



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

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

MATTER OF A- INC.

DATE: SEPT. 8, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting company, seeks to temporarily employ the Beneficiary as a "SQL database administrator" 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 it would have an employer-employee relationship with the Beneficiary and that the proffered position qualifies as a specialty occupation. In its appeal, the Petitioner asserts that the Director erred in her findings.

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

I. SPECIALTY OCCUPATION

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. Proffered Position

The Petitioner stated that it “delivers comprehensive solutions and a full range of IT services,” including “staffing services to a wide array of clients in the areas of engineering, scientific, and back-office support services.” The Petitioner indicated that the Beneficiary would work primarily at the location of its client, I- Inc., in [REDACTED] New Jersey. In a statement of work executed between the Petitioner and its client I- Inc. the duties of the proffered position were explained as follows:

The [SQL database administrator] will track and resolve database relayed incidents and requests, in addition to reviewing reports, making requested databases changes, and responding to related alerts and escalations as needed

- Perform core Microsoft SQL Server administration activities including installation, configuration, monitoring, security, and backup and recovery
- Troubleshoot and resolve database problems
- Provide routine performance tuning and optimization using native monitoring and troubleshooting tools
- Work closely with developers and support teams to design and optimize all database environments
- Provide technical reports when needed by utilizing tools such as SQL, SQL Server Management Studio, Excel, SSIS, SSRS.
- Write and review stored procedures and make recommendations on optimization

- Perform routine maintenance on several database environments including application of updates, patches, and hotfixes
- Analyze and optimize performance using indexes and recommend performance improvements directly to development teams

According to the Petitioner, the proffered position requires at least a bachelor's degree in computer science, engineering, or a related discipline, or the foreign equivalent.

C. Analysis

We determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not (1) describe the position's duties with sufficient detail; (2) establish specialty occupation work for the entire requested period of employment; and (3) establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

As a preliminary matter and 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.*

The client provided duties for the proffered position are vague and do not convey the actual day-to-day tasks to be performed and the knowledge required to perform them. The statement of work between the Petitioner and its client reflects that the Beneficiary would be responsible for a number of general, vaguely stated tasks such as "perform[ing] core Microsoft SQL Server administration activities including installation, configuration, monitoring, security and backup and recovery," "troubleshoot[ing] and resolv[ing] database problems," "provid[ing] routine performance tuning and optimization using native monitoring and troubleshooting tools," and "work[ing] closely with developers and support team to design and optimize all database environments," among other similar duties. The client's duty description does not reference the specifics of the project(s) or the tasks the Beneficiary would complete over the asserted three year employment period.

Nor does the client's description convey the knowledge required to perform these duties. In fact, the client provided documentation is silent as to the minimum educational requirement, if any, for the proffered position. While the Petitioner asserts a specific educational requirement for the proffered

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

position, there is no documentation directly from the client to corroborate the Petitioner's claimed requirement.

Therefore, we find that the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which precludes a 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.

In addition, the Petitioner has not submitted supporting documentation to substantiate that the Beneficiary would be engaged at the client location in [REDACTED] New Jersey, during the entire period of the requested visa. On the H-1B petition, the Petitioner requested a period of employment from October 1, 2016, to September 16, 2019. However, the Petitioner submits a statement of work between it and the client, applicable to the Beneficiary's assignment, stating that the expected start date of the work would be December 1, 2016,² and ending on a date "to be determined." Further, a letter from the client indicated that the expected start date of the employment would be "June 2017," making no mention of the length of the project. Lastly, a "work itinerary" applicable to the Beneficiary indicates that the duration of the project is until December 31, 2019, a date inconsistent with the stated end date of the requested employment and other documents on the record. The Petitioner has not submitted supporting documentation to substantiate that the Beneficiary would be engaged at the client location during the entire period of the requested visa. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, we find that the Petitioner has not established non-speculative work for the Beneficiary at the time of the petition's filing for the entire period requested. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).³ As the Petitioner has not demonstrated what the Beneficiary would be doing, for

² As noted by the Director, the regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) prohibits the filing or approval of a petition earlier than six months before the date of actual need for the beneficiary's services or training.

³ 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:

whom, and from where he would work during the entire validity period, we are precluded from finding that the proffered position qualifies for classification as a specialty occupation.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will next address the issue of whether or not the Petitioner qualifies as a “United States employer” with “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 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:

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).

- (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 Immigration and Naturalization Service nor USCIS defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to

assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁴

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.*

⁴ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to 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).

