



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

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

MATTER OF T-S- INC

DATE: JUNE 13, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an IT consulting 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 of the California Service Center denied the petition, concluding that the Petitioner had not demonstrated an employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts that it has the right to control the Beneficiary’s work.

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

I. LEGAL FRAMEWORK

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

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term “United States employer” is defined 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

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 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)).

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. 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, 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

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).

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.

II. ANALYSIS

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

On the H-1B petition, the Petitioner, which is located in Michigan, indicated that the Beneficiary will work remotely from his home in Texas. In response to the Director's request for evidence (RFE), the Petitioner reiterated that the Beneficiary will work from home and clarified that he "will only work on a project for [its] client, [REDACTED] (Company T), also located in Texas. The Petitioner claimed that no other end-client or third party company will be involved.

With its RFE response, the Petitioner submitted, *inter alia*, a letter from Company T and the master services agreement (MSA) between the Petitioner and Company T. The express "Purpose" of this agreement is stated as follows: "[Company T] shall attempt to locate a client who requires temporary staffing of a specific project and to identify the specific training, skills, abilities, and experience required to perform the project." This agreement further references Company T's client by stating, for example, that "[a]ny evaluation of [Petitioner's] Engineer's performance shall be made by client," and that "Engineer may perform services on client's and/or [Company T's] premises." As the Director pointed out when denying the petition, the MSA's provisions indicating that the Beneficiary will be assigned to Company T's client conflict with the Petitioner's claim that the Company T is the direct end-client to which the Beneficiary will be exclusively assigned.

On appeal, the Petitioner acknowledges that "the agreement between the petitioner and [Company T] does give the impression that [Company T] will further contract the beneficiary's services to other firms needing computer-related positions to complete their projects." But the Petitioner counters that "the planned use of the beneficiary's services changed between the time the contract was entered into and the filing of this petition." The Petitioner also supplements the appeal with a new letter from Company T stating that "this statement in [the] MSA is not applicable" because the Beneficiary "will not be outsourced" and will "provide his expertise to [Company T's] team for [its] in-house projects."

However, we are not persuaded by the Petitioner's explanations and evidence submitted on appeal. Although the MSA was executed in January 2016 before this petition was filed in April 2016, the Petitioner still submitted the same MSA with its RFE response in November 2016 without any indication that one of the MSA's major provisions did not apply. On appeal, the Petitioner does not submit a new or amended MSA (or another similar contractual document) governing the new scope and conditions of the Beneficiary's assignment with Company T.

A new or amended MSA appears necessary as some of the MSA's provisions are expressly dependent upon the Beneficiary's assignment to Company T's client. For example, the MSA states that "[a]ny evaluation of [Petitioner's] Engineer's performance shall be made by client." It also states that any payment for the Beneficiary's services will only be made after Company T receives "payment from End Client." The Petitioner has not explained how the Beneficiary's performance would be evaluated, how he would be paid, and how other provisions of the MSA would be executed if Company T has no client. While Company T's new letter states that the "Purpose" provision of the MSA "is not applicable," it does not address other provisions of the MSA which specifically apply to Company T's "client."

Further, the record does not contain sufficient details about Company T's "in-house projects" to which the Beneficiary will be assigned. For instance, Company T's letter states that the Beneficiary will "design and develop large-scale eCommerce web applications," but it does not identify *who* the Beneficiary will design these applications for. Notably, Company T's letter begins by explaining the nature of its business as providing services to other end-clients, and ends by referring to sample MSAs with these other clients "which describe [Company T's] business product in detail." All of these statements strongly suggest that, contrary to the Petitioner's claims, the Beneficiary will ultimately be providing his services to an end-client(s) other than Company T. Without additional information and evidence from the end-client(s) ultimately receiving the Beneficiary's services, we cannot assess the terms and conditions of the Beneficiary's assignments, and accordingly, the Petitioner's employment relationship with him.

Even if the Beneficiary were bound by the terms of the submitted MSA, this MSA is insufficient to demonstrate that the Petitioner will remain his "employer" for H-1B purposes. As previously cited, the MSA states that "[a]ny evaluation of [Petitioner's] Engineer's performance shall be made by client." This provision undermines the Petitioner's statements that it will have "full and ultimate control" over the Beneficiary's employment, including the claimed responsibility to evaluate his work product. The Petitioner has not explained this MSA provision which gives Company T's client a degree of control over the Beneficiary's work product.

