



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

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

MATTER OF A-S-, INC.

DATE: MAR. 29, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

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

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that (1) it will have an employer-employee relationship with the Beneficiary; and (2) the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner asserts that the evidence of record establishes eligibility for the benefit sought.

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

I. EMPLOYER-EMPLOYEE RELATIONSHIP

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 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

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 will look to common-law agency doctrine and 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).

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. 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

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).

as an employee or an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

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 Petitioner has not established that it will be a “United States employer” having an employer-employee relationship with the Beneficiary.

The Petitioner, which is located in California, asserts that it will assign the Beneficiary to work for [REDACTED] (the end-client) in Colorado for the duration of the requested validity period. The contractual chain through which the Beneficiary’s assignment has been arranged is as follows: the Petitioner contracted with the mid-vendor [REDACTED] which in turn contracted with the mid-vendor [REDACTED] which in turn contracted with the mid-vendor [REDACTED] which in turn contracted with the end-client. In this case, the record does not contain sufficient, consistent, and credible documentation regarding who exercises control over the Beneficiary.

For example, the Petitioner has not consistently identified the contractual chain between the parties. As noted in the Director’s decision, the Petitioner “initially indicated that [REDACTED] was contracted directly with the end-client,” but in response to the Director’s request for evidence (RFE), it stated that the contractual chain through which the Beneficiary’s assignment has been arranged is as outlined above. The Petitioner does not directly address this issue on appeal, but repeats its assertion from the RFE. We note that the Petitioner must resolve any discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The Petitioner, however, has not submitted sufficient evidence in support of its claim. For example, although the record contains a number of documents establishing the relationship between the Petitioner and [REDACTED] including a statement of work indicating that the Beneficiary “will work in [REDACTED] CO,” it does not include the name of the end-client. Further, the Beneficiary’s offer letter states that his “first assignment will be for our customer [REDACTED] located at [REDACTED] Colorado.” In addition, the subcontractor master services agreement between [REDACTED] and [REDACTED] does not contain a signature by anyone at [REDACTED] and is dated more than five months after the date of filing. The Petitioner must establish the Beneficiary’s eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(1). Two letters, one from [REDACTED] and one from the end-client, are both dated after the date of filing and do not mention the Petitioner. Without evidence which demonstrates the relationship between the Petitioner and the claimed end-client, the provided documents are

insufficient to resolve the discrepancy in the record, demonstrate the nexus and work arrangement between the Petitioner, the middle vendors, and the end-client, and establish the contractual chain at the time of filing.

Further, the evidence in the record undermines the Petitioner's claim that it is the Beneficiary's employer. For example, the letters from the end-client and [REDACTED] do not make any reference to the Petitioner as the employer. The letter from [REDACTED] indicates that it is "in contract with [the Beneficiary]'s employer [REDACTED]" and the letter from the end-client states that the Beneficiary "is currently employed here at [REDACTED] as a contractor via [REDACTED]". We must also note that the Beneficiary received his assignment start date from [REDACTED] and not the Petitioner.

Moreover, while the Petitioner claims it "will directly supervise and otherwise *significantly control* the beneficiary and the beneficiary's services both from our office and at our client site," the record does not demonstrate how the Petitioner will provide such claimed supervision and control. According to the statement of work between the Petitioner and [REDACTED] the Beneficiary will report to [REDACTED] assigned manager, but the Beneficiary's offer letter states that he "will be directly accountable to" the Petitioner's "IT head." Although the Petitioner generally states that it will manage the Beneficiary via "conference calls, emails and if possible fact to face meetings between our company, the beneficiary and our client," it has not explained to which client it is referring and has not provided sufficient detail regarding the frequency of communication and who oversees, directs, assigns, reviews, supervises and otherwise controls the Beneficiary's day-to-day work. According to the submitted organization charts, the Petitioner's IT head has at least 60 other direct reports, working on at least four teams. It is not clear if any of the listed individuals will work on the same project as the Beneficiary or where these individuals will be located. In other words, the record does not sufficiently answer the questions of who will provide control over the Beneficiary and how that control will be exercised.

On appeal, the Petitioner asserts that it is the Beneficiary's employer because it provides wages and benefits. While payroll 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, where the work is 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. 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.

Finally, the Petitioner has not established that it has sufficient work for the Beneficiary for the duration of the requested validity period. According to the [REDACTED] statement of work, the end date of the project is "December 31, 2016 (further extension afterwards)." The Petitioner asserts that it "will assign the beneficiary to one of the company's other ongoing projects/products" if the current project ends before the requested validity period. However, without supporting evidence of the

specific H-1B level project, the Petitioner's assertion is insufficient to establish the availability of work for the entire three-year period requested.²

Based on the above, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

II. SPECIALTY OCCUPATION

We also agree with the Director that the record does not sufficiently 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.

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).

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*, 201 F.3d at 387.

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

B. Analysis

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. *See id.* The record contains a job description from the Petitioner and some of its mid-vendors. However, the Petitioner has not provided reliable documentation directly from the end-client. Specifically, the letter from [REDACTED] a senior manager business intelligence at [REDACTED] only states that the Beneficiary is a “critical contributor to our Big Data Business intelligence team . . . on a full-time basis.” However, the letter makes no mention of the Petitioner and does not provide any additional information regarding the Beneficiary’s duties, the project on which he will be working, or the duration of the project. Further, the accompanying email indicates that, because the

Beneficiary is an [REDACTED] contractor, it is [REDACTED] responsibility, and not [REDACTED] to provide the letter. [REDACTED] authority to provide such a letter, therefore, has not been established. In addition, as the letter is unsigned, it is of little probative value. Without reliable, official documentation directly from the end-client that provides additional information regarding 1) the project itself, such as its length and scope, including a description of the Beneficiary's duties and responsibilities, 2) the manner of control over the Beneficiary's work, and 3) its arrangement with the Petitioner, we cannot determine the substantive nature of the proffered position.

We are therefore precluded from finding that the proffered position satisfies any of the 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, we cannot find that the proffered position qualifies for classification as a specialty occupation.

III. CONCLUSION

The Petitioner did not establish that (1) it will have an employer-employee relationship with the Beneficiary; and (2) the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of A-S-, Inc.*, ID# 225370 (AAO Mar. 29, 2017)