Darden, 503 U.S. at 318-19.⁵

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).⁶

Therefore, in considering whether or not one will be an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, we must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a “United States employer” as one who “has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee” (emphasis added)).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *Defensor*, 201 F.3d at 384, 388 (determining that hospitals, as the recipients of beneficiaries’ services, are the “true employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

⁵ 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))).

⁶ 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).

Furthermore, when examining the factors relevant to determining control, we must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-24. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not sufficiently establish that the Petitioner would 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 would exercise control over the Beneficiary.

As noted, the Petitioner states that the Beneficiary would work at the client's location in [REDACTED] New Jersey. The Petitioner asserts that it would maintain an employer-employee relationship with the Beneficiary. However, the Petitioner has not submitted sufficient documentation to corroborate that it would maintain control over the Beneficiary while assigned to the client location.

First, the Petitioner does not explain or document the nature of the Beneficiary's supervision at the client location. Although the Petitioner identifies the Beneficiary's assigned supervisor by name, it does not articulate or substantiate how this supervisor would oversee the Beneficiary or whether this supervisor would be located at the client location. This lack of detail and evidence is notable since the Beneficiary's listed supervisor is the "Director HR and Resources Planning," and the Petitioner has not explained how someone in this position is able to provide the Beneficiary with daily direction with respect to his substantive, database administration tasks. The Petitioner does not provide detail or documentary evidence to substantiate how and in what form it would maintain control over the Beneficiary at the client location. Instead, the Petitioner's itinerary indicates that the Beneficiary would be managed at the client location by S-G-, who is identified elsewhere in the record as the client's chief financial officer (CFO). The Petitioner has not explained the nature of the interaction between its "Director HR and Resources Planning" and the client's CFO with respect to the Beneficiary's substantive work.

In addition, the Petitioner submits agreements that indicate that the Beneficiary would be placed as part of staffing assignment, thus suggesting that the Petitioner would not regularly supervise him once assigned. For instance, the statement of work refers to the Beneficiary as a "product engineering team member" of the client. The agreement between the Petitioner and the client is an

“Agreement for Staffing Services” providing that the Petitioner will provide its client with “personnel . . . to supplement [the client’s] own work force.” Further, Section 4(F) of the agreement states that the Petitioner must provide a supervisor “responsible for addressing and responding to personnel issues” who must “promptly notify a designated manager at [the client] of any human-resource-type issues.” This language suggests that the Petitioner’s supervisor is not at the client site and not involved with daily supervision of the substantive work, but is only involved in the event of “personnel” or “human-resource-type issues.” Meanwhile, Section 5 of the agreement states that the Petitioner “*retains the right* to direct and supervise [emphasis added]” assigned personnel, suggesting that it does not normally *exercise* this direction and control and the client location. In addition, this agreement further reflects that the Petitioner may not remove personnel without first consulting the client. Further, Section 6(c) states that the client may hire personnel assigned by the Petitioner at its discretion, and Section 6(e) indicates that all invoices issued by the Petitioner must be supported by a timecard approved and signed by the client.

Likewise, marketing materials provided by the Petitioner state that the company provides staffing services, including required “interviewing and reference checks,” and that it places “contractors” in various industries such as advertising and marketing, finance, life sciences, and information technology. As such, the Petitioner’s focus on staffing in various industries, and the Beneficiary’s general assignment to a human resources supervisor with the company, indicates that it does not provide daily substantive supervision and direction to those assigned to a client location, as it would not have the subject matter expertise to do so.

In sum, this documentary evidence suggests that the Beneficiary would be placed as a part of a staffing arrangement more likely under the primary direction and control of the client. In contrast, the Petitioner has submitted little documentary evidence to substantiate its control over personnel assigned to the client location. Further, the Petitioner provides little evidence to indicate who would provide the tools and instrumentalities necessary for the Beneficiary’s work, among other relevant conditions of his assignment.

Although we acknowledge that the Petitioner would likely pay the Beneficiary and administer his benefits, the preponderance of the evidence indicates that the Beneficiary would primarily be under the direction of the client, and that he would only occasionally check in with the Petitioner as to his progress. While payroll, tax withholdings, and other employment benefits are relevant factors in determining who would control the Beneficiary, other aspects of the relationship, e.g., who would oversee and direct the work of the Beneficiary, who would provide the instrumentalities and tools, where would the work be located, and who would have 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 would be the Beneficiary’s employer. Here, we find that the preponderance of the evidence demonstrates that the Beneficiary would more likely be primarily under the control of the client and not the Petitioner.

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

III. CONCLUSION

The Petitioner has not established that the proffered position qualifies as a specialty occupation, and that it would have an employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Inc.*, ID# 639598 (AAO Sept. 8, 2017)