The sample MSAs do not corroborate the Petitioner's statements about controlling the Beneficiary's work, either. One sample MSA states that Company T "shall take end to end responsibility for the Services, including supervision and management of the project execution to be provided by Consultant and the specific deliverables to be created and provided," and also provides that Company T "shall be responsible hereunder for the performance of any independent contractors or temporary employees to the same extent as Consultant is responsible for the performance of its own employees." Some sample MSAs similarly state that "[Company T] shall supervise the performance of its employees, if any, and shall have control of the manner and means by which the Services are performed." Some sample MSAs additionally indicate that Company T's services will be provided "on-site" at the client's premises, instead of being purely "in-house" projects as claimed. Moreover, Company T's letter specifies that the Beneficiary "will be providing development work on [Company T's] eCommerce projects under the VP of Development." The Petitioner has not

explained these MSA provisions which give Company T control over the Beneficiary's performance and work product.

Based on the above, it appears that the Beneficiary's daily substantive work will *actually* be controlled by Company T, with some degree of control also exercised by Company T's client.

The Petitioner maintains that it has the *right* to supervise and otherwise control the Beneficiary's daily work, stating:

We do have the ability, as well as the legal right, to control the manner and means in which the work, and certainly could assign a technically skilled person to directly supervise the beneficiary if that was deemed beneficial. However, the beneficiary is sufficiently skilled to operate without direct technical supervision from our company under the general guidance, but not control, of the client. We provide access to [the Petitioner's] other technical employees for the beneficiary for solutions to complex technical problems when needed by the beneficiary, or when we feel beneficiary is behind on a deadline.

On appeal, the Petitioner reinforces that "so long as that **right** to control exists, there is no need to show that the petitioner **actually** controls the beneficiary's work." We disagree.

As discussed above, we must examine who has *actual* control, not just the *right to* control, the Beneficiary's work. *See Darden*, 503 U.S. at 323.² Thus, even if the Petitioner reserves the right to control the Beneficiary's work, if Company T and another entity exercise *actual* control over his work on a daily basis, then we could not find the Petitioner to be the Beneficiary's "employer" for H-1B purposes.

Although the Petitioner claims that it will track the Beneficiary's general performance through regular phone calls or emails, it is the Beneficiary who is advising the Petitioner of his progress and performance. That the Beneficiary is the one providing the Petitioner with such information, and not the other way around, raises additional questions as to how much knowledge and control the Petitioner actually has over the Beneficiary's substantive work. Indeed, the Petitioner's organizational chart portrays a single IT services manager as overseeing the work of all 35 of the Petitioner's technical employees, including the Beneficiary. This staffing structure supports the

² The Petitioner cites to a memorandum from Donald Neufeld, Associate Director of Service Center Operations, addressed to Service Center Directors. However, this memorandum merely articulates internal guidelines for Service Center Directors and their personnel; it does not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000). An agency's internal personnel guidelines "neither confer upon [a] petitioner substantive rights nor provide procedures upon which [they] may rely." *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346 (5th Cir. 1985).

Petitioner's statements that the Beneficiary normally works "without direct technical supervision from [the Petitioner]." ³

The Petitioner also states that it does not currently provide the Beneficiary with the tools or instrumentalities needed for his work, but, "if the client requests it, [the Petitioner] can provide laptops, and associated software." Again, however, we must examine the *actual* source of the Beneficiary's instrumentalities and tools, not just who has the *right* to provide them.

In the end, it appears that the Petitioner's role and responsibilities are essentially limited to the administration of the Beneficiary's payroll and other related benefits, including the filing of immigration benefits. Accordingly, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. *See id.* (with the Petitioner's role limited to essentially the functions of a payroll administrator, the Beneficiary is even paid, in the end, by the client or end client). We therefore find that the Petitioner has not demonstrated that the Petitioner will exercise an employer-employee relationship with the Beneficiary.

III. CONCLUSION

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).

ORDER: The appeal is dismissed.

Cite as *Matter of T-S- Inc*, ID# 395014 (AAO June 13, 2017)

³ In designating this position on the labor condition application at a Level I wage rate, the Petitioner effectively attested to the U.S. Department of Labor that the Beneficiary will perform routine tasks that require limited, if any, exercise of judgment, that he will be closely supervised and his work closely monitored and reviewed for accuracy, and that he will receive specific instructions on required tasks and expected results. This wage designation is inconsistent with the Petitioner's statements regarding the Beneficiary's level of skill and independence.