and how the Petitioner's descriptions correlate to the end-client's job descriptions. For example, it is not apparent whether the Petitioner-stated duty of "[u]se Spring Framework to autowire/inject components and also configure the batch jobs" correlates to the end-client's stated duties of "[d]eveloping applications and tools," or "[p]romote and support team efforts to accomplish all the aspects of the project life cycle," or "[u]nit testing, verifying and validating logic with actual data."

Finally, the evidence of record reflects various titles for the proffered position. The H-1B petition and the end-client letter both identify the Beneficiary's title as a "software engineer." But the purchase order and the mid-vendor's letter both identify the Beneficiary's position as a "systems architect 6." Furthermore, as previously mentioned, the Petitioner's organizational chart and pay statements identify the Beneficiary's position as a "programmer analyst." The Petitioner has not explained these inconsistencies. While a position's title is not the critical element in determining a position's job duties, the Petitioner is nevertheless obligated to reconcile inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591.

Without more, we find that the record of proceedings lacks sufficient explanation and documentation evidencing what exactly the Beneficiary will do for the entire period of time requested. The record lacks, for example, detailed job duties by the end-client. It also lacks a detailed explanation of how and why the proffered job duties require a particular level of education and highly specialized knowledge in a specific specialty.

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.

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

III. CONCLUSION

The burden is on the Petitioner to show 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 S-T- Inc*, ID# 118633 (AAO Jan. 26, 2017)